IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling

MICHAEL RAY FORTUNA,

Plaintiff,

v.

Civil Action No. 5:19-CV-319
Judge Bailey

FBOP, WARDEN HUDGINS,
DR. ANDERSON, P.A. WILSON,
and **NURSE BREHMUR,**

Defendants.

ORDER DENYING LETTER MOTION TO REOPEN CASE

Pending before this Court is a sealed letter filed by plaintiff, which this Court construes as a Motion to Reopen Case. [Doc. 42]. Therein, plaintiff requests this Court to reinstate his previously dismissed civil action styled above. [Id].

Plaintiff is a former federal inmate who was confined at the Federal Correctional Institution ("FCI") Gilmer, West Virginia. [Doc. 21 at 1]. On November 27, 2019, plaintiff filed a Complaint asserting a cause of action pursuant to ***Bivens v. Six Unknown Federal Agents of Federal Bureau of Narcotics***, 403 U.S. 388 (1971). [Doc. 1]. Therein, plaintiff alleged that defendants did not ensure plaintiff a bottom bunk assignment, which resulted in plaintiff falling and injuring himself. [Id.].

Ultimately, the Court dismissed the Complaint because plaintiff failed to effectuate proper service on defendants. *See* [Doc. 28]. Subsequent to dismissal, plaintiff filed a Notice

of Appeal [Doc. 30], then filed a Motion to voluntarily dismiss the appeal pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure, which was granted by the Fourth Circuit in its April 24, 2020, Order. [Doc. 40].

This Court denied plaintiff's prior request to reopen this case in its Order Denying Motion to Reopen Case [Doc. 39], on April 22, 2020. In the instant Motion, plaintiff provides no reason why this Court should disregard its earlier Order. Accordingly, the Motion to Reopen Case [**Doc. 42**] is denied.

Plaintiff is reminded that since the alleged actions giving rise to plaintiff's Complaint occurred on August 17, 2019, plaintiff should not be presented with any statute of limitations issues in filing a new complaint. *See* ***O'Neil v. Anderson***, 372 F.App'x 400, at *2 (4th Cir. 2010) (stating that a ***Bivens*** claim based on personal injury has a two-year statute of limitations in West Virginia). Thus, as his Complaint was dismissed without prejudice, plaintiff may file a new complaint and properly effectuate service in compliance with Federal Rule of Civil Procedure 4.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to counsel of record herein, and to mail a copy to the *pro se* plaintiff.

DATED: April 23, 2021.

JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

FILED: November 12, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-6910
(5:21-cv-00072-JPB-JPM)

MICHAEL RAY FORTUNA

Plaintiff - Appellant

v.

MR. HUDGINS, Warden; DR. ANDERSON, Doctor at Medical Services; MRS. WILSON, Physicians Assistant; NURSE BREHMUR, Nurse at Medical Services

Defendants - Appellees

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-6910

MICHAEL RAY FORTUNA,

Plaintiff - Appellant,

v.

MR. HUDGINS, Warden; DR. ANDERSON, Doctor at Medical Services; MRS. WILSON, Physician's Assistant; NURSE BREHMUR, Nurse at Medical Services,

Defendants - Appellees.

Appeal from the United States District Court for the Northern District of West Virginia, at Wheeling. John Preston Bailey, District Judge. (5:21-cv-00072-JPB-JPM)

Submitted: October 28, 2021 Decided: November 12, 2021

Before WYNN and HARRIS, Circuit Judges, and KEENAN, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Michael Ray Fortuna, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Michael Ray Fortuna appeals the district court's order dismissing under 28 U.S.C. § 1915(e)(2)(B) his complaint filed pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). On appeal, we confine our review to the issues raised in the informal brief. *See* 4th Cir. R. 34(b). Because Fortuna's informal brief does not challenge the district court's conclusion that *Bivens* does not provide a remedy for the types of claims Fortuna raised, he has forfeited appellate review of the court's order. *See Jackson v. Lightsey*, 775 F.3d 170, 177 (4th Cir. 2014) ("The informal brief is an important document; under Fourth Circuit rules, our review is limited to issues preserved in that brief."). In any event, we conclude that Fortuna's claim would fail for the reasons stated by the district court. Accordingly, we affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: July 14, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-6910
(5:21-cv-00072-JPB-JPM)

MICHAEL RAY FORTUNA

Plaintiff - Appellant

v.

MR. HUDGINS, Warden; DR. ANDERSON, Doctor at Medical Services; MRS. WILSON, Physicians Assistant; NURSE BREHMUR, Nurse at Medical Services

Defendants - Appellees

O R D E R

The court grants leave to proceed in forma pauperis.

For the Court--By Direction

/s/ Patricia S. Connor, Clerk

FILED: January 4, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-6910
(5:21-cv-00072-JPB-JPM)

MICHAEL RAY FORTUNA

Plaintiff - Appellant

v.

MR. HUDGINS, Warden; DR. ANDERSON, Doctor at Medical Services; MRS. WILSON, Physicians Assistant; NURSE BREHMUR, Nurse at Medical Services

Defendants - Appellees

MANDATE

The judgment of this court, entered November 12, 2021, takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling

MICHAEL RAY FORTUNA,

Plaintiff,

v.

Civil Action No. 5:21-CV-72
Judge Bailey

MR. HUDGINS, Warden, **DR. ANDERSON**, Doctor at Medical Services, **MRS. WILSON**, Physicians Assistant, and **NURSE BREHMUR**, Nurse at Medical Services,

Defendants.

ORDER DISMISSING CASE

Pending before this Court on initial review is the complaint filed by former inmate Michael Ray Fortuna [Doc. 1]. In his Complaint, Mr. Fortuna asserts a ***Bivens*** action against the Warden, a physician, a physicians assistant, and a nurse for failing to see that he was not assigned a bottom bunk while housed at FCI Gilmer, within the Northern District of West Virginia.

In his Complaint, Mr. Fortuna alleges that he was supposed to be assigned to a bottom bunk, but when he arrived at FCI Gilmer, he was assigned to a top bunk. He complained to the medical personnel, Dr. Anderson, PA Wilson, and Nurse Brehmur, but nothing was done until he filed a BP-8 as part of the administrative grievance policy.

On August 17, 2019, Mr. Fortuna fell while attempting to climb into his bunk. On the same day, he was taken to Stonewall Jackson Memorial Hospital, where he was diagnosed as having a contusion. He was returned to FCI Gilmer the same day.

In his Complaint, Mr. Fortuna demands the following relief: (1) free medical treatment for life; (2) 50 million dollars for pain and suffering and loss of the ability to enjoy life; (3) 45 million dollars in punitive damages; and (4) 5,000 dollars per day for the rest of his life.

First, this Court must determine whether the plaintiff has a remedy under ***Bivens***. "Whether an implied damage remedy is available for a constitutional claim is logically 'antecedent' to any question about the merits of the claim. ***Hernandez v. Mesa***, —— U.S. ——, 137 S. Ct. 2003, 2006 (2017) (internal quotation marks omitted). The implied-remedy question does not go to the jurisdiction of the court, and it is sometimes appropriate for a court to assume the existence of a ***Bivens*** remedy and dispose of the claim by resolving the constitutional question. ***Id.*** at 2007. In this case, because this area of the law is in flux and guidance would be beneficial, we believe it is appropriate to determine whether a ***Bivens*** remedy is available . . .. *See* ***Bistrian v. Levi***, 912 F.3d 79, 89 (3d Cir. 2018) ('[T]hreshold questions are called that for a reason, and it will often be best to tackle head on whether ***Bivens*** provides a remedy, when that is unsettled.')." ***Earle v. Shreves***, 990 F.3d 774, 778 (4th Cir. 2021).

As noted by the Sixth Circuit:

> Between 1971 and 1980 in a trio of decisions, the Supreme Court recognized an implied cause of action by individuals who sued federal officers for violations of their constitutional rights. ***Carlson v. Green***, 446 U.S. 14 (1980); ***Davis v. Passman***, 442 U.S. 228 (1979); ***Bivens v. Six Unknown Fed. Narcotics Agents***, 403 U.S. 388 (1971). The Court reasoned that

sometimes individual-rights violations could be redressed only by damages, and it had the power to create such actions unless Congress limited them. ***Bivens***, 403 U.S. at 397.

Subsequent developments leave Callahan with a forbidding hill to climb. What started out as a presumption in favor of implied rights of action has become a firm presumption against them. The Supreme Court has not recognized a new ***Bivens*** action in the 40 years since ***Carlson***. And it has repeatedly declined invitations, many just like Callahan's, to create such actions. ***Ziglar v. Abbasi***, —— U.S. ——, 137 S. Ct. 1843, 1857 (2017) (collecting eight examples). Over the same period of time, it has renounced the method of ***Bivens***, ***Davis***, and ***Carlson***. When asked "who should decide" whether a cause of action exists for violations of the Constitution, "[t]he answer most often will be Congress." ***Id.*** The Court has not just rejected the ***Bivens*** inclination that a private right of action exists when Congress is silent; it has adopted the opposite approach in statutory and constitutional cases. *See* ***Alexander v. Sandoval***, 532 U.S. 275, 286–87 (2001).

The Court's actions over the last four decades match its words. Most telling of all, it has rejected extensions of ***Bivens*** to claims that involve constitutional rights that ***Bivens*** already reaches. ***Carlson***, for example, authorized a ***Bivens*** action for an Eighth Amendment claim of deliberate indifference to an inmate's medical needs. 446 U.S. at 16–18. But ***Minneci***

> ***v. Pollard*** rejected a deliberate-indifference claim in the context of a privately operated prison, even if the Eighth Amendment otherwise applied there. 565 U.S. 118, 121 (2012). ***Bivens*** itself involved a Fourth Amendment seizure. 403 U.S. at 389–90. But just five months ago, ***Hernandez v. Mesa*** rejected an invitation to innovate a similar remedy for a Fourth Amendment claim arising from a cross-border shooting. —— U.S. ——, 140 S. Ct. 735, 744, 750 (2020).

Callahan v. Fed. Bureau of Prisons, 965 F.3d 520, 523 (6th Cir. 2020).

"The Court's repeated reluctance to extend ***Bivens*** is not without good reason. A ***Bivens*** cause of action is implied without any express congressional authority whatsoever. This is hardly the preferred course. The Supreme Court has 'recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases.' ***Sosa v. Alvarez–Machain***, 542 U.S. 692 (2004); *see also* ***Erie R.R. Co. v. Tompkins***, 304 U.S. 64 (1938) (abandoning the idea of a substantive federal common law). The Court has therefore on multiple occasions declined to extend ***Bivens*** because 'Congress is in a better position to decide whether or not the public interest would be served' by the creation of 'new substantive legal liability.' ***Schweiker*** [***v. Chilicky***], 487 U.S. at 426–27 [(1988)] (internal quotation marks omitted); ***Bush*** [***v. Lucas***], 462 U.S. at 390 [(1983)] (same)." ***Holly v. Scott***, 434 F.3d 287, 289–290 (4th Cir. 2006).

In his dissent in ***Carlson***, Justice Rehnquist stated:

> ***Bivens*** is a decision "by a closely divided court, unsupported by the

confirmation of time," and, as a result of its weak precedential and doctrinal foundation, it cannot be viewed as a check on "the living process of striking a wise balance between liberty and order as new cases come here for adjudication." *Cf.* 336 U.S., at 89; ***B. & W. Taxicab Co. v. B. & Y. Taxicab Co.***, 276 U.S. 518, 532–533 (1928) (Holmes, J., dissenting); ***Hudgens v. NLRB***, 424 U.S. 507 (1976), overruling ***Food Employees v. Logan Valley Plaza***, 391 U.S. 308 (1968).

446 U.S. at 32.

In ***Tun-Cos v. Perrotte***, the Fourth Circuit stated:

In the almost 40 years since ***Carlson***, however, the Court has declined to countenance ***Bivens*** actions in *any* additional context. *See* ***Chappell v. Wallace***, 462 U.S. 296, 297 (1983) (refusing to recognize a ***Bivens*** remedy where enlisted servicemen alleged that their officers discriminated against them based on race); ***Bush v. Lucas***, 462 U.S. 367, 390 (1983) (refusing to recognize a ***Bivens*** remedy where a federal employee alleged that his supervisor violated his First Amendment rights); ***United States v. Stanley***, 483 U.S. 669, 671–72 (1987) (refusing to recognize a ***Bivens*** remedy where a serviceman alleged that military officers violated his substantive due process rights); ***Schweiker v. Chilicky***, 487 U.S. 412, 414 (1988) (refusing to recognize a ***Bivens*** remedy for alleged violations of procedural due process by Social Security officials); ***FDIC v. Meyer***, 510 U.S. 471, 473–74 (1994) (refusing to recognize a ***Bivens*** remedy where an employee alleged

that he was wrongfully terminated by a federal agency in violation of due process); ***Corr. Servs. Corp. v. Malesko***, 534 U.S. 61, 63 (2001) (refusing to recognize a ***Bivens*** remedy where a prisoner alleged that a private prison operator violated his Eighth Amendment rights); ***Wilkie*** [***v. Robbins***], 551 U.S. at 541 [(2007)] (refusing to recognize a ***Bivens*** remedy where a landowner alleged that officials from the Bureau of Land Management violated the Due Process Clause); ***Minneci v. Pollard***, 565 U.S. 118, 120 (2012) (refusing to recognize a ***Bivens*** remedy where prisoners alleged that guards at a privately operated federal prison violated their Eighth Amendment rights).

The Court's most recent guidance on the continued availability of ***Bivens*** actions came in ***Ziglar v. Abbasi***, where the Court expressed open hostility to expanding ***Bivens*** liability and noted that "in light of the changes to the Court's general approach to recognizing implied damages remedies, it is possible that the analysis in the Court's three ***Bivens*** cases might have been different if they were decided today." 137 S.Ct. at 1856. The plaintiffs in ***Abbasi*** — aliens who were detained and held in the aftermath of the September 11 terrorist attacks — brought an action against certain executive officials and the wardens of the facility in which they were held, alleging Fourth and Fifth Amendment violations premised on the harsh conditions of their confinement and alleged abuse by prison guards. ***Id***. at 1851–53. The Court held that no ***Bivens*** remedy was available for the

conditions-of-confinement claims and accordingly concluded that those claims should be dismissed. *See* ***id.*** at 1858–63. And it remanded the prisoner abuse claims, holding that the lower court had erred in concluding that such claims arose in the same context as ***Carlson*** and had therefore failed to engage in the proper analysis. *See* ***id.*** at 1865. The ***Abbasi*** Court explained its outlook by noting that when ***Bivens***, ***Davis***, and ***Carlson*** were decided, "the Court followed a different approach to recognizing implied causes of action than it follows now." ***Id.*** at 1855. More expansively, it stated:

> [I]n light of the changes to the Court's general approach to recognizing implied damages remedies, it is possible that the analysis in the Court's three ***Bivens*** cases might have been different if they were decided today. To be sure, no congressional enactment has disapproved of these decisions. And it must be understood that this opinion is not intended to cast doubt on the continued force, or even the necessity, of ***Bivens*** in the search-and-seizure context in which it arose. ***Bivens*** does vindicate the Constitution by allowing some redress for injuries, and it provides instruction and guidance to federal law enforcement officers going forward. The settled law of ***Bivens*** in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed

> principle in the law, are powerful reasons to retain it in that sphere.

922 F.3d 514, 521–22 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 2565 (2020).

In addition to ***Abbasi*** itself, at least two district court decisions in this Circuit have held that there is no ***Bivens*** type action for conditions of prison confinement. *See* ***Tate v. Harmon***, 2020 WL 7212578 (W.D. Va. Dec. 7, 2020) (Moon, J.) and ***Mays v. Smith***, 2020 WL 5821841 (E.D. N.C. Sept. 30. 2020) (Flanagan, J.).

Even though this Court agrees with the above decisions, it is appropriate to conduct an independent inquiry because the special factors inquiry is context specific. In conducting that inquiry, it is clear that expanding the ***Bivens*** remedy is a "disfavored" judicial activity. ***Tun-Cos***, 922 F.3d at 522.

In this case, this Court will necessarily conduct two separate inquiries: whether there is a ***Bivens*** remedy for being placed on a top bunk and whether there is a ***Bivens*** remedy for any medical attention claims. In conducting these inquiries, this Court will follow the steps outlined by Judge Flanagan in ***Mays***:

> Recently, the United States Supreme Court explained that Congress is better positioned to extend ***Bivens*** liability to new contexts not previously recognized by the Court, and thus instructed federal district and appellate courts to conduct a rigorous analysis before authorizing a ***Bivens*** remedy in any new context. *See* ***Ziglar v. Abbasi***, 137 S. Ct. 1843, 1856–57 (2017); *see also* ***Correctional Servs. Corp. v. Malesko***, 534 U.S. 61, 74 (2001); ***Tun-Cos v. Perrotte***, 922 F.3d 514, 520–21 (4th Cir. 2019). The Court

established the following framework governing judicial expansion of ***Bivens*** liability into new contexts. ***Ziglar***, 137 S. Ct. at 1857–60; ***Tun-Cos***, 922 F.3d at 522.

The first step requires determining whether the case involves a "new ***Bivens*** context" because it is "different in [any] meaningful way" from the three prior cases in which the Court has provided a ***Bivens*** remedy. ***Ziglar***, 137 S. Ct. at 1859. "A radical difference is not required." *See* ***Tun-Cos***, 922 F.3d at 522. The Court, "without endeavoring to create an exhaustive list," noted that a case might differ in a meaningful way based on:

> the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous Bivens cases did not consider.

Id. at 1859–60.

In the event the case involves a new context, the court analyzes whether "special factors counseling hesitation" in expanding ***Bivens*** are present. ***Ziglar***, 137 S. Ct. at 1857 (quoting ***Carlson***, 446 U.S. at 18); ***Tun-Cos***, 922 F.3d at 523. This inquiry "must concentrate on whether the

Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." ***Ziglar***, 137 S. Ct. at 1857–58. A special factor counseling hesitation "must cause a court to hesitate before answering that question in the affirmative." ***Id.*** at 1858. Extending ***Bivens*** to a new context is a "disfavored judicial activity" where Congress is generally better suited to determine whether a new damages remedy should be authorized. ***Ziglar***, 137 S. Ct. at 1857.

The Supreme Court has emphasized two special factors that counsel hesitation in extending ***Bivens*** to a new context: 1) whether an "alternative remedial structure is available" and 2) whether extending ***Bivens*** would violate separation-of-powers principles. ***Id.*** at 1857–58; *see also* ***Tun-Cos***, 922 F.3d at 525–27. Additional relevant special factors include, *inter alia*, 1) "the burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself when the tort and monetary liability mechanisms of the legal system are used to bring about the proper formulation and implementation of public policies"; 2) whether Congress has previously enacted legislation in the area, "making it less likely that Congress would want the judiciary to interfere" 3) whether a damages remedy is necessary to deter future similar violations; 4) whether the claim addresses broader policy questions delegated to an administrative agency; and 5) whether national security interests are at issue. ***Id.*** at

1856–63 (citing ***Wilkie v. Robbins***, 551 U.S. 537 (2007); ***Malesko***, 534 U.S. at 73–74; ***FDIC v. Meyer***, 510 U.S. 471 (1994); ***United States v. Stanley***, 483 U.S. 669 (1987); ***Chappell v. Wallace***, 462 U.S. 296 (1983); and ***Bush v. Lucas***, 462 U.S. 367 (1983)).

2020 WL 5821841, at *11.

In examining whether a claim is a new context, the "Court has made clear that, for a case to be 'different in a meaningful way from [the three] previous ***Bivens*** cases,' a radical difference is not required." ***Tun-Cos***, 922 F.3d at 523 (citing ***Abbasi***, 137 S.Ct. at 1859).

This Court finds that the plaintiff's claims with regard to assignment to a top bunk would be a new context. "The differences between [the ***Abbasi*** plaintiffs' prisoner abuse claims] and the one in ***Carlson*** are perhaps small, at least in practical terms. Given this Court's expressed caution about extending the ***Bivens*** remedy, however, the *new-context inquiry is easily satisfied. . . .*" ***Id.*** (emphasis in original) (citing ***Abbasi*** 137 S.Ct. at 1865).

The finding of a new context now requires this Court to examine the "special factors" to determine whether to extend ***Bivens*** to cover the new context. ***Earle v. Shreves***, 990 F.3d 774 (4th Cir. 2021). "And in determining whether 'special factors' are present to counsel hesitation in expanding ***Bivens***, courts must consider 'whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed.' ***Abbasi***, 137 S.Ct. at 1857–58. If a factor exists that 'cause[s] a court to hesitate before answering that question in the affirmative,' then a ***Bivens*** remedy is unavailable. ***Id.*** at 1858. 'In sum, if there are sound

reasons to think Congress **might doubt** the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, then courts **must refrain** from creating the remedy in order to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III.' ***Id.*** (emphasis added)." ***Tun-Cos***, 922 F.3d at 523.

This Court finds that there are alternative remedies available to Mr. Fortuna, which strongly cautions against an expansion of ***Bivens*** into a new context. ***Abbasi***, 137 S. Ct. at 1858 ("[I]f there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new ***Bivens*** cause of action."). As noted in ***Correctional Services Corp. v. Malesko***, a federal prisoner claiming negligence or deliberate indifference has access to "remedial mechanisms established by" the BOP. 534 U.S. 61, 74 (2001). Indeed, "many courts have explicitly recognized that the BOP's administrative remedy program is an alternative process that precludes a ***Bivens*** remedy." ***Scates v. Craddock***, 2019 WL 6462846, at *8 (N.D. W.Va. July 26, 2019) (Trumble, M.J.) (collecting authority), *report and recommendation adopted*, 2019 WL 4200862 (N.D. W.Va. Sept. 5, 2019) (Kleeh, J.).

In this case, it appears that the administrative remedy procedure worked. The plaintiff notes that he was not moved to a lower bunk until he filed his BP-8 as part of the administrative procedure. Obviously, the administrative procedure provided him with the result that he sought.

While the administrative procedure does not permit an award of money damages, it nonetheless offers the possibility of meaningful relief and therefore remains relevant to

our analysis. *See* ***Schweiker v. Chilicky***, 487 U.S. 412, 425 (1988) (declining to imply a ***Bivens*** remedy for due process claims springing from the denial of Social Security benefits despite unavailability of compensatory damages under alternate remedial scheme); ***Tun-Cos***, 922 F.3d at 526–27 ("The plaintiffs are correct that the protections provided by the INA do not include a money damages remedy and often do not redress constitutional violations that occur apart from removal proceedings. But this misses the point, for the relevant question is not what remedy the court should provide for a wrong that would otherwise go unredressed but instead whether an elaborate remedial system should be augmented by the creation of a new judicial remedy." (internal quotation marks and alteration omitted)). ***Earle v. Shreves***, 990 F.3d 774, 776 (4th Cir. 2021).

Furthermore, Congress's inaction and failure to provide a damages remedy, particularly where it has acted to enact sweeping reforms of prisoner litigation, suggest that an extension of a damages remedy for other types of mistreatment should not be judicially created. *See* ***Abbasi***, 137 S. Ct. at 1865 ("[I]t seems clear that Congress had specific occasion to consider the matter of prisoner abuse and to consider the proper way to remedy those wrongs" and Congress's declining to provide a "damages remedy against federal jailers . . . suggests [that] Congress chose not to extend the ***Carlson*** damages remedy to cases involving other types of prisoner mistreatment.").

In ***Tate v. Harmon***, Judge Moon noted that "[o]ther courts, too, have reached the same conclusion and rejected a ***Bivens*** remedy for similar claims brought by federal prisoners. *E.g.*, ***Mack v. Yost***, 968 F.3d 311 (3d Cir. 2020) (First Amendment retaliation claim); ***Johnson v. Burden***, 781 F.App'x 833 (11th Cir. 2019) (same); ***Schwarz v.***

Meinberg, 761 F.App'x 732 (9th Cir. 2019) (First Amendment, Fifth Amendment, and Eighth Amendment claim regarding unsanitary cell conditions); ***Vega v. United States***, 724 F.App'x 536 (9th Cir. 2018) (First Amendment claim alleging denial of right of access to courts and Fifth Amendment claim arising out of a prison disciplinary process); ***Mays v. Smith***, 2020 WL 5821841, at *13 (E.D. N.C. Sept. 30, 2020) at *13 (First Amendment retaliation claim, Fifth Amendment due process claim, and Fifth Amendment claim for racial discrimination), *appeal docketed*, No. 20-7540 (4th Cir. Oct. 19, 2020); ***Williams v. Lynch***, 2018 WL 4140667, at *4 (D.S.C. Aug. 30, 2018) (claims of 'retaliation, denial of access to courts, [and] unconstitutional conditions of confinement under the First, Fifth, and Eighth Amendments') (internal footnote omitted); ***Kirtman v. Helbig***, 2018 WL 3611344, at *5 (D.S.C. July 27, 2018) (First Amendment retaliation claim). *See also* ***Fuquea v. Mosley***, 2020 WL 3848150, at *6–7 (D.S.C. Mar. 6, 2020) (concluding that a prisoner's Eighth Amendment conditions-of-confinement claim could not be brought under ***Bivens*** and assuming, without deciding, that the deliberate indifference claim could be, but dismissing it because plaintiff failed to present sufficient evidence to survive summary judgment), report and recommendation adopted, 2020 WL 1899493 (D.S.C. Apr. 16, 2020)." 2020 WL 7212578, at *6 (W.D. Va. Dec. 7, 2020).

In ***Mays***, Judge Flanagan discussed that, "as separation-of-powers concerns, 'courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform .... Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government.' ***Turner v.***

Safley, 482 U.S. 78, 84–85 (1987). In the context of new constitutional claims filed by federal prisoners challenging prison policies, the Judiciary is ill suited, 'absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed.' ***Ziglar***, 137 S. Ct. at 1857–58. Separation-of-powers principles thus counsel strongly against recognizing a new ***Bivens*** remedy in the context of plaintiff's claims challenging his termination from UNICOR, placement in administrative detention, and transfer to FCI-Gilmer. ***Id.*** at 1857 ('When a party seeks to assert an implied cause of action under the Constitution itself ... separation-of-powers principles are or should be central to the analysis.'); ***Wetzel v. Edwards***, 635 F.2d 283, 288 (4th Cir. 1980) ('It is a rule grounded in necessity and common sense, as well as authority, that the maintenance of discipline in a prison is an executive function with which the judicial branch ordinarily will not interfere.'); *see also* ***Bistrian v. Levi***, 912 F.3d 79, 94–96 (3d Cir. 2018) (providing similar special factors analysis in context of challenge to administrative detention and retaliation claims and noting that decisions 'to place an inmate in more restrictive detention involve[ ] real-time and often difficult judgment calls about disciplining inmates, maintaining order, and promoting prison officials' safety and security' which 'strongly counsels restraint' in recognizing a new ***Bivens*** remedy for such claims)." 2020 WL 5821841, at *13.

Based upon the foregoing, this Court is compelled to find that no ***Bivens*** remedy exists for Mr. Fortuna's top bunk confinement issues and to dismiss such claims.

This Court now turns to the issue of whether there is a ***Bivens*** remedy for Mr. Fortuna's medical claims. While his Complaint does not assert a claim for medical

treatment, this Court wishes to be as thorough as possible. The medical records disclose that as a result of his fall on August 17, 2019, he suffered a contusion. An entry four days thereafter provides as follows:

> Please inform this inmate that after review of hospital paperwork from the fall on August 17, 2019 it is noted that overall assessment was unremarkable. There were tests completed for CT of the brain and spine and xray of the right elbow, right rib area and right hip which were all normal. Inmate was diagnosed at that time with contusions which is bruising and is treated by rest, ice and over-the-counter pain medication for discomfort. Since the fall the inmate has been seen by multiple health care staff. On 8/23/19, inmate was seen for chronic care, sick call and optometry. During sick call the inmate complained of ringing in ears, right shoulder pain and blurry vision. Inmate was assessed and had a high blood pressure reading and admitted to not takirig~blood pressure medications since arrival into the BOP. High blood pressure can cause ringing of the ears and blurry vision. Inmate was then seen later that same day with chronic care doctor and overall assessment was noted only to have high blood pressure. Inmate then was seen by optometry and did have a change in vision with right eye and has a pending consult waiting for approval for ophthalmologist.

[Doc. 1-1 at 18].

"To state a claim of cruel and unusual punishment under the Eighth Amendment, a prisoner must allege: (1) that the deprivation of a basic human need, as an objective matter, was sufficiently serious; and (2) that, when viewed from a subjective perspective,

prison officials acted with a sufficiently culpable state of mind. *See* ***De'lonta*** [***v. Johnson***], 708 F.3d at 525 [(4th Cir. 2013)]. To satisfy the subjective component, a prisoner must allege that prison officials acted with 'deliberate indifference' to his serious medical need. ***Id.***; ***Wilson v. Seiter***, 501 U.S. 294, 297 (1991). We consider prison officials' culpable mental state because 'only the unnecessary **and wanton** infliction of pain implicates the Eighth Amendment.' ***Wilson***, 501 U.S. at 297 (citing ***Estelle v. Gamble***, 429 U.S. 97, 104 (1976)) (internal quotation marks omitted) (emphasis in original)." ***King v. United States***, 536 F.App'x 358, 360 (4th Cir. 2013).

"To constitute deliberate indifference to a serious medical need, 'the treatment [a prisoner receives] must be so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness.' ***Miltier v. Beorn***, 896 F.2d 848, 851 (4th Cir. 1990). Deliberate indifference requires that a prison official 'know[ ] of and disregard[ ] an excessive risk to inmate health or safety,' that is, 'the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.' ***Farmer v. Brennan***, 511 U.S. 825, 837 (1994). It is well-settled, however, that 'mere negligence or malpractice does not violate the [E]ighth [A]mendment.' ***Miltier***, 896 F.2d at 852 (citations omitted)." ***Id.*** at 361.

This Court finds that Mr. Fortuna's claims differ from the claims in ***Carlson*** in that the medical problems are not severe, are not likely to cause permanent damage, and certainly not cause death. As such, this Court finds that the claim constitutes a new context when compared to ***Carlson***.

Many of the factors affecting this claim are the same as above. Certainly, the

Federal Tort Claims Act provides an alternative remedy. In his dissent in ***Carlson***, Chief Justice Burger wrote that "[t]he Federal Tort Claims Act provides an adequate remedy for prisoners' claims of medical mistreatment. For me, that is the end of the matter." ***Carlson v. Green***, 446 U.S. 14, 30 (1980) (Burger, C.J., dissenting).

For the same reasons discussed above, these non-serious, non-life threatening claims of medical inattention are more appropriately handled by others. The Federal Courts are ill prepared to engage in the finer points of contusion management and health.

Furthermore, such a claim would invade the management of the prison system by the executive branch.

For these reasons, this Court finds that there is no ***Bivens*** remedy for non-serious, non-life threatening claims of deliberate indifference.

Whether analyzed under ***Bivens*** or whether the plaintiff has stated a claim for relief under the above ***Carlson*** standard, there is no avenue for relief for this plaintiff, except perhaps the FTCA.

For the reasons stated above, this Court hereby **DISMISSES** this action.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to any counsel of record herein and to mail a copy to the *pro se* plaintiff.

DATED: June 1, 2021.

JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE