

(Petitioner(s)) APPENDIXIES
A - A (2-~~15~~5)

FILED: December 2, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-6431
(7:19-cv-00628-PMS)

LORENZA GERALD FERESEE, JR.

Plaintiff - Appellant

v.

WARDEN C. MANIS, Wallens Ridge State Prison; UNIT MANAGER Q.
REYNOLDS, Wallens Ridge State Prison

Defendants - Appellees

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge
requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Gregory, Judge Rushing,
and Senior Judge Floyd.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX A

Petitioner(s)' APPENDIX A (2)

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-6431

LORENZA GERALD FERESEE, JR.,

Plaintiff - Appellant,

v.

WARDEN C. MANIS, Wallens Ridge State Prison; UNIT MANAGER Q. REYNOLDS, Wallens Ridge State Prison,

Defendants - Appellees.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Pamela Meade Sargent, Magistrate Judge. (7:19-cv-00628-PMS)

Submitted: October 13, 2021

Decided: October 14, 2022

Before GREGORY, Chief Judge, RUSHING, Circuit Judge, and FLOYD, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Lorenza Gerald Ferebee, Jr., Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Lorenza Gerald Ferebee, Jr., appeals the magistrate judge's orders denying relief on his 42 U.S.C. § 1983 complaint and denying his motion for reconsideration.* On appeal, we confine our review to the issues raised in the informal brief. *See* 4th Cir. R. 34(b); *see also* *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 his informal brief, Ferebee alleges that we lack jurisdiction over appeals from a single district court judge or a magistrate judge and asks to appeal directly to the United States Supreme Court. A litigant may appeal directly to the Supreme Court only from the grant or denial of an interlocutory or permanent injunction by order of "a district court of three judges." 28 U.S.C. § 1253. In all other cases, "[c]ases in the court of appeals may be reviewed by the Supreme Court" via certiorari review or certification of a question of law by a court of appeals. 28 U.S.C. § 1254. Because Ferebee's judgment was not issued by a district court of three judges, he may not bypass our court. 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.

DISMISSED

* The parties consented to proceed before a magistrate judge. 28 U.S.C. § 636(c).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

LORENZA GERALD FEREBEE, JR.,)
Plaintiff,)
v.)
WARDEN C. MANIS, et al.,)
Defendants.)
)
Civil Action No. 7:19cv00628
)
MEMORANDUM OPINION
)
By: Pamela Meade Sargent
United States Magistrate Judge

Plaintiff, Lorenza Gerald Ferebee, Jr., (“Ferebee”), is a Virginia Department of Corrections, (“VDOC”), inmate currently housed at Wallens Ridge State Prison, (“Wallens Ridge”). Ferebee has filed this civil rights action pursuant to 42 U.S.C. § 1983, against VDOC employees Wallens Ridge Warden C. Manis, (“Manis”), and Unit Manager Q. Reynolds, (“Reynolds”), alleging that he has been subjected to cruel and unusual punishment in violation of the Eighth Amendment due to exposure to mold. This case is before the court on defendants’ Motion For Summary Judgment, (Docket Item No. 42) (“Motion”), and plaintiff’s Motion For Declaratory Judgment, (Docket Item No. 64), (“Cross-Motion”).¹ For the reasons stated below, the Motion will be granted, and the Cross-Motion will be denied.

APPENDIX A (5)

¹ Ferebee's Cross-Motion seeks to have the court "make a 'SPECIFIC DECLARATION' for: (1) WHETHER – Mold, Blackmold, or Mildew possess(s) the 'Same Element(s)' of Fungi?; and if so or not so, then (2) WHETHER – Multiple 'FALSE DISCIPLINARY INFRACTION, because of this ongoing litigation shall constitute 'RETALIATION(S)?" (Docket Item No. 64.) Ferebee's Cross-Motion is based on him asking the court to rule on whether infractions he has allegedly received constitute retaliation as a result of his currently pending lawsuits. (Docket Item No. 64.)

I. Facts

In his Amended Complaint, (Docket Item No. 32), Ferebee seeks a declaratory judgment, injunctive relief and damages, alleging that the defendants were deliberately indifferent to the danger posed to him by exposure to the environmental hazard of mold or black mold at Wallens Ridge. In his Amended Complaint, which is sworn to under penalty of perjury, Ferebee alleged that he was transferred to Wallens Ridge on February 26, 2019. Ferebee alleged that he spoke to both Manis and Reynolds "about the Prison Conditions" of "Mold" in his cell, B-104, on March 28, 2019. Ferebee alleged that mold was all over his cell walls, window and bunk.

In response to an Informal Complaint complaining of mold, filed on April 25, 2019, Reynolds responded on April 29, 2019, that he had just cleaned the cells in B-1, and Ferebee should let him know if he needed additional cleaning supplies. Ferebee said that he then filed a Regular Grievance concerning the mold in his cell. Warden Manis responded that Ferebee's Grievance was unfounded because the Maintenance Department had inspected Ferebee's cell and found no evidence of mold. This decision was upheld on appeal to the Regional Administrator. Ferebee attached his requests for administrative remedies and the VDOC's responses to his original Complaint. (Docket Item No. 1-1.)

Ferebee said that he spoke to Manis again on June 3, 2019, about "overall" prison conditions. After that, Ferebee alleged he was moved to cell B-101 and, then, to cell B-102, where mold also existed. Ferebee alleged that he spoke to Manis again on July 11, 2019, about the black mold in cell B-101.

Ferebee alleged that the mold destroyed his photos and photo album, letters, cards, books, clothes and blanket. Ferebee seeks compensatory damages of \$1 million, punitive damages of \$500,000.00, and nominal, special and treble damages and injunctive relief ordering that he and all prisoners be removed from Wallens Ridge.

In his motion for preliminary injunction, ("Preliminary Injunction Motion"), (Docket Item No. 24), which also was sworn to under penalty of perjury, Ferebee alleged that he has been exposed to mold and/or black mold in Wallens Ridge cells B-104, B-101 and B-102 since February 26, 2019. Ferebee, again, alleged that he spoke to Manis regarding prison conditions on March 28 and June 3, 2019. Ferebee also alleged that he spoke to Reynolds on July 11, 2019, and to VDOC Health Services Director McMillian on July 10, 2019, about the "mold and/or black mold" in Wallens Ridge. On July 11, 2019, Ferebee alleged that he showed Reynolds the "prison condition(s) all over the cell." (Preliminary Injunction Motion at 4.)

Ferebee alleged in the Preliminary Injunction Motion that he could "barely breath[e] most of the time in my cell and while in the pod for pod recreation because I feel a shortness of breath and my lung(s) be hurting, and some time(s) I be coughing up blood." (Preliminary Injunction Motion at 4.) Ferebee alleged that there was a crack in the prison's B Building foundation, which ran from cell B-101 to B-108, and through which rain water would travel into cells B-104, B-101 and B-102. Ferebee stated that he "believed" this crack was the source of the mold in the B Building.

In an Affidavit attached to the Preliminary Injunction Motion, (Docket Item No. 24-2) ("Affidavit"), Ferebee again stated that he "can barely breath[e] and have

a shortness of air and my lung(s) be hurting, some time(s) I cough up blood." (Affidavit at 2.) Ferebee also stated that he spoke with Warden Manis about "Prison Condition(s) of Mold and/or Blackmold" on March 28 and June 3, 2019, and spoke with McMillian, the Health Services Director of VDOC, on July 10, 2019, and "notified" him of the "pre-existing" mold and/or black mold conditions at Wallens Ridge. Ferebee also stated that he spoke with Unit Manager Reynolds on July 11, 2019, about the mold and/or black mold. (Affidavit at 2-3.)

Ferebee further stated that on December 13, 2019, Reynolds came into the B-1 Pod with Correctional Sergeant Roberts and Correctional Officer Polly pushing a cart with buckets of white and blue paint, a pole and paint rollers. Ferebee further stated that a Wallens Ridge maintenance worker came into the B-1 Pod on January 30, 2020, on a "Big Moving Machine" and painted over the mold and/or black mold on the ceiling close to cells 1-8, by the sally port door and the mail and commissary box, beside #6 and 7 pod phones and above the pod television. Days before, he stated, a maintenance worker and supervisor came into the B-1 Pod and sprayed bleach on the mold and/or black mold all over the ceiling and took a towel and wiped it off. (Affidavit at 3-4.)

In his Affidavit Of Truth And Facts, (Docket Item No. 54), ("Second Affidavit"), Ferebee stated that the "fungi" in Building B at Wallens Ridge had to be mold and not mildew because it returned every time it was painted over. He stated that Defendant Reynolds had told him that the fungi was mildew and not mold. Ferebee stated that Reynolds said that, if he reported that there was mold in the building, "B1 Pod will not be suitable for offender(s) to live...." (Docket Item No. 54 at 3.) Ferebee stated that he and several other inmates had complained about the mold, but it had never been properly investigated. (Docket Item No. 54 at 3.)

Ferebee stated that he had been diagnosed with asthma after he had filed an Informal Complaint alleging that the Medical Department was trying to "cover up" his medical concerns over mold exposure. Ferebee stated that Wallens Ridge physician Dr. B. Mullins diagnosed him with asthma due to mold exposure and prescribed an inhaler. Ferebee, again, stated that he suffered from shortness of breath, hurting lungs, dizziness, lightheadedness, wheezing and coughing up blood, and his personal property had been damaged. (Docket Item No. 54 at 4.) While Ferebee stated that this Second Affidavit was sworn to under penalty of perjury, he failed to do so. (Docket Item No. 54 at 1-10.)

Ferebee has provided a written statement from Wallens Ridge inmate Thomas Wade, No. 1055103. (Docket Item No. 54 at 13-14.) In this statement, Wade said he had been housed in cell 103 in the B Building at Wallens Ridge since February 2017. Wade said that there was black mold on his cell walls, windows and metal bunk due to having no ventilation in the building. He said breathing the mold was affecting his lungs. Wade said the problem had grown worse since the building's ventilation system continued to shut down. While Wade stated his affidavit was sworn to under penalty of perjury, he failed to do so. (Docket Item No. 54 at 13-14.)

Ferebee has provided a written statement from Wallens Ridge inmate Kevon Williams, No. 1778880. (Docket Item No. 54 at 11-12.) In this statement, Williams said he had been housed in the B-1 Building at Wallens Ridge since May 12, 2017. Williams said his cell was "infested with mold," and there was no air conditioning. (Docket Item No. 54 at 11-12.) Williams said the mold was affecting his laundry, clothes and bed linens. He said the mold had been a problem since he had been housed in the B-1 Building. He said that the staff "try to paint over it so it would look[] like nothing.... (Docket Item No. 54 at 12.) While Williams stated his

affidavit was sworn to under penalty of perjury, he failed to do so. (Docket Item No. 54 at 11-12.)

Ferebee has provided a written statement from Wallens Ridge inmate Lawrence Roberson, signed under penalty of perjury. (Docket Item No. 54 at 16.) Roberson said that he arrived at Wallens Ridge in January 2020 and, since then, had been exposed to black mold as well as fecal matter in D Building cell 220 and in B Building cell 112. (Docket Item No. 54 at 16.) He said this exposure caused him shortness of breath, chest tightening, daily headaches and eye irritation. (Docket Item No. 54 at 16.) Roberson said that black mold was "highly visible" in numerous places in the pod. (Docket Item No. 54 at 16.) While Roberson stated his affidavit was sworn to under penalty of perjury, he failed to do so. (Docket Item No. 54 at 16.)

Ferebee has provided a written statement from Wallens Ridge inmate Brian Butts, signed under penalty of perjury. (Docket Item No. 54 at 15.) Butts said that he was housed in cell 102 in the B Building at Wallens Ridges, and he previously had been housed in cell 101. He said that there was so much mold in cell 101 that it spread throughout his personal clothing, letters and legal mail. He said the mold is the reason he was moved from cell 101 to cell 102, but he said there was black mold in cell 102. Butts stated, "The facility tried to cover it up with white paint. But the black mold is showing itself to be stronger than anything they can attempt to cover it up with." (Docket Item No. 54 at 15.) Butts said the mold was plain to see underneath the beds and on the cell walls. He said that his cell was "uncomfortable, unpleasant and unlivable." (Docket Item No. 54 at 15.)

In support of the Motion, the defendants have filed an Affidavit from Reynolds, (Docket Item No. 43-1) ("Reynolds Affidavit"). In this Affidavit, Reynolds stated that VDOC records showed that Ferebee had been incarcerated at Wallens Ridge since February 27, 2019. He said that Ferebee was housed in cell B-104 until July 3, 2019, when he was moved to cell B-101. Ferebee was moved from cell B-101 to cell B-102 on August 16, 2019, where he remained.

Reynolds Affidavit states:

During the summer of 2019, a project to replace the roofing at Wallens Ridge was underway. During the process of roof removal and replacement, increased moisture was introduced into B-1 housing unit which resulted in mildew in multiple cells, including Ferebee's cell, and in the pod office. The cells on the outside wall of the housing unit were primarily affected. The wall and the foundation are not cracked and water was not entering the building through the wall or floor as Ferebee claims. I notified the Institutional Safety Officer and the issue was addressed in August 2019. The mildew was cleaned with mildew resistant cleaners and every cell in B-1 was painted, including Ferebee's cell. The products were ordered by the Safety Officer, and I supervised the cleaning and painting of the cells. The mildew was resolved after the cells were cleaned and painted. To my knowledge, there has been no black mold in the cells or in any area at Wallens Ridge.

(Docket Item No. 43-1 at 2.)

The defendants also provided an Affidavit from C. Collins, a registered nurse at Wallens Ridge, (Docket Item No. 43-2) ("Collins Affidavit"). Collins stated that a review of Ferebee's VDOC medical records indicated that his primary medical concerns since arriving at Wallens Ridge had been facial acne and hypertension. Collins stated that he had not been seen by medical staff for "any complaints

regarding breathing problems, shortness of breath, hurting lungs, coughing up blood or mold/mildew in his housing unit.” (Docket Item No. 43-2 at 1.) Collins attached copies of the relevant portion of Ferebee’s medical records to her Affidavit. A review of these medicals shows no complaints of exposure to mold or mildew or any breathing problems. (Docket Item No. 43-2 at 3-10.)

The defendants provided an Affidavit from J. Richardson, the Buildings and Grounds Supervisor at Wallens Ridge. (Docket Item No. 43-3) (“Richardson Affidavit”). Richardson stated that he began employment at Wallens Ridge in October 2019. (Docket Item No. 43-3 at 1.) Prior to his arrival at Wallens Ridge, the roof was replaced during a summer-long project, and new HVAC units were installed. During the project, there were some leaks in the buildings which caused humidity levels to increase. Richardson admitted that he was aware that there was some mildew in some of the cells, which is often the result of poor ventilation. (Docket Item No. 43-3 at 1.) Richardson stated that the cells were treated with specialized mildew cleaner, and they were painted. He stated that all of the cells in B-1 were scrubbed and painted beginning in August 2019. (Docket Item No. 43-3 at 1.)

Later, in December 2019, there also was a dirt-type substance high on the wall in B-1 located approximately eight feet down from the ceiling. Richardson stated that this material also was scrubbed and treated, and the walls were painted. (Docket Item No. 43-3 at 2.) Richardson explained that Security staff is responsible for checking the cells and preparing weekly sanitation reports for each housing unit, while Buildings and Grounds staff and the Institutional Safety Officer conduct inspections of the housing units on a monthly basis for fire safety, including the pod areas and showers. (Docket Item No. 43-3 at 2.) Richardson stated that the mildew

in B-1 was reported to Buildings and Grounds by Housing Unit Manager Quinn Reynolds. (Docket Item No. 43-3 at 2.) The necessary cleaning materials were ordered by Building and Grounds in June and October of 2019, and Reynolds coordinated the cleaning and painting of the cells in B-1. Richardson stated that he had no knowledge that black mold was found in any of the housing units, including B-1 Housing Unit. (Docket Item No. 43-3 at 2.) In addition to filing a grievance, offenders may submit complaints to the Buildings and Grounds staff and the Institutional Safety Officer, Mr. Carroll. Records kept by Richardson's department reflect that no written complaints were received from Ferebee or any offender in B-1 Housing Unit about mold or mildew in the cells. (Docket Item No. 43-3 at 2.)

The defendants provided an Affidavit from Carl A. Manis, the Regional Administrator for Institutions in the Western Region of the VDOC. (Docket Item No. 43-4) ("Manis Affidavit"). This Affidavit was not sworn under oath and, therefore, may not be considered as evidence on the Motion. Nonetheless, Manis stated that, in the summer of 2019, a roof replacement project was underway at Wallens Ridge. To Manis's understanding, during the project, the roof membrane was taken up, and moisture entered the building through leaks. Maintenance staff checked the housing units and determined that mildew was present in the corners of some of the cells. The inspections and treatment of the mildew continued during the roofing project. The mildew was treated with chemicals made specifically to combat it, and all of the cells were painted. (Docket Item No. 43-4 at 2.) Manis stated that Wallens Ridge keeps a log of his rounds in the housing units. According to these records, Manis made rounds in B-1 Housing Unit on February 20, 2019; March 6, 14 and 26, 2019; May 16, 2019; June 5 and 11, 2019; July 10 and 31, 2019; and August 15, 2019. (Docket Item No. 43-4 at 2.) Manis did not make rounds in B-1 on March 28, 2019, and June 3, 2019, the dates Ferebee stated that he talked to Manis.

and other staff members about prison conditions. Manis stated that during his rounds, he went to every offender's cell, and he did not recall talking with Ferebee about his cell, and he did not tell Ferebee that he "should not have it made." (Docket Item No. 43-4 at 2.) Manis stated that, to the best of his knowledge, the mildew in B-1 was adequately addressed and resolved in a timely manner, and all of the cells were scrubbed and painted. To his knowledge, the material was not tested because there was not enough of an accumulation of the substance for testing. (Docket Item No. 43-4 at 2.) Manis explained that offenders' cell doors are closed much of the day, and they put towels underneath the cell doors and cover the air vents, which reduces the ability for moisture to evaporate and for air to circulate in the cell. This is a daily occurrence in the offender housing units, and staff works diligently against the blocking of the air vents. (Docket Item No. 43-4 at 2.) Manis stated that he had no reason to believe that there was anything other than mildew in limited areas of the housing units during the roofing project at Wallens Ridge. (Docket Item No. 43-4 at 2-3.)

The defendants also have provided an Affidavit from T. Townsend, a registered nurse and the Director of Nursing at Wallens Ridge. (Docket Item No. 59-2) ("Townsend Affidavit"). Townsend stated that she had reviewed Ferebee's VDOC medical progress notes from April 2020 to the date of her Affidavit, August 6, 2020. Townsend said that these notes showed that Ferebee was seen during sick call for a complaint of shortness of breath on May 8, 2020. (Docket Item No. 59-2 at 2.) The nurse noted that, when she arrived at Ferebee's cell door, Ferebee was working out and showed no difficulty breathing. The nurse noted that Ferebee had a steady gait, and he was alert and oriented with no signs of distress. His capillary refill time was less than two seconds. The nurse referred Ferebee to the physician for further assessment. (Docket Item No. 59-2 at 2.)

According to Townsend, Ferebee was seen by a physician on May 18, 2020,² for complaints of shortness of breath for one year with cough and blood. The physician noted that Ferebee had no fever and a negative history for lung disease. The physician noted that Ferebee's lungs were clear, and he ordered a chest x-ray. He also prescribed an inhaler. A chest x-ray was conducted on Ferebee on June 4, 2020. On June 8, 2020, Dr. Mullins found that Ferebee's chest x-ray showed that his lungs were clear and within normal limits. Ferebee saw Dr. Mullins for blood work on June 18, 2020, with follow up in one month. (Docket Item No. 59-2 at 2.)

Ferebee saw Dr. Mullins for follow up and hypertension chronic care on July 16, 2020. Ferebee had no complaints. Townsend said that, according to the record, Ferebee continued to use his inhaler as needed due to his complaints of shortness of breath. She said that the medical records showed that Ferebee had voiced no complaints since May 18, 2020. (Docket Item No. 59-2 at 2-3.) The relevant medical records were attached to Townsend's Affidavit. (Docket Item No. 59-2 at 4-8.)

The defendants also have filed a Supplemental Affidavit from Reynolds (Docket Item No. 59-3) ("Reynolds Supplemental Affidavit"). In this Affidavit, Reynolds stated that, since signing his earlier Affidavit on April 3, 2020, he had not received any new offender complaints regarding mold or mildew in the Wallens Ridge B-1 Housing Unit or in individual cells. (Docket Item No. 59-3 at 1-2.) He also stated that he was not aware of any continuing issues concerning mildew, mold

² Ferebee alleged in his Second Affidavit, (Docket Item No. 54), that, on May 18, 2020, Dr. B. Mullins diagnosed him with asthma resulting from being exposed to mold or black mold. (Docket Item No. 54 at 4.) Again, while Ferebee states that this Affidavit was sworn under oath, it was not. (Docket Item No. 54.) Regardless, Ferebee's hearsay statement of what a physician had told him would not be admissible at trial, and, therefore, cannot be used to establish a genuine dispute of material fact on summary judgment. *See FED. R. CIV. P. 56(c)(4).*

or black mold. He stated that Ferebee was no longer housed in the B-1 Housing Unit and was moved to the C Building on May 20, 2020, to the C-6 Housing Unit. (Docket Item No. 59-3 at 2.)

In his Cross-Motion, Ferebee admits that, on or about May 20, 2020, he was removed from being housed in the B-Building and placed in the C-Building Housing Unit, specifically cell C1-106. (Docket Item No. 64 at 4.) Ferebee's Cross-Motion is asking the court to rule on whether infractions he has allegedly received constitute retaliation as a result of his pending lawsuits, which is an attempt to assert a new claim into this litigation. (Docket Item No. 64 at 4-5.) In addition, the Cross-Motion seeks a "specific declaration" as to whether mold, black mold or mildew possess the same elements of fungi, (Docket Item No. 64), which was addressed when the court denied Ferebee's Motion For Leave For Scientific Testing. (Docket Item Nos. 53, 57.)

II. Analysis

With regard to a motion for summary judgment, the standard for review is well-settled. The court should grant summary judgment only when the pleadings, responses to discovery and the record reveal that "there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(a); *see, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). A genuine issue of fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. In considering a motion for summary judgment, the court must view the facts and the reasonable inferences to

be drawn from the facts in the light most favorable to the party opposing the motion. *See Anderson*, 477 U.S. at 255; *Matsushita*, 475 U.S. at 587. In order to be successful on a motion for summary judgment, a moving party "must show that there is an absence of evidence to support the non-moving party's case" or that "the evidence is so one-sided that one party must prevail as a matter of law." *Lexington-South Elkhorn Water Dist. v. City of Wilmore, Ky.*, 93 F.3d 230, 233 (6th Cir. 1996). When a motion for summary judgment is made and is properly supported by affidavits, depositions or answers to interrogatories, the nonmoving party may not rest on the mere allegations or denials of the pleadings. *See Oliver v. Va. Dep't of Corrs.*, 2010 WL 1417833, at *2 (W.D. Va. Apr. 6, 2010) (citing FED. R. CIV. P. 56(e)). Instead, the nonmoving party must respond by affidavits or otherwise and present specific facts from which a jury could reasonably find for either side. *See Anderson*, 477 U.S. at 256-57.

The defendants argue that there is no genuine dispute of material fact, and they are entitled to the entry of summary judgment in their favor on Ferebee's claims. In particular, they argue that Ferebee cannot recover monetary damages against them in their official capacities. They also argue that the undisputed facts do not rise to the level of cruel and unusual punishment in violation of the Eighth Amendment, in that Ferebee has not presented evidence of an objectively extreme deprivation or of subjective deliberate indifference. The defendants further argue that they are entitled to qualified immunity because Ferebee's allegations do not rise to the level of a constitutional violation, and he has not demonstrated that the defendants' actions violated a clearly established statutory or constitutional right of which a reasonable person would have known.

Ferebee's Amended Complaint claims that the defendants violated his Eighth Amendment right to be free from cruel and unusual punishment by being deliberately indifferent to the dangers posed by his conditions of confinement. In particular, Ferebee claims that the defendants were deliberately indifferent to the danger posed to him by exposure to mold or mildew in the B-1 Housing Unit at Wallens Ridge. The Eighth Amendment to the U.S. Constitution not only prohibits excessive sentences, but it also protects inmates from inhumane treatment and conditions while imprisoned. *See Williams v. Benjamin*, 77 F.3d 756, 761 (4th Cir. 1996). To amount to deliberate indifference, a public official must have been personally aware of facts indicating a substantial risk of serious harm, and the official must have actually recognized the existence of such a risk. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994). “[D]eliberate indifference entails something more than mere negligence, ... [but] is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.” *Farmer*, 511 U.S. at 835.

Ferebee, as the plaintiff, has the burden to prove each element of his deliberate indifference claim, including his assertion that mold or mildew in his housing unit posed a danger to his health. *See Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994) (plaintiff in § 1983 deliberate indifference claim must show alleged danger poses a risk of danger to the plaintiff); *see also Mabry v. N.Y.C. Dep’t of Corrs.*, 2009 WL 2709324, at *5 (S.D. N.Y. Mar. 12, 2009) (“As with any tort, a plaintiff asserting a claim of unconstitutional conditions of confinement must demonstrate a causal relation between the harm ... suffered and the defendant’s action or inaction.”) (citing *Barnes v. Anderson*, 202 F.3d 150, 158 (2nd Cir. 1999) (in § 1983 action the defendant’s actions or inactions must proximately cause plaintiff’s injury)).

Viewing the evidence before the court in the light most favorable to Ferebee's claim, the defendants, through Reynolds's Affidavits, have admitted that there was a period of time in 2019 when there was a mildew problem in the B-1 Housing Unit at Wallens Ridge. While the defendants, through Reynolds's Affidavits, also have provided evidence that this mildew problem was remedied, Ferebee has presented evidence disputing that the problem was remedied before he was moved from the B-1 Housing Unit on May 20, 2020. While the court must resolve this dispute in the evidence in Ferebee's favor, Ferebee's claim, nevertheless, must fail because he has failed to present any evidence that this mold or mildew problem created a substantial risk of serious harm to him or that the defendants were aware of any such risk. See *Thompson v. Commonwealth of Virginia*, 878 F.3d 89, 107 (4th Cir. 2017).

In a case involving a prisoner's claim that prison officials were deliberately indifferent to the prisoner's medical needs, this court has held that, to meet the objective component of a deliberate indifference claim, a medical need must be "sufficiently serious." *Shelton v. Angelone*, 148 F. Supp. 2d 670, 678 (W.D. Va. 2001). The court held that a medical need is sufficiently serious "if it is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Shelton*, 148 F. Supp. 2d at 678 (quoting *Hunt v. Uphoff*, 199 F.3d 1220, 1224 (10th Cir. 1999)). Also, expert medical opinion evidence is usually required to show the cause of an injury or disease, or, as is relevant in this case, the propensity to cause a disease or injury, "because the medical effect on the human system of the infliction of injuries is generally not within the sphere of the common knowledge of the lay person." *Barnes*, 202 F.3d at 159.

While Ferebee claims that he suffered injury to his health from exposure to mold while housed in the B-1 Housing Unit, Ferebee has produced no medical evidence of any physical injury, or even any risk of injury, caused by exposure to mold or mildew. In fact, the undisputed medical evidence before the court shows that Ferebee complained of breathing problems on only one occasion -- May 18, 2020. The physician noted that Ferebee's lungs were clear, and he ordered a chest x-ray, which subsequently showed that Ferebee's lungs were clear and within normal limits. Although the physician prescribed an inhaler for Ferebee, he did not diagnose any particular medical condition, and he did not provide any expert opinion that Ferebee's condition was caused by exposure to mold or mildew.

28 → While Ferebee has attempted to offer Dr. Mullins's statements to him as evidence to be considered in opposition to the Motion, such hearsay statements would not be admissible at trial, and, therefore, may not be considered by the court on summary judgment. *See* FED. R. CIV. P. 56(c)(4).

15 → Furthermore, the undisputed evidence before the court shows that Ferebee, within two days of seeking medical treatment for breathing problems, was moved from the B-1 Housing Unit.

Based on the above-stated reason, an appropriate order will be entered granting the Motion and denying the Cross Motion, and judgment will be entered in favor of the defendants.

ENTERED: February 18, 2021.

/s/ Pamela Meade Sargent
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

LORENZA GERALD FERESEE,
JR.,

Plaintiff,

v.

WARDEN C. MANIS and
UNIT MANAGER Q. REYNOLDS
Defendants.

APPENDIX A (5)

) Civil Action No. 7:19cv00628
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MEMORANDUM OPINION

) By: Hon. Pamela Meade Sargent
)
United States Magistrate Judge

Plaintiff, Lorenza Gerald Ferebee, Jr., ("Ferebee"), is a Virginia Department of Corrections, ("VDOC"), inmate currently housed at Wallens Ridge State Prison, ("Wallens Ridge"). Ferebee has filed this civil rights action pursuant to 42 U.S.C. § 1983, against VDOC employees Wallens Ridge Warden C. Manis, ("Manis"), and Unit Manager Q. Reynolds, ("Reynolds"), alleging that he has been subjected to cruel and unusual punishment in violation of the Eighth Amendment due to exposure to mold. This case is before the court on a motion for preliminary injunctive relief, (Docket Item No. 24) ("Motion"). For the reasons stated below, the Motion will be denied.

I. Facts

In his Amended Complaint, (Docket Item No. 32), Ferebee seeks a declaratory judgment, injunctive relief and damages, alleging that the defendants were deliberately indifferent to the danger posed to him by exposure to the environmental

hazard of mold or black mold at Wallens Ridge. In his Amended Complaint, which is sworn to under penalty of perjury, Ferebee alleged that he was transferred to Wallens Ridge on February 26, 2019. Ferebee alleged that he spoke to both Manis and Reynolds "about the Prison Conditions" of "Mold" in his cell, B-104, on March 28, 2019. Ferebee alleged that mold was all over his cell walls, window and bunk.

In response to an Informal Complaint complaining of mold, filed on April 25, 2019, Reynolds responded on April 29, 2019, that he had just cleaned the cell, and Ferebee should let him know if he needed additional cleaning supplies. Ferebee said that he then filed a Regular Grievance concerning the mold in his cell. Warden Manis responded that Ferebee's Grievance was unfounded because the Maintenance Department had inspected Ferebee's cell and found no evidence of mold. This decision was upheld on appeal to the Regional Administrator. Ferebee attached his requests for administrative remedies and the VDOC's responses to his original Complaint. (Docket Item No. 1-1.)

Ferebee said that he spoke to Manis again on June 3, 2019, about "overall" prison conditions. After that, Ferebee alleged he was moved to cell B-101 and, then, to cell B-102, where mold also existed. Ferebee alleged that he spoke to Manis again on July 11, 2019, about the black mold in cell B-101.

Ferebee alleged that the mold destroyed his photos and photo album, letters, cards, books, clothes and blanket. Ferebee seeks compensatory damages of \$1 million, punitive damages of \$500,000.00, and nominal, special and treble damages and injunctive relief ordering that he and all prisoners be removed from Wallens Ridge.

In his Motion, which also was sworn, Ferebee alleged that he has been exposed to mold and/or black mold in Wallens Ridge cells B-104, B-101 and B-102 since February 26, 2019. Ferebee, again, alleged that he spoke to Manis regarding prison conditions on March 28 and June 3, 2019. Ferebee also alleged that he spoke to Reynold on July 11, 2019, and to VDOC Health Services Director McMillian on July 20, 2019, about the “mold and/or black mold” in Wallens Ridge. On July 11, 2019, Ferebee alleged that he showed Reynolds the “prison condition(s) all over the cell.” (Motion at 4.)

Ferebee alleged in the Motion that he could “barely breath[e] most of the time in my cell and while in the pod for pod recreation because I feel a shortness of breath and my lung(s) be hurting, and some time(s) I be coughing up blood.” (Motion at 4.) Ferebee alleged that there was a crack in the prison’s B Building foundation, which ran from cell B-101 to B-108, and through which rain water would travel into cells B-104, B-101 and B-102. Ferebee stated that he “believed” this crack was the source of the mold in the B Building.

In an Affidavit attached to the Motion, (Docket Item No. 24-2) (“Affidavit”), Ferebee again stated that he “can barely breath[e] and have a shortness of air and my lung(s) be hurting, some time(s) I cough up blood.” (Affidavit at 2.) Ferebee also stated that he spoke with Warden Manis about “Prison Condition(s) of Mold and/or Blackmold” on March 28 and June 3, 2019, and spoke with McMillian on July 10, 2019, and “notified” him of the “pre-existing” mold and/or black mold conditions at Wallens Ridge. Ferebee also stated that he spoke with Unit Manager Reynolds on July 11, 2019, about the mold and/or black mold.

Ferebee further stated that on December 13, 2019, Reynolds came into the B-1 Pod with Correctional Sergeant Roberts and Correctional Officer Polly pushing a cart with buckets of white and blue paint, a pole and paint rollers. Ferebee further stated that a Wallens Ridge maintenance worker came into the B-1 Pod on January 30, 2020, on a “Big Moving Machine” and painted over the mold and/or black mold on the ceiling close to cells 1-8, by the sally port door and the mail and commissary box, beside #6 and 7 pod phones and above the pod television. Days before, he stated, a maintenance worker and supervisor came into the B-1 Pod and sprayed bleach on the mold and/or black mold all over the ceiling and took a towel and wiped it off.

Ferebee stated that Wallens Ridge prisoner Kevon Williams, No. 1778880, on March 19, 2019, swore under oath that he had been housed at Wallens Ridge in cell B-103 since May 12, 2017, and his cell walls, windows and metal bunk were infested with mold and there was no air conditioning. Williams claimed that staff and the correctional officers would paint over the mold. He said that the mold affected his laundry, clothes and bed linens.

Ferebee stated that Wallens Ridge prisoner Thomas Wade, No. 1055103, on March 19, 2019, swore under oath that he had been housed at Wallens Ridge in cell B-103 since February 12, 2017. Wade said that black mold infected his cell walls, windows and metal bunk because there was no ventilation in the building. Wade said breathing the mold was affecting his lungs. Wade said that the mold problem grew worse once the ventilation system in the building shut down.

Ferebee stated that Wallens Ridge prisoner Lawrence Nolerven arrived at Wallens Ridge on January 25, 2019, and had been exposed to black mold since then,

causing him shortness of breath as well as chest tightening with daily headache and eye irritation. Nolerven said he was exposed to black mold as well as fecal matter in D Building cell 220 and in B Building cell 112. He said that black mold was "highly visible in numerous place(s) on the pod."

Ferebee references the statements for Williams, Wade and Nolerven by exhibit number, but none of these original sworn statements have been filed in this matter by Ferebee.

Ferebee also provided the court with a copy of his Institutional Classification Authority Hearing Report for a hearing held on January 7, 2020. (Docket Item No. 24-3.) This Report recommended that Ferebee be transferred to Keen Mountain Correctional Center, River North Correctional Center or Sussex II State Prison. This transfer was disapproved by the Central Classification Services.

Ferebee filed a motion to amend his request for preliminary injunctive relief, (Docket Item No. 56), which has been denied by the court. This motion to amend references another "Affidavit;" however, no affidavit from Ferebee was attached to that motion. That motion was not sworn under oath and, therefore, may not be considered as evidence on the Motion. Nonetheless, in that motion, Ferebee alleged that he was diagnosed with asthma by Wallens Ridge Dr. B. Mullens and prescribed an inhaler. Ferebee alleged that he experienced shortness of breath, hurting lungs, dizziness, lightheadedness, wheezing and coughing up blood on occasion due to being exposed to mold or black mold. Ferebee asserted that neither he, nor any of the defendants, was qualified to determine the difference between mold, black mold or mildew, but he said that he knew that the "pre-existing known fungi" is an environmental health hazardous prison condition at Wallens Ridge.

In a sworn reply on the Motion, Ferebee claimed that the nurses and physicians at Wallens Ridge were "acting to cover up" his complaints about the effect breathing mold had on his body by not documenting these complaints in his health records. Ferebee attached several receipts for the purchase of items of personal property and Personal Property Request Forms to his reply. (Docket Item No. 40-1 at 1-6.) Ferebee also attached a Level II Response to Regular Grievance No. WRSP-20-REG-00067, on which the Director of Offender Management Services noted that Ferebee had been approved for transfer to a Security Level 4 facility when bed space became available. (Docket Item No. 40-1 at 7.)

Ferebee has filed a second Affidavit with the court, (Docket Item No. 54) ("Second Affidavit"), in which he stated that the "fungi" in Building B at Wallens Ridge had to be mold and not mildew because it returned every time it was painted over. He stated that Defendant Quinn had told him that the fungi was mildew and not mold. Ferebee stated that Quinn said that, if he reported that there was mold in the building, "B1 Pod will not be suitable for offender(s) to live...." (Second Affidavit at 3.) Ferebee stated that he and several other inmates had complained about the mold, but it had never been properly investigated.

Ferebee stated that he had been diagnosed with asthma after he had filed an Informal Complaint alleging that the Medical Department was trying to "cover up" his medical concerns over mold exposure. Ferebee stated that Wallens Ridge physician Dr. B. Mullins diagnosed him with asthma due to mold exposure and prescribed an inhaler. Ferebee, again, stated that he suffered from shortness of breath, hurting lungs, dizziness, lightheadedness, wheezing and coughing up blood, and his personal property had been damaged.

Ferebee has provided a written statement from Wallens Ridge inmate Kevon Williams, signed under penalty of perjury. (Docket Item No. 54 at 11-12.) In this statement, Williams said he had been housed in the B-1 Building at Wallens Ridge since May 12, 2017. Williams said his cell was "infested with mold." (Docket Item No. 54 at 12.) Williams said the mold was affecting his laundry. He said the mold had been a problem since he had been housing in the B-1 Building. He said that the staff "try to paint over it so it would look[] like nothing.... (Docket Item No. 54 at 12.)

Ferebee has provided a written statement from Wallens Ridge inmate Thomas Wade, signed under penalty of perjury. (Docket Item No. 54 at 13-14.) In this statement, Wade said he had been housing in cell 103 in the B Building at Wallens Ridge since February 2017. Wade said that there was black mold on his cell walls, windows and metal bunk due to having no ventilation in the building. He said breathing the mold was affecting his lungs. Wade said the problem had grown worse since the building's ventilation system continues to shut down.

Ferebee has provided a written statement from Wallens Ridge inmate Brian Butts, signed under penalty of perjury. (Docket Item No. 54 at 15.) Butts said that he was housed in cell 102 in the B Building at Wallens Ridges, and he previously had been housed in cell 101. He said that there was so much mold in cell 101 that it spread throughout his personal clothing, letters and legal mail. He said the mold is the reason he was moved from cell 101 to cell 102, but he said there was black mold in cell 102. Butts stated, "The facility tried to cover it up with white paint. But the black mold is showing itself to be stronger than anything they can attempt to cover it up with." (Docket Item No. 54 at 15.) Butts said the mold was plain to see

underneath the beds and on the cell walls. He said that his cell was “uncomfortable, unpleasant and unlivable.” (Docket Item No. 54 at 15.)

Ferebee has provided a written statement from Wallens Ridge inmate Lawrence Roberson, signed under penalty of perjury. (Docket Item No. 54 at 16.) Roberson said that he arrived at Wallens Ridge in January 2020 and, since then, had been exposed to black mold. He said this exposure caused him shortness of breath, chest tightening and headaches. Roberson said he had been housed in cells B-112 and D-220. He said that black mold was “highly visible” in numerous places in the pod. (Docket Item No. 54 at 16.)

In response to the Motion, the defendants have filed an Affidavit from Reynolds, (Docket Item No. 35-1) (“Reynolds Affidavit”). In this Affidavit, Reynolds stated that VDOC records showed that Ferebee had been incarcerated at Wallens Ridge since February 27, 2019. He said that Ferebee was housed in cell B-104 until July 3, 2019, when he was moved to cell B-101. Ferebee was moved from cell B-101 to cell B-102 on August 16, 2019, where he remained.

Reynolds Affidavit states:

During the summer of 2019, a project to replace the roofing at Wallens Ridge was underway. During the process of roof removal and replacement, increased moisture was introduced into B-1 housing unit which resulted in mildew in multiple cells, including Ferebee’s cell, and in the pod office. The cells on the outside wall of the housing unit were primarily affected. The wall and the foundation are not cracked and water was not entering the building through the wall or floor as Ferebee claims. I notified the Institutional Safety Officer and the issue was addressed in August 2019. The mildew was cleaned with mildew resistant cleaners and every cell in B-1 was painted, including Ferebee’s

cell. The products were ordered by the Safety Officer, and I supervised the cleaning and painting of the cells. The mildew was resolved after the cells were cleaned and painted. To my knowledge, there has been no black mold in the cells or in any area at Wallens Ridge.

(Reynolds Affidavit at 2.)

Reynolds also stated that Ferebee had been approved for transfer to a Security Level 4 facility on March 17, 2020. A copy of the ICA Hearing Report recommending this transfer is attached to Reynolds's Affidavit.

The defendants also have provided an Affidavit from C. Collins, a registered nurse at Wallens Ridge. (Docket Item No. 35-2) ("Collins Affidavit"). Collins stated that a review of Ferebee's VDOC medical records indicated that his primary medical concerns since arriving at Wallens Ridge had been facial acne and hypertension. Collins stated that he had not been seen by medical staff for "any complaints regarding breathing problems, shortness of breath, hurting lungs, coughing up blood or mold/mildew in his housing unit." (Collins Affidavit at 1.) Collins attached copies of the relevant portion of Ferebee's medical records to her Affidavit. A review of these medicals shows no complaints of exposure to mold or mildew or any breathing problems. (Collins Affidavit at 3-10.)

The defendants also have provided an Affidavit from T. Townsend, a registered nurse and the Director of Nursing at Wallens Ridge. (Docket Item No. 59-2) ("Townsend Affidavit"). Townsend stated that she had reviewed Ferebee's VDOC medical progress notes from April 2020 to the date of her Affidavit, August 6, 2020. Townsend said that these notes showed that Ferebee was seen during sick call for a complaint of shortness of breath on May 8, 2020. The nurse noted that,

when she arrived at Ferebee's cell door, Ferebee was working out and showed no difficulty breathing. The nurse noted that Ferebee had a steady gait, and he was alert and oriented with no signs of distress. His capillary refill time was less than two seconds. The nurse referred Ferebee to the physician for further assessment.

According to Townsend, Ferebee was seen by a physician on May 18, 2020, for complaints of shortness of breath for one year with cough and blood. The physician noted that Ferebee had no fever and a negative history for lung disease. The physician noted that Ferebee's lungs were clear, and he ordered a chest x-ray. He also prescribed an inhaler. A chest x-ray was conducted on Ferebee on June 4, 2020. On June 8, 2020, Dr. Mullins found that Ferebee's chest x-ray showed that his lungs were clear and within normal limits. Ferebee saw Dr. Mullins for blood work on June 18, 2020, with follow up in one month.

Ferebee saw Dr. Mullins for follow up and hypertension chronic care on July 16, 2020. Ferebee had no complaints. Townsend said that, according to the record, Ferebee continued to use his inhaler as needed due to his complaints of shortness of breath. She said that the medical records showed that Ferebee had voiced no complaints since May 18, 2020.

The relevant medical records were attached to Townsend's Affidavit. (Townsend Affidavit at 4-8.)

The defendants also have filed a Supplemental Affidavit from Reynolds. (Docket Item No. 59-3) ("Reynolds Supplemental Affidavit"). In this Affidavit, Reynolds stated that since signing his earlier Affidavit on April 3, 2020, he had not received any new offender complaints regarding mold or mildew in the Wallens

Ridge B-1 Housing Unit or in individual cells. He also stated that he was not aware of any continuing issues concerning mildew, mold or black mold. He stated that Ferebee was no longer housed in the B-1 Housing Unit and was moved to the C Building on May 20, 2020, to the C-6 Housing Unit.

II. Analysis

“The law is well settled that federal injunctive relief is an extreme remedy.” *Simmons v. Poe*, 47 F.3d 1370, 1382 (4th Cir. 1995). Furthermore, a preliminary injunction is considered “an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied ‘only in [the] limited circumstances’ which clearly demand it.” *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 811 (4th Cir. 1991) (quoting *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 800 (3rd Cir. 1989)). The party seeking entry bears the burden to establish that these factors support granting a preliminary injunction: (1) the movant’s likelihood of succeeding on the merits of the action; (2) the likelihood of irreparable harm to the movant if preliminary injunctive relief is denied; (3) that the balance of equities tips in the movant’s favor; and (4) that an injunction is in the public interest. See *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

As stated above, the Motion before the court seeks the entry of preliminary injunctive relief ordering that Ferebee and all prisoner be transferred out of Wallens Ridge. Based on the evidence currently before the court, I find that Ferebee has failed to establish that the entry of any preliminary injunctive relief is appropriate. The evidence before the court has not shown that Ferebee is likely to suffer irreparable

harm if the requested injunctive relief is denied. Ferebee also has failed to show that he is likely to succeed on the merits of his claim.

Ferebee claims that the defendants were deliberately indifferent to the dangers posed by his conditions of confinement. In particular, Ferebee claims that the defendants were deliberately indifferent to the danger posed to him by exposure to mold or mildew in the B-1 Housing Unit at Wallens Ridge. The Eighth Amendment to the U.S. Constitution not only prohibits excessive sentences, but it also protects inmates from inhumane treatment and conditions while imprisoned. *See Williams v. Benjamin*, 77 F.3d 756, 761 (4th Cir. 1996). To amount to deliberate indifference, a public official must have been personally aware of facts indicating a substantial risk of serious harm, and the official must have actually recognized the existence of such a risk. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994). “[D]eliberate indifference entails something more than mere negligence, ... [but] is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.” *Farmer*, 511 U.S. at 835.

Turning to the facts of Ferebee’s claims, the defendants, through Reynolds’s Affidavits, have admitted that there was a period of time in 2019 when there was a mildew problem in the B-1 Housing Unit at Wallens Ridge. Reynolds also has provided evidence that this mildew problem has been remedied. While Ferebee disputes this, the evidence before the court shows that Ferebee no longer is housed in the B-1 Housing Unit. Ferebee now is housed in the C-6 Housing Unit. While Ferebee claims that he suffered injury to his health from exposure to mold while housed in the B-1 Housing Unit, Ferebee has produced no medical evidence of any physical injury caused by exposure to mold or mildew. In fact, the only medical evidence before the court shows that Ferebee complained on breathing problems on

only one occasion -- May 18, 2020. The physician noted that Ferebee's lungs were clear, and he ordered a chest x-ray, which subsequently showed that Ferebee's lungs were clear and within normal limits. While the physician prescribed an inhaler for Ferebee, he did not diagnose any particular medical condition, and he did not provide any expert opinion that Ferebee's condition was caused by exposure to mold or mildew.

Based on the above, the court also cannot find that the balance of equities tips in Ferebee's favor or that the entry of preliminary injunctive relief is in the public interest.

Based on the above-stated reasons, I will deny the Motion.

ENTERED: September 18, 2020.

/s/ Pamela Meade Sargent
UNITED STATES MAGISTRATE JUDGE

Petitioner(s) APPENDIX(S) B - B (1-4)

FILED: December 2, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-6446
(7:19-cv-00680-PMS)

LORENZA GERALD FERESEE, JR.

Plaintiff - Appellant

v.

C. MANIS, Wallens Ridge State Prison "Warden"

Defendant - Appellee

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Gregory, Judge Rushing, and Senior Judge Floyd.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX B

Petitioner(s) APPENDIX B (2)

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 21-6446

LORENZA GERALD FERESEE, JR.,

Plaintiff - Appellant,

v.

C. MANIS, Wallens Ridge State Prison "Warden,"

Defendant - Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Pamela Meade Sargent, Magistrate Judge. (7:19-cv-00680-PMS)

Submitted: October 13, 2021

Decided: October 14, 2022

Before GREGORY, Chief Judge, RUSHING, Circuit Judge, and FLOYD, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Lorenza Gerald Ferebee, Jr., Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

Page(s) (1-2)

PER CURIAM:

Lorenza Gerald Ferebee, Jr., appeals the magistrate judge's orders denying relief on his 42 U.S.C. § 1983 complaint and denying his motion for reconsideration.* On appeal, we confine our review to the issues raised in the informal brief. *See* 4th Cir. R. 34(b); *see also* *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 his informal brief, Ferebee alleges that we lack jurisdiction over appeals from a single district court judge or a magistrate judge and asks to appeal directly to the United States Supreme Court. A litigant may appeal directly to the Supreme Court only from the grant or denial of an interlocutory or permanent injunction by order of “a district court of three judges.” 28 U.S.C. § 1253. In all other cases, “[c]ases in the court of appeals may be reviewed by the Supreme Court” via certiorari review or certification of a question of law by a court of appeals. 28 U.S.C. § 1254. Because Ferebee’s judgment was not issued by a district court of three judges, he may not bypass our court. 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.

DISMISSED

* The parties consented to proceed before a magistrate judge. 28 U.S.C. § 636(c).

APPENDIX ~~B~~ (4)

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

LORENZA GERALD FERESEE, JR.,)
Plaintiff,)
v.)
WARDEN C. MANIS,)
Defendant)
) Civil Action No. 7:19cv00680
)
) MEMORANDUM OPINION
)
) By: Pamela Meade Sargent
) United States Magistrate Judge
)

Plaintiff, Lorenza Gerald Ferebee, Jr., (“Ferebee”), is a Virginia Department of Corrections, (“VDOC”), inmate currently housed at Wallens Ridge State Prison, (“Wallens Ridge”). Ferebee has filed this civil rights action pursuant to 42 U.S.C. §1983, against VDOC employee Wallens Ridge Warden C. Manis, (“Manis”), alleging that his rights under the First and Fourteenth Amendments to the U.S. Constitution were violated. This case is before the court on the defendant’s Motion To Dismiss Plaintiff’s Amended Complaint, (Docket Item No. 27) (“Motion”), and plaintiff’s Motion To Amend, (Docket Item No. 31). For the reasons stated below, the Motion will be granted, and the Motion To Amend, will be denied.

I. Facts

In his Amended Complaint, (Docket Item No. 26), Ferebee seeks a declaratory judgment, injunctive relief and compensatory, punitive, treble, special and nominal damages, alleging that the defendant violated his First Amendment right to free

speech.¹ In his Amended Complaint, which is sworn to under penalty of perjury, Ferebee stated that on March 28, 2019, he spoke to Manis face-to-face concerning Wallens Ridge policy that forbids inmates from talking to one another, to staff and employees, etc., through the gate/fence during recreation.² (Amended Complaint at 4; Docket Item No. 31-2 at 4.) Manis responded that Wallens Ridge policy was posted on the prison gate to prevent Ferebee, or any prisoner, from talking to another prisoner, staff, employee, etc., while on the recreation yard. (Amended Complaint at 4.) Manis informed Ferebee that, if he did not follow the posted rule, he would be punished by either an institutional disciplinary charge or sent to his cell. (Amended Complaint at 5; Document Item No. 31-2 at 5.)

On June 2, 2019, Ferebee attempted to speak to another inmate about a recent death in his family through the dividing fence during outdoor recreation. (Amended Complaint at 5; Docket Item No. 31-2 at 5.) Ferebee alleges that B. Roberts, a correctional officer, saw this and executed Manis's "policy and custom" by sending him to his cell and denying him outside recreation as punishment for talking to another inmate through the dividing fence. (Amended Complaint at 5; Docket Item No. 31-2 at 5.) Roberts instructed Ferebee to return to his cell and threatened to write an institutional disciplinary charge if he did not obey his order to return to his cell. (Amended Complaint at 5; Docket Item No. 31-2 at 5.) Ferebee complied with the

¹ While Ferebee asserts that the defendant's actions also violated the Fourteenth Amendment, he raises no separate due process or equal protection claim in either the Amended Complaint or the proposed Second Amended Complaint.

² Ferebee alleges that he spoke to Manis about this "policy" on March 28, 2019. (Amended Complaint at 4; Docket Item No. 31-2 at 4.) To the extent he implies that this was preceded by an incident similar to what occurred on June 2, 2019, he has stated no facts regarding any such earlier incident and does not appear to argue that it gives rise to a separate claim.

order and returned to his cell without incident. (Amended Complaint at 5.) Ferebee does not allege the disciplinary charge was written.

Ferebee later filed an Informal Complaint concerning the “policy and custom” of “no talking” in violation of his rights. (Amended Complaint at 6; Docket Item No. 31-2 at 6.) On June 18, 2019, Q. Reynolds responded to Ferebee’s Informal Complaint, stating that, if Ferebee is given a “direct order,” then he must comply. (Amended Complaint at 6; Docket Item No. 31-2 at 6.) Being dissatisfied with this response, Ferebee filed a Regular Grievance on June 27, 2019. (Docket Item No. 31-2 at 6.) While waiting on a response to this Grievance, Ferebee filed another Informal Complaint on July 30, 2019, addressing Wallens Ridge policy of denying him “free speech” by not allowing him to talk on the fence or through the gate. (Docket Item No. 31-2 at 6.)

On July 30, 2019, in response to Ferebee’s Grievance, Manis stated that, “[t]he procedure at Wallens Ridge State Prison govern(s) this grievance.” (Amended Complaint at 6; Docket Item No. 31-2 at 6.) Manis has a “policy and custom” posted on the prison gate/fence stating, “[n]o talking or yelling on the fence.” (Amended Complaint at 6; Docket Item No. 31-2 at 5.) On August 2, 2019, Reynolds responded to Ferebee’s July 30, 2019, Informal Complaint, stating that, “[f]or security reason(s), we can make sure gang related information is not spread to other(s).” (Docket Item No. 31-2 at 6.) Ferebee appealed Manis’s July 30, 2019, response. (Docket Item No. 31-2 at 6-7.)

Ferebee states that on September 7, 2019, he filed a third Informal Complaint because he, along with the entire B-1 Pod and A-6 Pod, were denied outside recreation after they were talking on the fence. (Docket Item No. 31-2 at 7.) Ferebee

alleges that no one was a threat to safety or security because the Outside Recreation Officer and K-9 Dog Officer were outside, and no one was on “some-gang-tanza(s).” (Docket Item No. 31-2 at 7.) On September 11, 2019, Reynolds responded to Ferebee’s third Informal Complaint, stating, “[t]he officer(s) are in charge of security on the yard without a doubt. The Booth Officer did his/her job to not allow communication between the yard(s).” (Docket Item No. 31-2 at 7.)

The only difference between Ferebee’s Amended Complaint and the proposed Second Amended Complaint attached to the Motion To Amend is that the proposed Second Amended Complaint alleges that the defendant’s actions also violated Ferebee’s rights under the Eighth Amendment, in addition to the First and Fourteenth Amendments. (Docket Item No. 31-2.) In his proposed Second Amended Complaint, Ferebee alleges that the defendant violated his Eighth Amendment rights by being “deliberately indifferent” to the fact that the policy violated his free speech rights and inflicted cruel and unusual punishment. (Docket Item No. 31-2 at 4-6, 9.)

In support of his Motion, Manis does not admit that the facts within the Amended Complaint are true, but he accepts Ferebee’s version of the facts for purposes of his Motion. (Docket Item No. 28 at 2.)

II. Analysis

In the Motion, the defendant argues that Ferebee’s Amended Complaint should be dismissed under Federal Rules of Civil Procedure Rule 12(b)(6) for failing to state a claim upon which relief may be granted. The defendant also argues that he is entitled to dismissal of the Amended Complaint, pursuant to Federal Rules of Civil Procedure Rule 12(b)(1) on grounds of Eleventh Amendment immunity. The

defendant further argues that Ferebee's claims against him in his official capacity should be dismissed because Ferebee cannot recover money damages from him in his official capacity under § 1983.

A motion to dismiss under Rule 12(b)(6) examines the legal sufficiency of the facts alleged on the face of a plaintiff's complaint. *See Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). In considering a motion to dismiss, all well-pleaded factual allegations contained in a complaint are to be taken as true and viewed in the light most favorable to the plaintiff. *See Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). The complaint must contain "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action," and it must allege facts specific enough to raise a right to relief above the speculative level. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). Dismissal also may be appropriate where the complaint contains a detailed description of underlying facts, which fail to state a viable claim. *See Estelle v. Gamble*, 429 U.S. 97, 106-08 (1976).

Furthermore, the court is required to liberally construe complaints filed by plaintiffs proceeding pro se. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Pro se complaints are held to a less stringent standard than those drafted by attorneys. *See Erickson*, 551 at 94; *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978). This requirement of liberal construction does not mean, however, that the court should ignore a clear failure to plead facts which set forth a cognizable claim. *See Weller v. Dep't of Soc. Servs.*, 901 F.2d 387 (4th Cir. 1990).

In this case, Ferebee claims that his First Amendment right to free speech was violated by the defendant's policy of prohibiting prisoners from speaking to anyone

through the fence during outdoor recreation. He further alleges, in his proposed Second Amended Complaint, that the defendant violated his Eighth Amendment rights by being “deliberately indifferent” to the fact that the policy violated his free speech rights and his right to be free from cruel and unusual punishment.

Courts have consistently concluded that a blanket restriction on inmate speech in a specific location within a prison is a reasonable restriction and does not constitute a deprivation of an inmate’s First Amendment right to free speech. *See Lamar v. Coffield*, 353 F. Supp. 1081, 1083 (S.D. Tex. 1972); *Wheeler v. Maddox*, 2017 WL 9440399, at *8 (N.D. Fla. June 27, 2017); *Riley v. Muhammad*, 2015 WL 10433469, at *11 (W.D. Pa. Dec. 11, 2015); *Holmes v. Dalrymple*, 2013 WL 504690, at * 3 (S.D. Ga. Jan. 15, 2013); *Taylor v. Ozmint*, 2011 WL 441934, at * 2-3 (D. S.C. Feb. 7, 2011); *Duncan v. Quartermar*, 2009 WL 2614395, at * 3 (N.D. Tex. Aug. 26, 2009); *see also Wall v. Mefford*, 2018 WL 9458209, at *5 (W.D. Va. Mar. 19, 2018) (recognized in dicta). They also have held that such a restriction does not violate the Eighth Amendment’s prohibition on cruel and unusual punishment. *See Hendrickson v. McCreanor*, 199 F. App’x 95, 102 (3rd Cir. 2006); *Smiley v. Stevenson*, 2010 WL 2902778, at *5 (D. S.C. Apr. 30, 2010). “Freedom of speech … must of necessity be one of the first Constitutional guarantees to fall subject to reasonable restriction by prison officials in the proper management and administration of prison systems.” *Lamar*, 353 F. Supp. at 1083. A prisoner should not “conflate[] the protections offered to him under the First Amendment with a general and irrefutable right to speak whenever he so desires without repercussions.” *Holmes*, 2013 WL 504690, at * 3.

In *Turner v. Safley*, 482 U.S. 78, 89 (1987), the Supreme Court held that “when a prison regulation impinges on inmates’ constitutional rights, the regulation

is valid if it is reasonably related to legitimate penological interests.” To meet this standard, the Court identified four factors to consider: (1) whether the regulation is rationally related to a legitimate and neutral governmental objective; (2) whether there are alternative avenues that remain open to the inmates to exercise the right; (3) the impact that accommodating the asserted right will have on other guards and prisoners and on the allocation of prison resources; and (4) whether the existence of easy and obvious alternatives indicates that the regulation is an exaggerated response by prison officials. *See Turner*, 482 U.S. at 89-90. Nonetheless, the Fourth Circuit has recognized that “[p]rison officials should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.” *In re Long Term Admin. Segregation of Inmates Designated as Five Percenters*, 174 F.3d 464, 469 (4th Cir. 1999) (internal quotation omitted). Furthermore, “[t]he burden … is not on the State to prove the validity of prison regulations but on the prisoner to disprove it.” *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003).

Ferebee, in both the Amended Complaint and the proposed Second Amended Complaint, cites the *Turner* decision and the four-part test set out above, and he urges that the court use the test to scrutinize the regulation at issue. Nonetheless, neither complaint contains facts from which the court could find that the regulation at issue in this case is not reasonably related to a legitimate penological interest. Therefore, I will dismiss Ferebee’s Amended Complaint as failing to state a claim under Rule 12(b)(6). I also will deny Ferebee’s Motion To Amend as futile, because the proposed Second Amended Complaint likewise fails to state a claim.

Based on my finding that Ferebee has failed to state a claim, it is not necessary
to address the defendant's remaining arguments.

Based on the above-stated reasons, I will grant the Motion, deny the Motion
To Amend and dismiss Ferebee's Second Amended Complaint for failing to state a
claim.

An appropriate Order and Judgment will be entered.

ENTERED: February 24, 2021.

/s/ Pamela Meade Sargent
UNITED STATES MAGISTRATE JUDGE