APPENDIX [A]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Final Orders

United States Court of Appeals for the Fifth Circuit

No. 20-40255
Summary Calendar

KENNETH HOWARD KERR, III,

Plaintiff—Appellant,

versus

LORIE DAVIS,

Defendant—Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
No. 6:19-CV-198

Before SMITH, STEWART, and GRAVES, *Circuit Judges*.
PER CURIAM:*

Proceeding *pro se* and *in forma pauperis*, Kenneth Kerr, III, Texas prisoner #716805, appeals the dismissal of his 42 U.S.C. § 1983 complaint against Lorie Davis, the Director of the Texas Department of Criminal Justice-Institutional Division ("TDCJ"), for failure to state a claim upon

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

which relief may be granted. Kerr alleged that Davis violated his rights under the Fifth and Fourteenth Amendments by refusing to allow sex offenders, like him, to take certain computer-related classes. He also moves to supplement the record. That motion is DENIED. *See Theriot v. Par. of Jefferson*, 185 F.3d 477, 491 n.26 (5th Cir. 1999).

We review *de novo* the dismissal of Kerr's § 1983 complaint using the same standard applicable to dismissals under Federal Rule of Civil Procedure 12(b)(6). *See Praylor v. Tex. Dep't of Crim. Just.*, 430 F.3d 1208, 1208 (5th Cir. 2005). Although "pro se complaints are held to less stringent standards than formal pleadings drafted by lawyers," such complaints must nonetheless "plead enough facts to state a claim to relief that is plausible on its face." *Bustos v. Martini Club Inc.*, 599 F.3d 458, 461–62 (5th Cir. 2010) (internal quotation marks and citations omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

There is no error in the dismissal. *See id.* With respect to Kerr's due process claim, a sex-offender's exclusion from "vocational programs while in prison does not implicate a liberty interest" for purposes of due process because those restrictions "do not impose atypical and significant hardship[s] on [the inmate] in relation to the ordinary incidents of prison life." *Toney v. Owens*, 779 F.3d 330, 342 (5th Cir. 2015) (internal quotation marks and citation omitted). Further, insofar as Kerr asserts that the prohibition against participating in certain computer-related classes will cause him irreversible harm, his assertion is necessarily speculative and, in any event, insufficient to implicate a liberty interest. *See Coleman v. Lincoln Par. Det. Ctr.*, 858 F.3d 307, 309 (5th Cir. 2017) ("[E]ven for pro se plaintiffs, . . . conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to state a claim for relief." (internal quotation marks and cita-

tion omitted)).

Kerr's equal protection claim likewise turns on his classification as a sex offender. A challenged classification that neither involves a suspect class nor impinges upon fundamental rights "'is accorded a strong presumption of validity.'" *Flores-Ledezma v. Gonzales*, 415 F.3d 375, 381 (5th Cir. 2005) (quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993)). Kerr's classification involves neither a suspect class nor a right or liberty protected by the Constitution. *See Stauffer v. Gearhart*, 741 F.3d 574, 585–87 (5th Cir. 2014); *Wottlin v. Fleming*, 136 F.3d 1032, 1036–37 (5th Cir. 1998). Indeed, sex offenders are not a suspect class for equal protection purposes. *Stauffer*, 741 F.3d at 587. Thus, "any classification of convicted sex offenders is only subject to a rational basis review." *Stauffer*, 741 F.3d at 587. Kerr's claim cannot survive rational basis review because he has not alleged facts that would be sufficient to show that there is no "reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller*, 509 U.S. at 320.

AFFIRMED.

United States Court of Appeals for the Fifth Circuit

No. 20-40255

KENNETH HOWARD KERR, III,

Plaintiff—Appellant,

versus

LORIE DAVIS,

Defendant—Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
No. 6:19-CV-198

ORDER:

IT IS ORDERED that appellant's motion to supplement the record on appeal is DENIED.

/s/ Jerry E. Smith
JERRY E. SMITH
United States Circuit Judge

APPENDIX [B]

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

FINAL JUDGMENT

ORDER ADOPTING REPORT AND RECOMMENDATION
OF UNITED STATES MAGESTRATE JUDGE

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGESTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

KENNETH HOWARD KERR,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Case No. 6:19-CV-198-JDK-JDL**
	§	
LORIE DAVIS, DIRECTOR, TDCJ-CID,	§	
	§	
Defendant	§	

FINAL JUDGMENT

The Court, having considered Plaintiff's case and rendered its decision by opinion issued this same date, hereby

ORDERS that the above-styled civil action is **DISMISSED WITH PREJUDICE** for failure to state a claim upon which relief may be granted.

All pending motions are **DENIED**.

The Clerk of the Court is instructed to close this case.

So **ORDERED** and **SIGNED** this **17th** day of **March, 2020.**

JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

KENNETH HOWARD KERR,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Case No. 6:19-CV-198-JDK-JDL**
	§	
LORIE DAVIS, DIRECTOR, TDCJ-CID,	§	
	§	
Defendant.	§	

ORDER ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Plaintiff Kenneth Howard Kerr, an inmate proceeding *pro se*, filed the above-styled and numbered civil rights lawsuit pursuant to 42 U.S.C. § 1983. The case was referred to United States Magistrate Judge John D. Love pursuant to 28 U.S.C. § 636. On January 17, 2020, the Magistrate Judge issued a Report and Recommendation (Docket No. 17), recommending that Defendant's motion to dismiss be granted. *Id.* at 8. Plaintiff filed objections on March 4, 2020. Docket No. 22.

In his objections, Plaintiff argues that Defendant is excluding "certain persons of a particular class while allowing others of the S3-G2 Offender Class to attend computer related trades." Docket No. 22 at 5. Further, Plaintiff argues that "there is no justification of this practice and that it serves no legitimate interest of the State." *Id.*

The Court overrules Plaintiff's objections. As the Magistrate Judge found, Plaintiff does not state an equal protection claim. "Inmates convicted of a sexual offense are not a suspect class, and thus any such classification is only subject to rational basis review." *Bell v. Woods*, 382 F. App'x 391, 392 (5th Cir. 2010). And there are "rational reasons why the State might restrict sexual

offenders from using computers. Such a restriction prevents sexual offenders from attempting to obtain and distribute sexually-explicit material over the Internet and contact potential victims over the internet." *Id.* at 392–93. Plaintiff therefore does not state a constitutional violation.

Having made a *de novo* review of the objections raised by Plaintiff to the Magistrate Judge's Report, the Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and Plaintiff's objections are without merit. The Court therefore adopts the findings and conclusions of the Magistrate Judge as the findings and conclusions of the Court.

Accordingly, it is hereby **ORDERED** that the Report and Recommendation (Docket No. 17) be **ADOPTED**. It is further

ORDERED that the above-styled civil action is **DISMISSED WITH PREJUDICE** for failure to state a claim upon which relief may be granted.

So **ORDERED** and **SIGNED** this **17th** day of **March, 2020.**

JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

KENNETH HOWARD KERR	§	
v.	§	CIVIL ACTION NO. 6:19cv198
LORIE DAVIS, DIRECTOR, TDCJ-CID	§	

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

The Plaintiff Kenneth Kerr, an inmate of the Texas Department of Criminal Justice, Correctional Institutions Division proceeding *pro se,* filed this lawsuit under 42 U.S.C. §1983 complaining of alleged deprivations of his rights. The lawsuit was referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges. The sole named Defendant is TDCJ-CID Director Lorie Davis.

I. The Plaintiff's Complaint

In his complaint, Kerr states that the TDCJ Rehabilitation Program Department is discriminating against sex offenders by refusing to allow them to enroll in computer-related classes, thus denying them "an equal opportunity to reform." For relief, he asks for "injunctive relief in the form of amending TDCJ-ROD and Windham School policy so that it will allow equal opportunity to all offenders."

Kerr attaches a number of exhibits to his complaint. The first of these is a letter addressed to Mario Cotton, Human Resources Administrator for the Windham School District. The letter stated that Kerr is seeking the revision of Windham School Policy OP 8.02, which provides that inmates who have been identified as sex offenders are ineligible to enroll in truck driving or

computer related trade courses. Kerr stated that the policy is preventing him from updating his career, which had been established long before he went to prison. He cited a Supreme Court case called Packingham v. North Carolina, 137 S.Ct. 1730 (2017) in which he says that the Supreme Court ruled that denying a sex offender access to computers and the Internet was a violation of the First Amendment.

Kerr's next exhibit is the response to his letter, from General Counsel Michael Mondville. This letter states that Kerr was not allowed to take the vocational class because inmates are allowed to take one vocational course when they enter prison and another within five years of release. Kerr took data processing in 2002 and his expected date of release is 2026, rendering him ineligible for a vocational class. Mondville also says that Packingham is distinguishable because the issue there was whether the state of North Carolina could prohibit registered sex offenders from accessing common social media sites such as Facebook and Twitter. Because Kerr is still in prison, he cannot have Internet access at al, and Packingham will apply to him after he is released, not while he is still confined.

After a letter from the Texas State Law Library setting out the statute on Internet access for sex offenders, Kerr furnishes Step One grievance no. 2019000524, in which he complains that TDCJ is not allowing inmates convicted of sex crimes to participate in classes involving computer operations, and that such denial is based on policies which do not exist. The response to the grievance stated that Windham School Policy OP 8.02 says that inmates identified as sex offenders are ineligible for enrollment in truck driving or computer related trades, including business computer information systems, business image management and multimedia, computer maintenance technician, technical introduction to computer-aided drafting, and printing and imaging technology.

Kerr filed a Step Two appeal of this grievance asserting that the refusal to allow sex offenders to enroll is discrimination and the denial of access to computer classes violates the First Amendment, as set out in Packingham. The response to this grievance stated that Kerr had been appropriately advised at the Step One level and no further action was warranted.

Kerr next attaches a letter he wrote to Dionne Ethridge of the TDCJ Rehabilitation Programs Division. This letter stated that Warden Britt, who responded to the Step One grievance, was apparently not aware that the Rehabilitation Programs Division, not Windham, oversees college courses. He cited Packingham and stated that he is seeking the revision of policy to provide that all prisoners, regardless of the crime committed, will be given equal opportunity to reform.

In a grievance signed on February 25, 2019, Kerr states that he was erroneously told that the college programs are governed by Windham School Policy 8.02, but a Windham counselor named Young told him that Windham has not overseen the college program since 2013. He asks what is the policy preventing sex offenders from enrolling in computer trades and argues that it is discriminatory to refuse to allow a certain class of persons to enroll in college courses. This grievance was screened (i.e. returned unprocessed) as redundant to grievance no. 2019000524. Kerr tried to file a Step Two appeal, but this was also returned unprocessed because screened grievances cannot be appealed.

In a letter to Warden Britt, Kerr stated that as of September 1, 2013, Windham School District no longer governs college classes because it was turned over to the Rehabilitation Programs Division of TDCJ. He said that a proper investigation of his grievance would have shown this and that the policy of prohibiting sex offenders from taking computer courses violates the Supreme Court's decision in Packingham.

Kerr also filed a Step One grievance complaining that his prior grievance was not investigated properly because the response cited a Windham School District policy when Windham no longer governed college courses. This grievance was screened as redundant and untimely.

II. The Defendant's Motion to Dismiss

The Defendant Lorie Davis has filed a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). In this motion, Davis states first that to the extent Kerr seeks a change in the Windham School District policy, she is not the proper party defendant because the Windham School District is a separate and distinct entity from TDCJ-CID. Davis also maintains that Kerr has

failed to state a claim that his due process rights were violated and that Kerr did not show a violation of his equal protection rights. Davis also invokes the defense of qualified immunity; however, this defense is inapplicable because Kerr seeks only injunctive relief. Robinson v. Hunt County, Texas, 921 F.3d 440, 452 (5th Cir. 2019).

In his response to the motion, Kerr asserts that he is not bringing his claim against the Windham School District but rather against the TDCJ Rehabilitation Programs Division, which oversees college courses. He states that he has been harmed because prior to his coming to prison, his career was in electronic technology, and the refusal to allow him to update his career causes him harm.

Kerr also contends that he has been subjected to an equal protection violation because TDCJ is not treating alike all persons similarly situated. He says that "the only basis for TDCJ-RPD to deny sex offenders an equal opportunity at reform is merely based on their prejudice of the act performed during the crime of offense. Kerr states that sex offenders are allowed to have jobs in computer-related fields and so when an application to enroll in computer-related trades is rejected because the person is a sex offender, but other inmates are allowed to enroll, this is an Equal Protection violation. He also argues that there is no rational relation to any legitimate governmental objective because sex offenders can pursue careers in computer related fields upon release and Packingham stated that even convicted criminals can receive benefits from accessing the world of ideas.

III. Discussion

A. General Standards on Motions to Dismiss

Fed. R. Civ. P. 12(b)(6) allows dismissal if a plaintiff fails "to state a claim upon which relief may be granted." In order to survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead enough facts to state a claim to relief which is plausible on its face. Severance v. Patterson, 566 F.3d 490, 501 (5th Cir. 2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). The Supreme Court stated that Rule 12(b)(6) must be read in

conjunction with Fed. R. Civ. P. 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Id. at 555.

Fed. R. Civ. P. 8(a) does not require "detailed factual allegations but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Ashcroft v. Iqbal, 556 U.S. 662, 677-78, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). A pleading offering "labels and conclusions" or a "formulaic recitation of the elements of a cause of action" will not suffice, nor does a complaint which provides only naked assertions that are devoid of further factual enhancement. Courts need not accept legal conclusions as true, and threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, are not sufficient. Id. at 678.

A plaintiff meets this standard by pleading "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. A complaint may be dismissed if a plaintiff fails to "nudge [his] claims across the line from conceivable to plausible," or if the complaint pleads facts merely consistent with or creating a suspicion of the defendant's liability. Id.; *see also* Rios v. City of Del Rio, Tex., 444 F.3d 417, 421 (5th Cir. 2006).

Pro se plaintiffs are held to a more lenient standard than are lawyers when analyzing a complaint, but *pro se* plaintiffs must still plead factual allegations which raise the right to relief above the speculative level. Chhim v. University of Texas at Austin, 836 F.3d 467, 469 (5th Cir. 2016). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Iqbal, 556 U.S. at 678.

If the facts alleged in a complaint do not permit the court to infer more than the mere possibility of misconduct, a plaintiff has not shown entitlement to relief. Id. (citing Fed. R. Civ. P. 8(a)(2)). Dismissal is proper if a complaint lacks a factual allegation regarding any required element necessary to obtain relief. Rios, 444 F.3d at 421.

B. Application of the Standards to Plaintiff's Complaint

Davis contends that she is not the proper defendant because the Windham School District is separate and apart from the Texas Department of Criminal Justice-Correctional Institutions

Division. Kerr responds that college programs are no longer under the auspices of the Windham School District but are under the Texas Department of Criminal Justice - Rehabilitation Services Division, which he says places these programs under Davis' control. The Defendant did not file a reply to this assertion; thus, while it appears that the Rehabilitation Services Division may also be separate from the Correctional Institutions Division, as set out on the TDCJ website, the Court will not consider this extraneous information but will assume for purposes of this Report that Davis is the proper defendant.

The Defendant next argues that Kerr has not shown a due process violation because he does not have a protected liberty interest in taking computer courses. In determining whether state action has violated an individual's right to procedural due process, the court must first decide whether the state action has deprived the individual of a protected life, liberty, or property interest. Augustine v. Doe, 740 F.2d 322, 327 (5th Cir. 1984).

There is no constitutional right to participate in rehabilitation programs or college courses; the Fifth Circuit has held that the Constitution does not require that prisoners, as individuals or as a group, be provided with any and every amenity which some person may think is needed to avoid mental, physical, and emotional deterioration. Newman v. Alabama, 559 F.2d 283, 291 (5th Cir.1977); Ketzel v. Trevino, 264 F.3d 1140, 2001 U.S. App. LEXIS 30654, 2001 WL 922462 (5th Cir., June 18, 2001) (no constitutional right implicated when prisoner suspended from participating in a continuing education program). Nor has Kerr shown a violation of any substantive due process rights, because he has not shown that not permitting him to take computer classes amounts to conduct which "shocks the contemporary conscience." *See* County of Sacramento v. Lewis, 523 U.S. 833, 862 and n.8, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998).

Although Kerr relies on the Supreme Court's decision in Packingham, that case struck down a North Carolina statute prohibiting registered sex offenders in the free world from accessing social media networking sites, a situation far removed from Kerr's circumstance. The decision did not pertain to prison inmates at all, much less create a constitutional right for incarcerated persons to

have access to computers or the Internet. Kerr's due process claim lacks an arguable basis in law and fails to state a claim upon which relief may be granted.

The Defendant also asserts that Kerr has not shown a violation of his equal protection rights. In Bell v. Woods, 382 F.App'x 391, 2010 U.S. App. LEXIS 12627, 2010 WL 2545421 (5th Cir., June 18, 2010), the plaintiff Jesse Bell complained that his right to equal protection was violated when Texas prison officials would not allow him to participate in computer-related vocational courses based on his having been convicted of a sexual offense. The Fifth Circuit held that inmates convicted of sexual offenses are not a suspect class and so equal protection claims are subject to rational basis review, citing Wottlin v. Fleming, 136 F.3d 1032, 1036-37 (5th Cir. 1998). The court specifically stated that there are rational reasons why the State of Texas might restrict sex offenders from using computers. Thus, because the restriction is rationally related to a legitimate penological interest, the equal protection claim lacked merit.

Similarly, the Fifth Circuit held that Bell did not have a viable "class of one" equal protection claim because he did not identify any other prisoners who were sexual offenders but were allowed to enroll in computer courses, nor did he allege that other prisoners were convicted of the same offense as he was or that they were allowed into the same courses for which he applied. The Fifth Circuit thus upheld the district court's rejection of this claim.

In Kerr's case, even assuming that he was not allowed to enroll in the computer classes because he was convicted of a sexual offense (contrary to the letter he received from General Counsel Michael Mondville), the fact remains that as the Fifth Circuit held in Bell, sex offenders are not a suspect class and the State has rational bases for such offenders from taking computer classes. Like the plaintiff in Bell, Kerr has not set out a viable class-of-one claim because he has not identified anyone convicted of his same offense, or even any prisoners convicted of any sexual offense, who have been allowed to enroll in the class for which Kerr was denied. Kerr's equal protection claim lacks an arguable basis in law and fails to state a claim upon which relief may be granted.

IV. Conclusion

In proceeding under Fed. R. Civ. P. 12(b)(6), a plaintiff with an arguable claim is ordinarily accorded notice of a pending motion to dismiss for failure to state a claim and an opportunity to amend the complaint before the motion is ruled upon. These procedures alert him to the legal theory underlying the defendants' challenge, and enable him meaningfully to respond by opposing the motion to dismiss on legal grounds or by clarifying his factual allegations so as to conform with the requirements of a valid cause of action. This adversarial process also crystallizes the pertinent issues and facilitates appellate review of a trial court dismissal by creating a more complete record of a case. Neitzke v. Williams, 490 U.S. 319, 329-30, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989).

Kerr was given a meaningful opportunity to respond by the Defendants' motion to dismiss, which allowed him to file a response. Viewing Kerr's pleadings with the liberality befitting his *pro se* status, Kerr has failed to state a claim upon which relief may be granted because he has not set out sufficient factual matter, accepted as true, to state a claim for relief which is plausible on its face. Iqbal, 556 U.S. at 678. The Defendant's motion to dismiss should be granted.

RECOMMENDATION

It is accordingly recommended that the Defendant's motion to dismiss (docket no. 11) be granted and the above-styled civil action dismissed with prejudice for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6).

A copy of these findings, conclusions and recommendations shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and recommendations must file specific written objections within 14 days after being served with a copy. In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the Magistrate Judge's proposed findings, conclusions, and recommendation where the disputed determination is found.

An objection which merely incorporates by reference or refers to the briefing before the Magistrate Judge is not specific, and the district court need not consider frivolous, conclusive, or general objections. *See* Battle v. United States Parole Commission, 834 F.2d 419, 421 (5th Cir. 1987).

Failure to file specific written objections will bar the objecting party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted and adopted by the district court except upon grounds of plain error. Douglass v. United Services Automobile Association, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

So ORDERED and SIGNED this 17th day of January, 2020.

JOHN D. LOVE
UNITED STATES MAGISTRATE JUDGE

Additional material from this filing is available in the Clerk's Office.