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APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 23-3414

James Saylor

Plaintiff - Appellant

v.

Rob Jeffreys, Director of the Nebraska Department of Correctional Services, in his official capacity

Defendant – Appellee

Appeal from United States District Court for the District of Nebraska – Omaha

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Submitted: November 20, 2024

Filed: March 19, 2025

Before COLLOTON, Chief Judge, BENTON and KELLY, Circuit Judges.

BENTON, Circuit Judge.

James M. Saylor sued the Director of Nebraska's Department of Correctional Services, alleging deprivation of accommodations, unlawful placement in solitary confinement, and discrimination based on disability. The district court[1] dismissed the complaint. He appeals. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

In 1985, Saylor, convicted of second-degree murder, was sentenced to life in prison. Assaulted by other inmates in 2002, he was later diagnosed with post- traumatic stress disorder due to the attack. In 2010, he won a $250,000 judgment against the Department for its failure to stop the attack and provide adequate care afterward.

In 2012, Saylor sued in federal court attacking the conditions of his confinement (*Saylor I*). ***Saylor v. Kohl***, 2016 WL 8201925 (D. Neb. Nov. 28, 2016). In 2017, he brought two suits in state court, also attacking the conditions of his confinement (*Saylor II* and *Saylor III*). See ***Saylor v. State***, 995 N.W.2d 192, 196 (Neb. 2023). All cases were dismissed.[2]

Saylor brought this fourth case under Title II of the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act. The district court dismissed, concluding his claims were barred by res judicata.

Saylor first argues that the district court erred in concluding the claims in this case are based on the same nucleus of operative facts as those alleged in

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[1] The Honorable John M. Gerrard, United States District Judge for the District of Nebraska.

[2] This court takes judicial notice of the records in these cases.

Saylor 1. He asserts that in January 2018, the Director "took away accommodations he had previously provided to Saylor, placed [him] in solitary confinement, excluded [him] from programs, activities, aids, and services, and did so discriminatorily based upon [his] disability, PTSD." These facts, his argument goes, "were sufficient to comprise a transaction which may be made the basis of a second action not precluded by the first."

This court reviews de novo the dismissal of a case on res judicata grounds. ***Yankton Sioux Tribe v. U.S. Dep't of Health & Hum. Servs.***, 533 F.3d 634, 639 (8th Cir. 2008). Res judicata is when "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." ***Id.*** The doctrine applies when: "(l) the first suit resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) both suits involve the same parties (or those in privity with them); and (4) both suits are based upon the same claims or causes of action." ***Elbert v. Carter***, 903 F.3d 779, 782 (8th Cir. 2018). "Whether two claims are the same for res judicata purposes depends on whether the claims arise out of the same nucleus of operative fact or are based upon the same factual predicate." ***Id.***

On November 28, 2016, the district court dismissed Saylor's § 1983 claims in *Saylor I*, 2016 WL 8201925. One month later, he moved to: (1) vacate the dismissal pursuant to Fed. R. Civ. P. 59(e), and (2) file a third amended complaint pursuant to Fed. R. Civ. P. 15(a)(2). The district court denied his motions. ***Saylor v. Kohl***, 2017 WL 486921, at *l (D. Neb. Feb. 6, 2017).

Saylor argues that in *Saylor I*, the district court "did not dismiss with prejudice or rule on the merits ... but simply found that [he] had not met the standard for a Rule 59(e) motion . . ." and also refused to allow an amended complaint. He concludes that there was no "judgment on the merits" in *Saylor I*, and thus res judicata does not bar his claim in this case.

To the contrary, it is "well settled that denial of leave to amend constitutes res judicata on the merits of the claims which were the subject of the proposed amended pleading." ***King v. Hoover Grp., Inc.***, 958 F.2d 219, 222-23 (8th Cir. 1992). Saylor tries to counter with *Lundquist v. Rice Memorial Hospital*, 238 F.3d 975 (8th Cir. 2001). While employed, Lundquist sued alleging discrimination under the ADA. 238 F.3d at 976. Later, she was fired. ***Id.*** The court denied her motion to add later "specific discriminatory events" resulting in alleged wrongful termination. ***Id.*** at 976-77. She then filed a second suit. This court held that her wrongful termination claims were not barred by res judicata because she "did not have a claim for wrongful termination at the time she filed her first Complaint," so "the merits of Lundquist's wrongful termination claim were never addressed by the district court." ***Id.*** at 978.

Unlike Lundquist, Saylor had an ADA claim when he filed his *Saylor I* complaint. Saylor believes that his claims here arise from new facts that occurred years after *Saylor I*. He says that the new facts are the "Director's rescission of accommodations, which had been provided to him *after* the facts in, and the filing of, *Saylor I*." See ***Id.*** at 977 ("it is well settled that claim preclusion does not apply to claims that did not arise until after the first suit was filed.") (cleaned up).

In fact, Saylor's proposed amended complaint in *Saylor I* would have added an ADA claim arising out of "the same nucleus of operative fact" as his original complaint there-so he could have brought the ADA claim then. *See* ***Elbert***, 903 F.3d at 782. In this case, Saylor again complains of ADA discrimination by the Director but alleges no new specific discriminatory events. In *Saylor I*, Saylor alleged that he was "discriminated against" because "of his disease or disability, specifically PTSD." Here, Saylor asserts he "has been, and continues to be, discriminated against because he has PTSD." Although both complaints reference his time in prison from 2002 to 2013, the complaint here adds that he "continued to be housed in solitary confinement" from 2013 to 2016, and 2018 to 2021. Saylor's complaint repeats facts from *Saylor I*, adding how they continued and reoccurred. Any "new facts" may be additional evidence, but are not specific discriminatory events. The nucleus of operative facts remains the same. *See* ***Banks v. Int'l Union Elec., Elec., Tech., Salaried & Mach. Workers***, 390 F.3d 1049, 1052-53 (8th Cir. 2004) ("Where a plaintiff fashions a new theory of recovery or cites a new body of law that was arguably violated by a defendant's conduct, res judicata will still bar the second claim if it is based on the same nucleus of operative facts as the prior claim."). "The pertinent question is whether the second claim is based on subsequent legal or factual events that produce a different nucleus of operative facts, not whether those events inspire new legal theories of recovery or provide additional evidence supporting the previously rejected claim." ***United States v. Bala***, 948 F.3d 948, 951 (8th Cir. 2020). When the *Saylor I* court denied

the motion to amend, it addressed the merits of his ADA claim and issued a final judgment.

Saylor emphasizes *Whole Woman's Health* to assert that claim preclusion does not apply to claims based on new facts. See ***Whole Woman's Health v. Hellerstedt***, 579 U.S. 582, 599-600 (2016) ("Material operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or taken in conjunction with the antecedent facts, comprise a transaction which may be made the basis of a second action not precluded by the first.").

Saylor's "new facts" refer to the Director's "rescission of accommodations which the Director had provided to Saylor from late 2017 until early 2018." His complaint outlines the following facts:

- In 2016, Saylor experienced a mental breakdown.
- After a hospital stay, he was transferred to the Mental Health Unit, given a single cell, and provided other accommodations.
- He remained in the Mental Health Unit from July 25, 2016, to January 24, 2018.
- He was later ordered out of the Mental Health Unit but refused to comply, leading officials to place him in the LCC C Unit – solitary confinement.

The movement into and out of the Mental Health Unit does not give rise to a new claim. Saylor acknowledges that he was placed "back into solitary confinement" – the same conditions this Court found lawful in *Saylor I*. *See* ***Saylor I***, 2016 WL 8201925 at

*1. While Saylor's transfer to the Mental Health Unit was a subsequent event, it did not produce a different nucleus of operative facts. The essence of his complaint is unchanged: he seeks a cell of his own. The movement is only one "transaction" in a "series of connected transactions" alleging discrimination against Saylor. *See* ***Lane v. Peterson***, 899 F.2d 737, 742 (8th Cir. 1990) (quoting Restatement (Second) of Judgments § 24 (1980)). Saylor's reliance on the prisoners-drinking-contaminated-water analogy in *Whole Woman's Health* is inapplicable. 579 U.S. at 600 ("If at first their suit is dismissed because a court does not believe that the harm would be severe enough to be unconstitutional, it would make no sense to prevent the same prisoners from bringing a later suit if time and experience eventually showed that prisoners were dying from contaminated water."). Here, there is no time and experience effect.[3] Saylor's ADA claim was neither "remote" nor "speculative" when it was rejected in *Saylor I*. *See* ***id.*** at 601. An eighteen-month stay in the Mental Health Unit, and subsequent return to conditions this court held constitutional, is not the kind of "concrete factual development" contemplated by the Supreme Court. *See* ***id.*** at 602.

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[3] This does not suggest that an extended period in solitary confinement can never produce a new claim. This case does not provide the opportunity to address whether indefinite solitary confinement might give rise to a new conditions-of-confinement claim if, for example, the conditions caused significant deterioration of mental or physical health over time. ***See Whole Women's Health***, 579 U.S. at 600.

The district court properly applied res judicata in this case.

Second, Saylor argues the district court should have granted his motion for "consideration of issue and directions." Construing this as a motion for extension of time to amend the complaint, the court denied the motion. This court reviews the denial of an extension for abuse of discretion. ***Soliman v. Johanns***, 412 F.3d 920, 921 (8th Cir. 2005). Saylor's motion does not explicitly request leave to amend. Nor does the motion explain the substance of the proposed amendment. "A district court does not abuse its discretion in failing to invite an amended complaint when plaintiff has not moved to amend and submitted a proposed amended pleading." ***Drobnak v. Andersen Corp.***, 561 F.3d 778, 787 (8th Cir. 2009). The district court did not abuse its discretion by denying the motion.

Third, Saylor challenges the district court's rejection of his Rule 59(e) motion to alter or amend the judgment. This, too, is reviewed for abuse of discretion. *See* ***Wagstaff & Cartmell, LLP v. Lewis***, 40 F.4th 830, 842 (8th Cir. 2022). "A district court has broad discretion in determining whether to grant a Fed. R. Civ. P. 59(e) motion to alter or amend judgment, and this court will not reverse absent a clear abuse of discretion." ***Innovative Home Health Care, Inc. v. P.T.-O.T. Assocs. of the Black Hills***, 141 F.3d 1284, 1286 (8th Cir. 1998) (cleaned up). Saylor's rule 59(e) motion repeated arguments that the district court rejected in dismissing his complaint. There is no ground for reversal. *See* ***Voss v. Hous. Auth. of the City of Magnolia***, 917 F.3d 618, 626 n.6 (8th Cir. 2019) (concluding "the district court did not

abuse its discretion in denying [appellant's] Rule 59(e) motion, which largely repeated the same arguments advanced at the summary judgment stage.").

Fourth, Saylor argues that the district court erred in denying his motion for leave to file his third amended complaint. As discussed, Saylor's claims-which repeated in the third amended complaint – are barred. The third amended complaint is thus futile. ***See Popoalii v. Corr. Med. Servs.***, 512 F.3d 488, 497 (8th Cir. 2008) (motion to amend complaint properly denied if amendment would be futile).

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The judgment is affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JAMES M. SAYLOR, Plaintiff, vs. ROB JEFFREYS, Director of the Nebraska Department of Correctional Services, in his official capacity,[1] Defendant.	No. 8:20CV264 MEMORANDUM AND ORDER

This Court dismissed the plaintiff's complaint over a year ago. Filing 105. The plaintiff claims that was wrong. He also claims that he asked for leave to amend his complaint *before* the Court dismissed it. So, he's filed two motions. One asks the Court to alter or amend its judgment of dismissal. Filing 122. The other

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[1] Rob Jeffreys is now the Director of the Nebraska Department of Correctional Services and will be automatically substituted as a party pursuant to Fed. R. Civ. P. 25(d).

asks the Court for leave to file his proposed second amended complaint. Filing 121. The Court will deny both motions.

BACKGROUND

This case began with a complaint filed on July 2, 2020, alleging among other things a claim for disability discrimination in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (ADA) and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Filing 1. The plaintiff is a state prisoner, and loosely described he alleges that a prison assault caused post-traumatic stress disorder that the Nebraska Department of Correctional Services isn't adequately accommodating.

On initial review, Judge Kopf directed the plaintiff to file an amended complaint that stated a claim upon which relief could be granted. Filing 10. The plaintiff filed an amended complaint on May 21, 2021, that passed muster (at least in part) and proceeded to service of process against the Director of the Nebraska Department of Correctional Services. Filing 51, filing 54.

The Director filed a motion to dismiss (filing 61) on August 12, 2021, based solely on *res judicata*, pointing out that the plaintiff had litigated two similar cases in this Court already. Filing 62; *see Saylor v. Nebraska*, 812 F.3d 637 (8th Cir. 2016); *Saylor v. Nebraska*, No. 8:17-CV-472, 2018 WL 1732178, at *1 (D. Neb. Apr. 10, 2018); *see also Saylor v. State*, 315 Neb. 285 (2023) (affirming dismissal of plaintiff's state law claims based on claim preclusion). After seven extensions of his response deadline, the plaintiff was told no further extensions would be granted and February 24, 2022 was his final deadline-

and on February 28, the plaintiff's opposition brief arrived in the mail.[2] In it, the plaintiff claimed his claims in this case were "based on new material facts which occurred after any prior judgment against him." Filing 91 at 2. The Director's reply brief was filed on May 4.

On June 27, 2022, Judge Kopf granted the Director's motion to dismiss, and dismissed the plaintiff's complaint. Filing 105. Judge Kopf recognized that claim preclusion doesn't apply to claims that didn't arise until after the first suit was filed. Filing 105 at 19 (citing *United States v. Bala*, 948 F.3d 948, 951 (8th Cir. 2020)). But Judge Kopf found that the plaintiff's allegations of "subsequent developments" since the dismissal of his previous case "concern[ed) the continuation of [the] same conduct" alleged in the previous case, meaning the previous dismissal had preclusive effect. Filing 105 at 21.

Judge Kopf also addressed whether the plaintiff would be permitted to amend his complaint. The plaintiff, in conjunction with his brief opposing the Director's motion to dismiss, had indicated his intent to ask for leave to file a second amended complaint. Filing 105 at 25 (citing filing 90). Judge Kopf "[l]iberally constru[ed]" that as a motion for additional time to seek leave to amend, but denied that motion. Filing 105 at 25. Judge Kopf reasoned that the

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[2] The plaintiff is still incarcerated, *see generally State v. Saylor*, 392 N.W.2d 789 (Neb. 1986), and the Court assumes without deciding that the "prison mailbox rule" can be applied to the plaintiff's filings, *see Mortensbak v. Butler*, 102 F. Supp. 3d 1085, 1091 n.6 (D.S.D. 2015).

plaintiff hadn't provided a copy of a proposed amended pleading or otherwise explained the substance of his proposed amendment. Filing 105 at 25. The plaintiff also, Judge Kopf explained, had effectively elected to stand on his operative pleading:

> The court liberally granted [the plaintiff's] repeated motions for extensions of time to respond to [the Director's] motion to dismiss, from August 12, 2021, until April 27, 2022, and additional time has passed since then. [The plaintiff[chose to stand on his pleadings in the face of [the Director's] motion to dismiss, which clearly identified the deficiency of his second amended complaint. The court will not allow this case to be drawn out any further.

Filing 105 at 25-26 (citation omitted). After some clerical errors, the Court's judgment of dismissal was filed on July 21, 2022. Filing 115.

DISCUSSION

Despite Judge Kopf's intent, this case has indeed been drawn out further. The two motions currently before the Court were allegedly mailed by the plaintiff on August 18, and filed on September 2. Filing 121 at 25; filing 122 at 3. One takes issue with the Court's dismissal of the operative complaint, and asks the Court to alter or amend its judgment pursuant to Fed. R. Civ. P. 59. Filing 122. The other, captioned as a "Motion Regarding Already Filed Motion," takes issue with the Court's denial of leave to amend, and asks for leave to file a second amended complaint. Filing 121.

MOTION TO ALTER OR AMEND JUDGMENT

The Court has broad discretion in determining whether to grant or deny a motion to alter or amend judgment pursuant to Rule 59(e). *United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 934 (8th Cir. 2006). But Rule 59(e) motions serve the limited function of correcting manifest errors of law or fact or to present newly discovered evidence. *Metro. St. Louis Sewer Dist.*, 440 F.3d at 934. They can't be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment. *Id.*; *see Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008); *Preston v. City of Pleasant Hill*, 642 F.3d 646, 652 (8th Cir. 2011); *Anjulo-Lopez v. United States*, 541 F.3d 814, 818 n.3 (8th Cir. 2008). And it's improper to repeat arguments the Court has already rejected. *See Preston*, 642 F.3d at 652.

Which is precisely what the plaintiff is trying to do here. He claims that the Court made "manifest errors of both law and fact" in determining that his claims were precluded. Filing 122 at 1. But a "manifest error" means that the Court "misunderstood the facts, a party's arguments, or the controlling law." *Van Horn v. Specialized Support Servs., Inc.*, 269 F. Supp. 2d 1064, 1069 (S.D. Iowa 2003). The plaintiff's argument, on the other hand, is simply that the Court applied the law to the facts incorrectly. *See* filing 127 at 15-20. He cites the same caselaw as Judge Kopf, points to the same pleading, and makes the same argument as he'd made in opposing the motion to dismiss – he simply contends that Judge Kopf got it wrong. *Compare* filing 127 at 16-18, *and* filing 174 at

2-4, *with* filing 91 at 23-25. But the remedy for that is a notice of appeal, not a Rule 59(e) motion.

MOTION FOR LEAVE TO AMEND COMPLAINT

As noted above, on February 24, 2022—at the same time the plaintiff mailed his brief in opposition (filing 91) to the Director's motion to dismiss (filing 61)—he also sent a "Motion Requesting Consideration of Issue and Directions" (filing 90), which:

> move[d] the Court to be aware that while Plaintiff met his deadline for filing his opposition brief in response to the Defendant's Rule 12(b)(6) motion to dismiss on February 24, 2022, Plaintiff has not yet completed a proposed second amended complaint and was not able to file a motion requesting leave to amend his complaint simultaneously with his opposition brief on February 24, 2022.
>
> Plaintiff still fully intends to request the Court's leave to file a second amended complaint, but there may be a delay in Plaintiff's ability to do so.
>
> Plaintiff respectfully moves the Court to be aware that Plaintiff still intends to request leave to amend and to make the parties aware of any expectations that the Court may have, or anything else that may serve this Court.

Filing 90 at 1-2. But no motion for leave to amend was received by the Court. Instead, after a couple of extensions, the Director filed a reply brief on May 4. Filing 104. Judge Kopf's memorandum and order

granting the motion to dismiss followed 7½ weeks later. Filing 105.

The plaintiff's "Motion Regarding Already Filed Motion" (filing 121) was received by the Court on September 2, 2022. In it, the plaintiff claims that he actually *did* mail a motion for leave to amend his complaint—on May 22, 2022, before the Court granted the Director's motion to dismiss. Filing 121 at 1-24. And he attached a copy of his intended motion for leave, filing 121 at 30-62, along with a copy of his proposed 135-page second amended complaint, filing 121 at 64-198. He wants the Court to consider his motion for leave as having been filed, and having been filed as of May 22. Filing 121 at 1.

The timing matters. A district court does not abuse its discretion in denying a plaintiff leave to amend the pleadings *after* the complaint has been dismissed under Fed. R. Civ. P. 12(b)(6). *Briehl v. Gen. Motors Corp.*, 172 F.3d 623, 629 (8th Cir. 1999). Unexcused delay is sufficient to justify the court's denial if the party is seeking to amend the pleadings after the district court dismissed the claims it seeks to amend, particularly when the plaintiff was put on notice of the need to change the pleadings before the complaint was dismissed. *Uradnik v. Inter Fac. Org.*, 2 F.4th 722, 727 (8th Cir. 2021). The plaintiff must bear the consequences of waiting to address the Court's rulings post-judgment. *Id.* Interests of finality dictate that leave to amend should be less freely available after a final order has been entered. *Par v. Wolfe Clinic, P.C.*, 70 F.4th 441, 449 (8th Cir. 2023).

The plaintiff wants his motion to be treated as pre-judgment instead of post-judgment. But the Court isn't persuaded, given the tortured procedural history

of this case, to let the plaintiff off the hook that easily. The plaintiff's argument, essentially, is that he should get credit for filing his motion for leave to amend his complaint only 9 months after the Director's motion to dismiss, instead of 12. True, the plaintiff did file a "motion" advising the Court that he planned to file a motion for leave to amend. *See* filing 90. But honestly, what was the Court supposed to do with that? Hold the Director's motion to dismiss in abeyance, indefinitely? No. Judge Kopf did the only thing he could do with the plaintiff's "motion"—decide whether the plaintiff would, under the circumstances, be allowed leave to amend.

And as Judge Kopf noted, the plaintiff effectively stood on his operative pleading by repeatedly extending his response deadline and then opposing the motion to dismiss. The plaintiff's *final* response deadline to the motion to dismiss had been set, and seeking leave to plead over a motion to dismiss is as much a "response" as a brief in opposition. The plaintiff made his choice.

Simply put, the blame for the plaintiff's belated motion for leave doesn't rest with the prison mailing system. It rests with the plaintiff, who by his own admission waited until after the Director's motion to dismiss was fully briefed and submitted to the Court to actually move for leave to amend his pleading. A party who doesn't act before a motion is fully submitted has assumed the risk that the Court will actually rule on the motion—and that's true even when a motion is briefed on schedule, much less delayed for months.

That said, the Court may not ignore the Fed. R. Civ. P. 15(a)(2) considerations that favor affording

parties an opportunity to test their claims on the merits. *Par*, 70 F.4th at 449. The Court should freely give leave to amend when justice so requires. Rule 15(a)(2). But the policy favoring liberal allowance of amendment doesn't mean that the right to amend is absolute, and a motion to amend should be denied if the plaintiff is guilty of undue delay, bad faith, dilatory motive, or if permission to amend would unduly prejudice the opposing party. *Kozlov v. Associated Wholesale Grocers, Inc.*, 818 F.3d 380, 394-95 (8th Cir. 2016).

It's not hard to find undue delay here. Nor is it hard to find "dilatory motive"—the plaintiff has clearly been filibustering, even if his reasons for doing so aren't as clear.[3] And the Court also denies leave to amend for two other reasons, both related to the futility of the pleading. Futility is a valid basis for denying leave to amend. *Munro v. Lucy Activewear, Inc.*, 899 F.3d 585, 589 (8th Cir. 2018). When the Court denies leave on the basis of futility, it means the Court has reached the legal conclusion that the amended complaint could not withstand a motion to dismiss under Rule 12(b)(6). *Id.*

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[3] The Director also argues that he would be prejudiced by having to continue engaging in this litigation. Filing 132 at 13. Having to defend an action, though, isn't the sort of concrete prejudice that warrants denying relief. *Cf. Johnson v. Dayton Elec. Mfg. Co.*, 140 F.3d 781, 785 (8th Cir. 1998). It wouldn't be hard to imagine more concrete examples of potential prejudice—for instance, discovery might be hampered by the fact that 5 or more years have now passed since some of the events on which the plaintiff's claim relies. But the Director doesn't argue that, so the Court doesn't consider it.

First, the plaintiff has already been instructed about compliance with Fed. R. Civ. P. 8, having been denied leave to file a proposed amended complaint "which contains 366 numbered paragraphs, plus numerous subparagraphs," many of which did not "contain factual allegations, but instead consist entirely of legal arguments and summaries of federal statutes, regulations, and caselaw." Filing 30 at 2. But that's much like what the plaintiff proposes to file now: an amended complaint containing 385 numbered paragraphs and numerous subparagraphs, many containing legal argument. Filing 121 at 64-198. The proposed amended complaint is a "dog's breakfast" that doesn't give the defendant fair notice of the grounds for the plaintiff's claim. *See Anderson v. Nebraska*, No. 4:17-CV-3073, 2019 WL 3557088, at *8 (D. Neb. Aug. 5, 2019), *aff'd*, No. 20-2751, 2021 WL 3730223 (8th Cir. Mar. 3, 2021). As a result, it wouldn't get past a Rule 12(b)(6) motion, and is futile. *See Munro*, 899 F.3d at 589.

And second, despite the length, the plaintiff still hasn't fixed the problem that led to dismissal of his complaint in the first place. Parties shouldn't be allowed to amend their complaint without showing how the complaint could be amended to save the meritless claim. *GWG DLP Funding V, LLC v. PHL Variable Ins. Co.*, 54 F.4th 1029, 1036 (8th Cir. 2022). And here, the proposed second amended complaint primarily just adds another 2 years' worth of alleged deprivation and harassment to the course of conduct that formed the basis for the plaintiff's previous lawsuit.

The plaintiff's argument is that his "proposed Verified Second Amended Complaint alleges that the

old pattern of disability discrimination against him ended in 2016, and then a new pattern of disability discrimination against him arose in 2018, when certain accommodations that Defendant had provided to him were rescinded." Filing 171 at 7. Generally described, the plaintiff alleges that he was in restricted housing from 2010 to 2016, but suffered a mental health crisis and was hospitalized. Filing 121 at 69-70. While hospitalized in the mental health unit, from 2016 to 2018, his disability was allegedly accommodated. Filing 121 at 70. But he was moved back into restricted housing in 2017 or 2018, losing those accommodations. Filing 121 at 70-71.

The result, though, is that the plaintiff is suing the Director now for the same behavior alleged in his previous case. *See* case no. 4:12-cv-3115, filing 225-1 at 30-39. The plaintiff argues that because his claims "arise out of facts that began in late 2017 and early 2018, when he was removed from the Mental Health Unit and deprived of certain programs and services, those claims could not be barred by his prior claims, which were based upon earlier factual events that occurred before he had been placed on the Mental Health Unit and provided accommodations in late 2016." Filing 171 at 13. But those "earlier factual events" were essentially just being deprived of the programs and services he's complaining about being deprived of now.

In other words, in 2017, the plaintiff asserted an ADA claim: "Keeping me in restricted housing is an ADA violation."[4] Judge Kopf found that claim was dismissed with prejudice, filing 105, and the Court

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[4] Obviously, that's an oversimplication.

doesn't understand the plaintiff's present motions to be taking issue with that legal conclusion, see filing 127; filing 174. So the claim from 2017—"Keeping me in restricted housing is an ADA violation"—is claim precluded. And that's the claim the plaintiff is trying to assert now. Were the plaintiff alleging a more discrete claim—for instance, a physical assault—then perhaps he would have a new claim if that conduct was repeated. But here, the gravamen of his claim is that his ongoing treatment in prison violates the ADA. That claim is not meaningfully different now than in 2017, for the reasons explained by Judge Kopf. Filing 105.

But more to the point, the question *on this issue* isn't whether Judge Kopf got it right or wrong—it's whether the proposed second amended complaint fixes the issues Judge Kopf found fatal to the operative complaint. On that point, the plaintiff just argues that "his proposed Verified Second Amended Complaint establishes even more clearly than his Verified Amended Complaint that his claims in this case arise out of events which occurred after the events which were the subject of his prior litigation." Filing 171 at 13. But Judge Kopf knew that. *See* filing 105 at 21. That was never the problem, so the proposed second amended complaint doesn't fix anything.

CONCLUSION

To summarize: Judge Kopf either got the claim preclusion issue right, or he didn't. But on a Rule 59(e) motion, the Court doesn't re-evaluate whether or not arguments that were fully and fairly presented were actually decided correctly. *See Preston*, 642 F.3d at 652. That disposes of the plaintiff's motion to alter or amend the judgment. And the plaintiff's proposed

second amended complaint adds to the narrative, but doesn't allege anything that would change Judge Kopf's conclusion that the plaintiff's ADA claim is precluded. (Not to mention that the proposed second amended complaint was a day late and a dollar short—or actually, weeks late and way too long). Because it's both late and futile, the Court will deny the plaintiff leave to file it. Accordingly,

IT IS ORDERED:

1. The Clerk of the Court is directed to substitute "Rob Jeffreys, Director of the Nebraska Department of Correctional Services, in his official capacity" as the defendant.

2. The plaintiff's "Motion Regarding Already Filed Motion" (filing 121) is denied.

3. The plaintiff's motion to alter or amend the judgment (filing 122) is denied.

Dated this 29th day of September, 2023.

BY THE COURT:

John M. Gerrard

Senior United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JAMES M. SAYLOR,	No. 8:20CV264
Plaintiff,	MEMORANDUM AND ORDER
vs.	
SCOTT R. FRAKES, in his official capacity,	
Defendant.	

I. INTRODUCTION

Plaintiff, James Saylor, an inmate in the custody of the Nebraska Department of Correctional Services ("NDCS"), brings this action pursuant to Title II of the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act" or "RA"). In general, Saylor alleges in his Second Amended Complaint (Filing 51) that he suffers from post-traumatic stress disorder ("PTSD") as a result of having been brutally attacked by other prisoners in May 2002, and since then has been held in solitary confinement, with the exception

of a 36-month period between October 2007 and September 2010, when he was placed in a single cell in a protective custody unit, and an 18-month period between July 2016 and January 2018, when he was assigned to a mental health unit. Upon the court's initial review of the Second Amended Complaint, conducted pursuant to 28 U.S.C. § 1915A, it was determined that Saylor stated plausible claims for relief under the ADA and RA for (1) disparate treatment and (2) failure to make reasonable accommodations insofar as Saylor "alleges that because of his PTSD he has been placed in solitary confinement and has been excluded from participation in or denied the benefits of certain prison services, programs, and activities, . . . " (Filing 54 at 4-5.) The court also determined, however, that to the extent Saylor "complains he has not received proper treatment for his PTSD, he cannot obtain relief under the ADA or RA." (Filing 54 at 4.)

The case proceeded to service of process and the sole defendant, Scott R. Frakes, in his official capacity as Director of NDCS, responded by filing a motion to dismiss Saylor's claims under Rule 12(6)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. (See Filing 61.) Frakes contends Saylor's claims "are barred by the doctrine of res judicata because [he] has previously litigated the same claims in two previous suits before the Court." (*Ibid.*)

For the reasons discussed below, the court concludes that Frakes' motion to dismiss should be granted, and that the Second Amended Complaint should be dismissed with prejudice.

II. STANDARD OF REVIEW

To survive a motion to dismiss, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). This standard does not require detailed factual allegations, but it does require more than labels and conclusions. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (1955). Furthermore, "a formulaic recitation of the elements of a cause of action will not do." *Id.* A complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. A claim is plausible on its face when the factual content pled "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This plausibility standard requires the possibility, not probability, of the alleged acts. *Id.*

To survive dismissal for failure to state a claim under 12(b)(6), a complaint must raise a claim of entitlement to relief. In reviewing a motion to dismiss, the court must assume all well-plead factual allegations are true and construe the complaint, as well as all reasonable inferences arising from it, in the light most favorable to the non-moving pleader. *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990). However, the court will not, "blindly accept the legal conclusions drawn by the pleader from the facts." *Id.* "When the allegations in a complaint, however true, could not raise a claim of entitlement to relief, the complaint should be dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6)." *Hawkins Constr. Co. v. Peterson Contractors, Inc.*, 970 F. Supp. 2d 945, 949 (D. Neb. 2013).

"When considering a Rule 12(b)(6) motion, the court generally must ignore materials outside the

pleadings, but it may consider some materials that are part of the public record or do not contradict the complaint, as well as materials that are necessarily embraced by the pleadings." *Ashford v. Douglas Cnty.*, 880 F.3d 990, 992 (8th Cir. 2018) (quoting *Smithrud v. City of St. Paul*, 746 F.3d 391, 395 (8th Cir. 2014)); see *Stahl v. U.S. Dep 't of Agric.*, 327 F.3d 697, 700 (8th Cir. 2003) ("The district court may take judicial notice of public records and may thus consider them on a motion to dismiss."). The court can take judicial notice of its own records and files, and facts which are part of its public records. *United States v. Jackson*, 640 F.2d 614, 617 (8th Cir. 1981). Judicial notice is particularly applicable to the court's own records of prior litigation closely related to the case before it. *Id.* The court can also take judicial notice of proceedings in other courts if they relate directly to the matters at issue. *Conforti v. United States*, 74 F.3d 838, 840 (8th Cir. 1996).

As per Frakes request, the court will take judicial notice of its own records in *Saylor v. Kohl*, No. 4:12-CV-3115 ("*Saylor I*"), including:

- Filing 178, *order denying defendants' motion for summary judgment*, 2014 WL 73335741 (D. Neb. Dec. 22, 2014) (Bataillon, J.)
- Filing 190, *order on appeal reversing and remanding with directions*, 812 F.3d 637 (8th Cir.), *as amended* (Jan. 29, 2016)
- Filing 222, *order dismissing on remand*, 2016 WL 8201925 (D. Neb. Nov. 28, 2016) (Bataillon, J.)

- Filing 225, *motion to reconsider with attached proposed third amended complaint* (filed Dec. 27, 2016)
- Filing 230, *order denying motion to reconsider*, 2017 WL 486921 (Feb. 6, 2017) (Bataillon, J.)

and in *Saylor v. Nebraska*, No. 8:17-CV-472 ("*Saylor II*"), including:

- Filing 1, *notice of removal with attached state-court complaint* (filed Dec. 8, 2017)
- Filing 28, *order remanding to state court*, 2018 WL 1732178 (D. Neb. Apr. 10, 2018) (Bataillon, J.)

III. BACKGROUND OF RELATED PROCEEDINGS

In 2002, while a prisoner at the Nebraska State Penitentiary (NSP), Saylor was allegedly attacked, beaten, and raped by other inmates. In 2005 Saylor was diagnosed with Post-Traumatic Stress Disorder (PTSD) as a result of the 2002 attack, and he began seeing Dr. Glen Christensen, a psychiatrist who contracted with NDCS. Saylor saw Dr. Christensen monthly for treatment. In April 2005, Saylor filed a complaint in state court alleging that the State of Nebraska and NDCS failed to protect him from the assault and failed to properly treat him after the assault. The trial was held in 2009, and in 2010 the state court entered an order in favor of Saylor, finding that the staff was

> negligent in failing to provide him with reasonably adequate protection from the 2002 assault. The court also found that Saylor received inadequate medical treatment from Dr. [Mohammad] Kamal from 2002 to 2005. Saylor was awarded $250,000 in damages.

Saylor I, Filing 190 (812 F.3d at 641).

> In the state court action, the court also found, however, that the Nebraska Department of Corrections had provided medically appropriate care from and after March 31, 20I0. *Saylor v. State of Nebraska*, No. CI 05-1597 (March 31, 2010); *see Saylor v. Kohl*, No. 4:12cv3115 (D. Neb.), Filing No. 143-18, Index of Evid., Ex. 16, State Court Decision at 35-36.

Saylor II, Filing 28 (2018 WL 1732178, at *I).

> In April 2010, Saylor had his last meeting with Dr. Christensen because his contract with the prison was ending in May 2010. In addition, Saylor had monthly Mental Status Reviews with Cathy Moss, a Licensed Mental Health Practitioner. She informed Saylor that Dr. Kamal was the only psychiatrist available to work with him at NSP. In May 2010, Saylor stated that he would not work with Dr. Kamal because Dr. Kohl had removed Dr. Kamal as Saylor's psychiatrist five years ago. Thus, Saylor agreed to forgo psychiatric care but wanted to continue taking his

medications. A multidisciplinary hearing was held in 2010 to discuss the next step for Saylor because Dr. Christensen's contract ended and Saylor refused to work with Dr. Kamal. Defendants Dr. Weilage, Dr. Perez, and Dr. Kamal participated in the meeting, along with others not named in the lawsuit. The group suggested that Saylor could be transferred to Tecumseh State Correctional Institution (TSCI) because Dr. Baker, a psychiatrist providing care at TSCI, could work with Saylor. It is normal procedure for a correctional facility to transfer inmates who need mental health care beyond the resources available in their facility to a facility where such care is available. Warden Bakewell made the final decision, and Saylor was transferred to TSCI in September 2010. Saylor claims that the transfer was unnecessary, retaliatory, and caused his PTSD to worsen.

Saylor was initially classified as an inmate in Protective Custody but was placed in the TSCI hospital upon arrival because he attempted to hang himself before he was transferred. While in the hospital he met with Dr. Baker. Dr. Baker wanted to gradually take Saylor off Seroquel, one of his medicines. He agreed and decided to continue taking Xanax. Throughout his time at TSCI, Saylor saw Dr. Baker every couple of months and was subjected to monthly

> Mental Status Reviews, but he often refused to participate. After a week in the hospital, Saylor was placed in the Special Management Unit (SMU) for refusing to move to Protective Custody. SMU is the only facility with single cells, and Saylor specifically asked for his own cell because of his PTSD and fear of roommates. In early October 2010, he was moved to Protective Custody, which houses two inmates per cell. In late October 2010, he was placed on immediate segregation again and housed in SMU because he feared for his safety. Thereafter, in the normal course, Saylor's classification was reviewed every four months per policy and procedure, and he was allowed to attend each hearing. As a result of these reviews, TSCI concluded that Saylor could be released into Protective Custody, but he rejected that proposal each time due to his fear of roommates. Therefore, Saylor remained in SMU for the duration of his time at TSCI.

Saylor I, Filing 190 (812 F.3d at 641-42).

> In 2012, Saylor filed an action in federal district court. *See Saylor I*, No. 4:12-CV-3115 (D. Neb.). His action in federal court was centered on the allegation that the defendants reverted to providing him the type of inadequate medical care he had received prior to November 2005 subsequent to the state court decision.

Id., Filing No. 113, Second Amended Complaint at 15. He asserted violations of his First, Eighth, and Fourteenth Amendment rights under 42 U.S.C. § 1983, contending, inter alia, that the Department of Corrections' failure to continue the treatment plan approved in his state tort action amounted to deliberate indifference to serious medical needs. *Id.* at 26-27. He also asserted a state law claim for negligence. *Id.* at 27-28; *see also id.*, Filing No. 124, Memorandum and Order at 1-5; *Saylor v. Nebraska*, No. 4:12cv3115, 2013 WL 6036630, *2-3 (D. Neb. Nov. 13, 2013) (summarizing the plaintiff's allegations in *Saylor I*).

In that action, defendants Nebraska Department of Correctional Services, State of Nebraska, Natalie Baker, M.D., Dennis Bakewell, Fred Britten, Robert Houston, Mohammad Kamal, M.D., Randy Kohl, M.D., Mark Weilage, Ph.D., and Cameron White, Ph.D. (hereinafter, "the state defendants") moved to dismiss the plaintiff's negligence claim on the ground of sovereign immunity. Saylor I, No. 4:12cv3ll5, Filing No. 116. The court granted the motion, finding that the State of Nebraska had not waived its sovereign immunity to suits for negligence in federal court through the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209. *Id.*, Filing No. 124, Memorandum and Order at 6; *Saylor I*,

No. 4:12cv3115, 2013 WL 6036630 at *4. The court found the Nebraska courts have exclusive jurisdiction over all tort claims against the State of Nebraska, its agencies, or its employees. *Id.* at 7; 2013 WL 6036630 at *4. The court also found Saylor's § 1983 claims for damages against the individual defendants in their official capacities were barred by sovereign immunity. *Id.* at 10. The court denied the defendants' motions to dismiss the § 1983 claims against the individual defendants in their individual capacities and claims for equitable relief. *Id.* at 12.

The court later denied the state defendants' motion for summary judgment based on qualified immunity. *Saylor I*, No. 4:12CV3115, Filing No. 178, Memorandum and Order at 22-27; *Saylor I*, No. 4:12CV3115, 2014 WL 7335742 at *11-*13 (D. Neb. Dec. 22, 2014). Following an interlocutory appeal, the Eighth Circuit reversed. *See Saylor I*, 812 F.3d at 642. The Eighth Circuit found no deprivation of Saylor's First, Fourteenth, or Eighth Amendment rights and remanded the action "with directions to dismiss [the state defendants] and for the entry of any further necessary orders concerning the non-appealing parties" consistent with its ruling. *Id.* at 647.

Saylor II, Filing 28 (2018 WL 1732178, at *1-*2) (footnote omitted). More specifically, the Eighth Circuit made the following determinations:

> Saylor provides no specific evidence to show that any of the nonmedical defendants were involved in, or directly responsible for, his allegedly insufficient medical care. These defendants did not even participate in the multidisciplinary meeting regarding Saylor's transfer. Thus, ... they cannot be held liable for cruel and unusual punishment in violation of the Eighth Amendment ....
>
> As for the named medical defendants, Dr. Kohl, Dr. White, Dr. Weilage, and Dr. Perez, none were treating physicians. Thus, these defendants also acted in a supervisory capacity.... Saylor's main argument is that the treatment that occurred after Dr. Christensen left NSP rises to the level of cruel and unusual punishment. Dr. Christensen's treatment plan was three-part: regular psychotherapy treatment, medication, and a safe environment. The medical defendants attempted to provide Saylor with another psychiatrist at NSP, ultimately found him another psychiatrist at TSCI, continued medication as they saw fit within their independent medical judgment, and gave him his requested private cell. To the extent there was any change in Dr. Christensen's treatment plan, Saylor

requested some and agreed to other deviations. Specifically, Saylor stated he was willing to forgo seeing a doctor so long as he could continue taking his medications. After the meeting with Dr. Baker wherein she suggested easing him off Seroquel because it did not seem to be helping and was causing low blood pressure, Saylor agreed to continue taking Xanax.

Throughout his time of incarceration, the record shows that Defendants met Saylor's medical needs beyond the minimum standard required. Defendants were aware of his medical needs and took steps to meet those needs. Because Saylor cannot show that Defendants acted with deliberate indifference, there was no deprivation of his Eighth Amendment rights, and thus, Defendants are entitled to qualified immunity.

* * *

Defendants violated no constitutional right by assigning Saylor to another psychiatrist when Dr. Christensen's contract with NDCS ended or by changing Saylor's medication at the direction of a doctor.... [T]he clearly stated, nonretaliatory reason for the transfer [to TSCI] was to provide Saylor with necessary psychiatric care. He refused to see Dr. Kamal at NSP, and Dr. Baker was available to work with Saylor

at TSCI. Finally, Saylor was kept in Administrative Segregation, specifically SMU, because he requested his own cell due to his PTSD. This is the only area with single prisoner cells. Although he was cleared to be released into Protective Custody, he would have had to share a cell with a roommate, which he refused to do. It is blatantly contradictory to request a private cell with no roommates and then complain about isolation. Because none of Saylor's activities were protected and none of Defendants' actions were retaliatory, Saylor has no First Amendment claim.

* * *

Saylor was transferred to a comparable prison for the sole purpose of obtaining psychiatric care. This does not violate the Due Process Clause of the Fourteenth Amendment, and neither does Saylor's confinement in SMU Segregation due to a prisoner's request to be kept in a single prisoner cell because of PTSD is not an atypical or a significant hardship. Rather, TSCI made special accommodations for Saylor. Accordingly, there has been no constitutional violation, and thus, Saylor has no cognizable Fourteenth Amendment claim. Defendants are entitled to qualified immunity on these two issues.

Saylor v. Nebraska, 812 F.3d 637, 646-47 (8th Cir. 2016), *as amended* (Mar. 4, 2016) (footnote omitted).

> On remand, this court dismissed the plaintiff's claims against the state defendants, dismissed the plaintiff's constitutional claims against the non-appealing parties (defendants Natalie Baker, M.D., and Correct Care Solutions) and declined to exercise supplemental jurisdiction over the plaintiff's state law negligence claim. *Saylor I*, No. 4:12CV3115, Filing No. 222, Memorandum and Order at 5-9; *Saylor v. Kohl*, 2016 WL 8201925, at *3-*5 (D. Neb. Nov. 28, 2016).
>
> Saylor later filed a motion [to reconsider] under Federal Rules of Civil Procedure 59 and 60 to vacate the court's order dismissing the action, reopen the case, and grant leave to file a third amended complaint. *Id.*, Filing No. 225. The attached proposed third amended complaint restated the plaintiff's earlier claims, added some factual allegations, and asserted a claim for violations of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 *et seq. Id.*, Filing No. 225-1, proposed third amended complaint. The court denied the motion, finding plaintiff had not met the standards for relief under Federal Rules of Civil Procedure 59(e) and 60(b). *Id.*, Filing No. 230, Memorandum and Order; *Saylor I*, 2017 WL 486921, *1 (D. Neb.

> Feb. 6, 2017). Neither this court nor the Eighth Circuit ever addressed the merits of Saylor's negligence claim.

Saylor II, Filing 28 (2018 WL 1732178, at *2).

In denying Saylor's motion to reconsider in *Saylor I*, this court specifically addressed his post-judgment request for leave to amend, stating:

> [Saylor] asks this Court to allow him to file a third amended complaint and add an entirely new claim for a violation of the American[s] with Disabilities Act allegedly because he has post-traumatic stress syndrome. The Court agrees with the defendant[s] that this will not be allowed. First, [Saylor] has made no showing that he has met the standards of Fed. R. Civ. P. 59(e) (motion to alter or amend a judgment) and 60(b) (grounds for relief from order). Next, [Saylor] already amended his complaint in this case. At no point during this time did [Saylor] ever ask to include an American[s with] Disabilities Act Claim in his case. Motions to reopen a case after dismissal in order to allow amendments to the complaint are "disfavored." *U.S. ex rel. Roop v. Hypoguard USA, Inc.*, 559 F.3d 818, 824 (8th Cir. 2009). Further, Rule 59(e) motions "serve the limited function of correcting manifest errors of law or fact or to present newly discovered evidence." *U.S. v. Metropolitan St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006) (internal quotation omitted).

> [Saylor] has not alleged that the Court committed any errors of law or fact. Nor has he contended that he has new evidence for this claim. In fact, it appears that this cause of action has existed throughout the case. The Court finds no good reason to permit [Saylor] to amend his complaint.

Saylor I, Filing 230 (2017 WL 486921, at *1) (footnote omitted).

A few months later, on May 30, 2017, Saylor commenced another state-court action, filing a complaint which was "substantially similar, if not identical, to the proposed third amended complaint submitted in [federal district court in *Saylor I*]." *Saylor II*, Filing 28 (2018 WL 1732178 at *2). Saylor obtained service of process on the State of Nebraska and NDCS in late November 2017, but all other defendants were dismissed from the action by operation of law for non-service. *See Saylor II*, Filing 1-1 at 41-51. The State and NDCS filed a notice of removal to this court, basing removal on federal question jurisdiction. Following removal, the defendants filed a Rule 12(b)(6) motion to dismiss in which they contended the complaint was barred by res judicata. A Rule 11 motion for sanctions was also filed. In response to these motions, Saylor filed an amended complaint in which he "recited essentially the same factual background, but asserted only a state law negligence claim," and he simultaneously moved to remand the action to state court. *Saylor II*, Filing 28 (2018 WL 1732178 at *2-*3).

The defendants' motion to dismiss was denied, and Saylor's motion to remand was granted. This court explained:

> The federal claims have now been abandoned and only [Saylor's] state law negligence claim is at issue. In *Saylor I*, this court ultimately declined to exercise its supplemental jurisdiction over Saylor's state law negligence claim. That claim remains at issue in the present case. Once again, in its discretion, the court will decline to exercise supplemental jurisdiction over [Saylor's] state law negligence claim. Contrary to the defendants' contention, the courts' findings on [Saylor's] constitutional claims in *Saylor I* does not preclude consideration of [Saylor's] negligence claim. The issue presented in [Saylor's] amended complaint is whether the defendants continued to provide [Saylor] with treatment that met the applicable community standard of care from and after March 31, 2010. Essentially, Saylor presents the same challenge to the defendants' conduct that he presented in his earlier state court action in 20I0, but the allegations relate to a different time-frame. Principles of economy, convenience, fairness, and comity dictate that state court is a superior forum for [Saylor's] claim. The claim is a state law claim and the state courts have as much or more familiarity with [Saylor's] claim as this court has.

Id. (2018 WL 1732178, at *5). The defendants' motion for sanctions was also denied, with this court stating:

> Although [Saylor] arguably violated Rule 11 by including the civil rights claims in his original complaint, the defendants have not shown the pleading was interposed for an improper purpose in that the pleading was timely amended to abandon the claims. The amended complaint contains a legally tenable claim. [Saylor's] counsel's reliance on a "form pleading" apparently cut and pasted from an earlier complaint is condoned, but the court does not consider the plaintiff's claims to be so baseless as to warrant Rule 11 sanctions. Notably, within a short time after the action was removed [Saylor] filed an amended complaint, removing the objectionable claims. He essentially concedes his civil rights claims are precluded.

Id. (2018 WL 1732178, at *5).[1]

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[1] After the action was remanded to the state district court, the State and DCS moved to dismiss the "[operative] Amended Complaint" pursuant to Neb. Ct. R. Pldg. § 6-ll12(b)(l) and (6), on the ground the tort claims were time barred under the STCA. Saylor requested and was granted leave to amend his original 2017 complaint to make it "identical" to the amended complaint that had been remanded by the federal court, and no party objected to this procedure. Thereafter, the parties agreed that the motion to dismiss could be converted into a motion for

IV. ANALYSIS

A district court may properly grant a motion to dismiss based on the affirmative defense of res judicata when the defense "is apparent on the face of the complaint." *Midwest Disability Initiative v. JANS Enterprises, Inc.*, 929 F.3d 603, 607 (8th Cir. 2019) (quoting *C.H. Robinson Worldwide, Inc. v. Lobrano*, 695 F.3d 758, 764 (8th Cir. 2012)). "Under the doctrine of claim preclusion, a final judgment forecloses successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit." *Daredevil, Inc. v. ZTE Corp.*, 1 F.4th 622, 627-28 (8th Cir. 2021) (internal quotations and citations omitted).

To establish that claim preclusion applies under federal common law,[2] a party must show that

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> summary judgment and that it should be treated as relating to Saylor's amended complaint.
>
> * * *
>
> The district court ... dismissed Saylor's amended complaint with prejudice, finding it was time barred under the STCA.

Saylor v. State, 936 N.W.2d 924, 928-29 (Neb. 2020). The Nebraska Supreme Court affirmed the dismissal on January 10, 2020. *Id.*, at 930. The present action was filed six months later.

[2] "The Full Faith and Credit Clause, U.S. Const. Art. IV, § 1, and the full faith and credit statute, 28 U.S.C. § 1738, govern the *res judicata* effects to be given *state* court judgments. But 'no federal textual provision addresses the claim-preclusive effect of a federal-court judgment in a federal-question case,' so that is an issue of federal common law." *In re Finstad*, 4 F.4th 693, 696 (8th Cir. 2021) (quoting *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507 (2001)).

"(l) the first suit resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) both suits involve the same parties (or those in privity with them); and (4) both suits are based upon the same claims or causes of action." *In re Buchanan*, 31 F.4th 1091, 1095-96 (8th Cir. 2022) (quoting *Yankton Sioux Tribe v. U.S. Dep 't of Health & Hum. Servs.*, 533 F.3d 634, 639 (8th Cir. 2008)).

Defendants contend each of these elements is satisfied with respect to both *Saylor I* and *Saylor II*. Saylor concedes that the second and third elements are satisfied. See Filing 91 at 7. However, Saylor denies there was a final judgment on the merits regarding his ADA claims in *Saylor I* and *II*, and he argues there are changed circumstances which differentiate the claims. See *ibid.* at 9.

a. Final Judgment on the Merits

A decision on the merits is one that signifies the "death knell" of the litigation, *i.e.*, one that permanently forecloses a party from further advancing a claim or defense. *Mitchell v. Chapman*, 343 F.3d 811, 821 (6th Cir. 2003). Indeed, since a decision may address the merits but still not have that effect, the Supreme Court has suggested that the "on the merits" language in the classic formulation of claim preclusion is misleading. *Arangure v. Whitaker*, 911 F.3d 333, 346-47 (6th Cir. 2018) (citing *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 501-03 (2001)). For the purpose of claim preclusion, a final judgment on the merits "is one that actually pass[es] directly on the substance of [a particular] claim before the court," *Semtek*, 531 U.S. at 501-02 (alteration in original) (internal quotation marks omitted). The phrase "final judgment on the merits" is often used

interchangeably with "dismissal with prejudice." *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002). However, the "with prejudice" label is not always conclusive for the purpose of res judicata and, indeed, does not equate to an adjudication on the merits when the dismissal is for lack of jurisdiction. *Ruiz v. Snohomish Cnty. Pub. Util. Dist. No. I*, 824 F.3d 1161, 1168 (9th Cir. 2016). *See, e.g., Kulinski v. Medtronic Bio-Medicus, Inc.*, 112 F.3d 368,373 (8th Cir. 1997) (district court's dismissal "with prejudice" did not operate as adjudication on the merits, so as to preclude subsequent actions under doctrine of res judicata, where dismissal for lack of jurisdiction did not reach the merits). On the other hand, a dismissal "without prejudice" generally means "a dismissal without barring the plaintiff from returning later, to the same court, with the same underlying claim." *Semtek*, 531 U.S., at 505. Such a judgment does not "permanently foreclose[ ]" a litigant from trying again, so it is not sufficiently "final" to be given res judicata effect. *Arangure*, 922 F.3d at 347 (quoting *Mitchell*, 343 F.3d, at 821).

1. *Saylor I*

This court entered a final judgment on the merits in *Saylor I* on November 28, 2016, when Judge Bataillon dismissed Saylor's § 1983 claims. Although the order (Filing 222) and separate judgment (Filing 223) do not specify whether the dismissal was with or without prejudice, the Eight Circuit made a determination on the merits that defendants Kohl, Bakewell, Houston, White, Weilage, Britten, and Perez had not violated Saylor's constitutional rights, and Judge Bataillon made a similar determination regarding defendants Baker and Correct Care

Solutions. All claims over which the court had original jurisdiction clearly were intended to be, and in effect were, dismissed with prejudice upon the granting of the defendants' motion for summary judgment.[3] See Fed. R. Civ. P. 4l(b) ("Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule – except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 – operates as an adjudication on the merits.").

On December 27, 2016, Saylor filed a motion requesting "the Court pursuant... Fed. R. Civ. P. 60(b) or Fed. R. Civ. P. 59(e) to vacate the Court's November 28, 2016, Memorandum and Order (Filing No. 222), and Its November 28, 2016, Judgment (Filing No. 223), to instruct the Clerk to re-open the case and to grant the Plaintiff leave, under Fed. R. Civ. P. 15(a)(2) to file his [proposed] Third Amended Complaint ...." *Saylor I*, Filing 225. This motion was denied in all respects on February 6, 2017. *Saylor I*, Filing 230, 2017 WL 486921. No appeal was taken.

Frakes contends the denial of Saylor's request for leave to amend was a final judgment on the merits of the proposed ADA claim. For supporting authority, he cites *Professional Management Associates, Inc. v. KPMG LLP*, 345 F.3d 1030, 1032 (8th Cir. 2003), in which the Eighth Circuit reversed the district court's denial of a defendant's Rule 1 l(b) motion for sanctions

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[3] By contrast, Judge Bataillon's dismissal of Saylor's state-law negligence claims under 28 U.S.C. § 1367(c)(3) was necessarily "without prejudice." *See Nagel v. City of Jamestown*, 952 F.3d 923,935 (8th Cir. 2020) ("Such a dismissal is without prejudice and is reviewed for abuse of discretion.").

"where a plaintiff attempted to re-litigate the same claims involving the same parties as a previous action" and "even admitted that the complaint in the second suit was simply a copy of a proposed amended complaint in the first suit, which had been denied." *C.H. Robinson Worldwide, Inc. v. Lobrano*, 695 F.3d 758, 767 (8th Cir. 2012). The Court of Appeals held that the district court abused its discretion in refusing to sanction the plaintiff ("PMA") because the second lawsuit was barred by res judicata. It explained:

> Under res judicata, a judgment on the merits in an earlier lawsuit bars a second suit involving the same parties based on the same cause of action. *Landscape Props., Inc. v. Whisenhunt*, 127 F.3d 678, 682 (8th Cir. 1997). PMA admits the complaint in *PMA I* involved the same claims and the same parties as this action, and "the complaint in this action is the same as the proposed complaint that [PMA] filed in connection with the motion for leave to amend" in *PMA I*, which the district court denied. Because the same parties and claims are involved in both cases, we need only decide whether the denial of the motion to amend was a judgment on the merits. We conclude that it was.
>
> The denial of a motion to amend a complaint in one action is a final judgment on the merits barring the same complaint in a later action. *Landscape Props.*, 127 F.3d at 683. "[D]enial of leave to amend constitutes res judicata on the

> merits of the claims which were the subject of the proposed amended pleading." *King v. Hoover Group*, Inc., 958 F.2d 219, 222-23 (8th Cir.1992). This is so even when denial of leave to amend is based on reasons other than the merits, such as timeliness. *Northern Assurance Co. v. Square D Co.*, 201 F.3d 84, 88 (2d Cir. 2000); *Poe v. John Deere Co.*, 695 F.2d 1103, 1107 (8th Cir. 1982). Thus, the fact that the district court denied leave to amend because of PMA's noncompliance with procedural rules is irrelevant. The denial is a judgment on the merits of the claims in the proposed amended pleading. Thus, the denial of leave to amend in *PMA I* bars the filing of the same pleading in this lawsuit.

Pro. Mgmt. Assocs., 345 F.3d at 1032-33 (citation to record omitted); see also *Carter v. Money Tree Co.*, 532 F.2d 113, 115 (8th Cir. 1976) ("If, upon dismissal of the complaint, the plaintiff seeks leave to file an amended complaint and such leave is denied with prejudice, the denial is res judicata as to any claim made by plaintiff in that amended complaint.").

Saylor argues his situation is distinguishable because "this Court had already rendered a final judgment on the merits of his claims in *Saylor I* before his motion to reconsider [and request for leave to amend] was filed." Filing 91 at 8. This is not a valid distinction, though, because the finality of this court's November 28, 2016 judgment was automatically

suspended on December 27, 2016,[4] when Saylor filed his motion to reconsider, and was restored on February 6, 2017, when the motion was denied. *See Banister v. Davis*, 140 S. Ct. 1698, 1703 (2020) ("The filing of a Rule 59(e) motion within the 28-day period 'suspends the finality of the original judgment' for purposes of an appeal.... Only the disposition of that motion 'restores th[e] finality' of the original judgment, thus starting the 30-day appeal clock And if an appeal follows, the ruling on the Rule 59(e) motion merges with the prior determination, so that the reviewing court takes up only one judgment.") (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 373, n. 10 (1984)). Saylor's additional citation of Rule 60(b) in his motion to reconsider does not alter this result. See *id.*, 140 S. Ct. at 1709-10, n. 9 ("[C]ourts of appeals have long treated Rule 60(b) motions filed within 28 days as ... Rule 59(e) motions."); *see also* Fed. Rule App. Proc. 4(a)(4)(A)(vi) (codifying that approach by setting the same appeals clock for self-styled Rule 60(b) motions filed within 28 days as for Rule 59(e) motions).[5]

Straightforward application of the rules stated in *Professional Management* requires a finding that

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[4] Twenty-eight calendar days after November 28, 2016, was December 26, 2016, a legal holiday. Thus, the motion was timely. See Fed. R. Civ. P. 6(a)(l).

[5] A Rule 60(b) motion filed outside the 28-day period "does not affect the time to appeal the judgment but is treated as initiating a new proceeding whose decision is independently final and appealable." *York Grp., Inc. v. Wuxi Taihu Tractor Co.*, 632 F.3d 399, 401 (7th Cir. 2011) (citing *Browder v. Director, Department of Corrections*, 434 U.S. 257, 263 n. 7 (1978)).

there was a final judgment on the merits of all federal claims alleged in Saylor's proposed third amended complaint in *Saylor I*, regardless of whether those claims were required to be brought in that action. *See, e.g., Olson v. Brott*, No. CIV. 09-790 JNE/JJG, 2009 WL 4912135, at *2 n. 1 (D. Minn. Dec. 11, 2009) ("Eighth Circuit precedent regarding the preclusive effect of the denial of a motion to amend a complaint compels dismissal."). As explained by the *Olson* court:

> Plaintiff argues that the claims in *Olson I* do not share a common nucleus of operative facts with the claims in this case. *See Poe v. John Deere Co.*, 695 F.2d 1103, 1106 (8th Cir.1982) (adopting common-nucleus-of-operative-facts test to determine whether claims are the same). Plaintiff's argument is undercut by the Eighth Circuit's repeated admonition that "denial of leave to amend constitutes res judicata on the merits of the claims which were the subject of the proposed amended pleading." *King v. Hoover Group, Inc.*, 958 F.2d 219, 222-23 (8th Cir.1992); *see also Prof'l Mgmt.*, 345 F.3d at 1032; *Landscape Props.*, 127 F.3d at 683. Thus, the Court looks to the proposed amended complaint in the earlier action to determine whether the later action asserts the same claims. *See Landscape Props.*, 127 F.3d at 682-83. *But see Daley [v. Marriott International, Inc.*, 415 F.3d 889, 896 (8th Cir. 2005)] (relying on claims in original complaint in earlier action); *Crystal Import [Corp. v. AVID*

> *Identification Sys., Inc.*, 582 F.Supp.2d 1166, 1170-71 (D.Minn. 2008)] (same). The procedural due process claims in this case are nearly identical to the claims in Plaintiff's proposed amended complaint in *Olson I*. Therefore, the claims are the same for purposes of res judicata, and Plaintiff is precluded from maintaining this action. Accordingly, the Court grants Defendants' motion to dismiss.

Id., 2009 WL 4912135, at *4 (footnote omitted).

Although the *Olson* court dismissed the second lawsuit, it denied the defendants' motion for sanctions, concluding that the plaintiff had "made a nonfrivolous argument for the modification or reversal of existing law." *Id.*, 2009 WL 4912135, at *8. The court noted that *Professional Management*'s "bright-line rule, which grants sweeping preclusive effect to an ostensibly nondispositive pretrial motion, appears not to have been consistently applied in the Eighth Circuit." *Id.*, at *5 (discussing *Daley, Lundquist v. Rice Memorial Hospital*, 283 F.3d 975, 976 (8th Cir. 2001), and *Kulinski v. Medtronic Bio-Medicus, Inc.*, 112 F.3d 368, 370 (8th Cir. 1997)). "In addition to this seemingly inconsistent approach to the preclusive effect of the denial of a motion to amend," the *Olson* court stated, "no other circuit has expressly adopted the Eighth Circuit's approach and it has been distinguished by the Second Circuit." *Id.*, at *6 (citing *Curtis v. Citibank, N.A.*, 226 F.3d 133, 139 (2d Cir. 2000)). "In the Second Circuit, the denial of a motion to amend a complaint in an earlier action is considered irrelevant to the res judicata inquiry in a later action unless that dismissal was on the merits of the

proposed amended complaint." *Id.* (citing *See Curtis*, 226 F.3d at 139 ("[D]enial of a motion to amend will not inevitably preclude subsequent litigation of those claims set out in a proposed new complaint. Only denial of leave to amend *on the merits* precludes subsequent litigation of the claims in the proposed amended complaint." (emphasis in original)).

In summary, Eighth Circuit precedent requires a determination that the denial of Saylor's post-judgment motion to file a third amended complaint in *Saylor I* was a final judgment on the merits, and the issue then becomes whether the claims alleged in the present action were also alleged in the proposed third amended complaint. Even without regard to the court's denial of that motion, however, the claims will also be precluded if, under general res judicata principles, they should have been joined with the § 1983 claims that were dismissed in *Saylor I* when the court granted the defendants' motion for summary judgment. As will be discussed subsequently, the court concludes that Saylor's ADA and RA claims are precluded under either approach.

2. *Saylor II*

There is no merit to Frakes' further contention that there was a "final judgment on the merits" in *Saylor II* which must be given res judicata effect. All federal claims alleged in the original complaint in *Saylor II* were automatically withdrawn from consideration when Saylor filed an amended complaint within 21 days after the defendants filed a Rule 12(b)(6) motion to dismiss.[6] *See* Fed. R. Civ. P. I

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[6] Frakes states in his reply brief that Saylor "appears to be correct" in arguing that "he voluntarily amended-out his ADA

5(a)(l)(B) (authorizing amendment as a matter of course).[7] It is axiomatic that prejudice does not attach to a claim that is properly dropped from a complaint under Rule 15(a) prior to final judgment. *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 403 F.3d 683, 690 (9th Cir. 2005). Frakes does not contend that the subsequent dismissal of the case following its remand to state court has a res judicata effect here.

B. Same Claims

"The final element of res judicata is whether both suits are based on the same claims or causes of action: a claim is barred by res judicata if it arises out of the same nucleus of operative facts as the prior claim." *Midwest Disability Initiative v. JANS Enterprises, Inc.*, 929 F.3d 603, 609-10 (8th Cir. 2019) (internal quotation marks and citation omitted).

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claims in *Saylor II*—thus, depriving the Court of the opportunity to rule on the defendant's motion to dismiss based on res judicata grounds," and that *Saylor II* "was never subjected to a final judgment on the merits, and therefore can have no preclusive effect in this case." Filing 104 at 7.

[7] Saylor argues that his filing of an amended complaint in *Saylor II* "amounted to a voluntary dismissal of [the original complaint's ADA] claim under Fed. R. Civ. P. 4l(a)(l), which, under Fed. R. Civ. P. 4l(b) is without prejudice and not an adjudication on the merits." Filing 91 at 8. This argument is legally and factually erroneous because, first of all, Rule 41(b) only applies to *involuntary* dismissals and, secondly, Saylor did not file a notice of dismissal under Rule 41(a)(l); instead, he filed an amended complaint under Rule 15(a)(l)(B). Indeed, the prevailing view is that "Rule 4l(a) does not provide for the voluntary dismissal of less than all claims against any defendant." *Environmental Dynamics, Inc. v. Robert Tyer and Associates, Inc.*, 929 F.Supp. 1212, 1225 (N.D. Iowa 1996) (analyzing cases).

Saylor argues that the ADA and RA claims alleged in the present case "arose after *Saylor I* and *Saylor II* were filed" and "are based in part on events which occurred after those cases were filed" and "in part on changed circumstances which show an exacerbation of harm from prior events to a degree which was not previously apparent." (Filing 91 at 9.)

The Court of Appeals has "never recognized a general 'exception' to the *res judicata* bar based on 'changed circumstances.'" *United States v. Bala*, 948 F.3d 948, 951 (8th Cir. 2020). This circuit does, however, "follow the general rule 'that claim preclusion does not apply to claims that did not arise until *after* the first suit was filed.'" *Id.* (quoting *Baker Grp. v. Burlington N. & Santa Fe Ry.*, 228 F.3d 883, 886 (8th Cir. 2000) (emphasis in original)). "The pertinent question is whether the second claim is based on subsequent legal or factual events that produce a different nucleus of operative facts, not whether those events inspire new legal theories of recovery or provide additional evidence supporting the previously rejected claim." *Id.* (citing *Lane v. Peterson*, 899 F.2d 737, 742-44 (8th Cir. 1990)).

The ADA claim alleged in the second amended complaint in the present action (Filing 51) arises out of the same nucleus of operative facts as the ADA claim alleged in the proposed third amended complaint in *Saylor I*. Saylor again challenges his conditions of confinement. *See Saylor I*, No. 4:12CV3115, Filing No. 225-1, Third Am. Compl. (hereinafter cited as "*Saylor I*, Third Am. Compl."); (Filing No. 51, Verified Am. Compl.). Specifically, he re-alleges that he is medically required to have his own cell as a result of his PTSD diagnosis, *Saylor I*,

Third Am. Compl. at ¶ 87-88; (Filing No. 51, Verified Am. Compl. at ¶ 26, 32-33, 35, 37, 42, 59-60, 65, 72, 133a); that because of his need for a single cell, he has been discriminatorily housed in "solitary confinement" and denied a reasonable accommodation for years, *Saylor I*, Third Am. Compl. at ¶ 87-88; (Filing No. 51, Verified Am. Compl. at ¶ 23-24, 33, 35-37, 44, 44a, 59-60, 62, 67-69, 96, 103, 105, 112, 118); that, as a consequence of having his own cell in solitary confinement, his PTSD is not improving, *Saylor I*, Third Am. Compl. at ¶ 87-88; (Filing No. 51, Verified Am. Compl. at ¶ 39, 41-42, 44c, 61, 113, 127, 130); and that because he is housed in "solitary confinement," he is being "excluded from many services, programs, and activities, available to other inmates, and activities, available to other inmates . . ." *Saylor I*, Third Am. Compl. at ¶ 87-88. All these allegations are broadly attributed to the actions of the State, State employees, or not attributed to any actor at all. *See Saylor I*, Third Am. Compl.; (Filing No. 51, Verified Am. Compl.).

Saylor alleges no new injuries resulting from these conditions. In both *Saylor I* and the present action, Saylor claims that he was deprived of commonly enjoyed services, to varying degrees, due to his PTSD and confinement, *Saylor I*, Third Am. Compl. at ¶ 89, 91-93; (Filing No. 51, Verified Am. Compl. at ¶ 38, 76-80, 83e,

104, 108,128,133, 134). This includes:

- A "normal" or "standard" bed, *Saylor I*, Third Am. Compl. at ¶ 93c; (Filing No. 51, Verified Am. Compl. at ¶ 133m);

- Access to personal property, *Saylor I*, Third Am. Compl. at ¶ 47, 93p; (Filing No. 51, Verified Am. Compl. at ¶ 133z4);
- Clothing options, *Saylor I*, Third Am. Compl. at ¶ 93e, 93*l*; (Filing No. 51, Verified Am. Compl. at ¶ 133z5, 136.3);
- Community, *Saylor I*, Third Am. Compl. at ¶ 91-92, 93w; (Filing No. 51, Verified Am. Compl. at ¶ 133i);
- Daily shower access, *Saylor I*, Third Am. Compl. at ¶ 93k; (Filing No. 51, Verified Am. Compl. at ¶ 133x);
- Desired housing, *Saylor I*, Third Am. Compl. at ¶ 93b; (Filing No. 51, Verified Am. Compl. at ¶ 133a, 133j-133k);
- Desired medical treatment, *Saylor I*, Third Am. Compl. at ¶ 91-92, 93a, 93e; (Filing No. 51, Verified Am. Compl. at ¶ 133b-h);
- Drug programs, *Saylor I*, Third Am. Compl. at ¶ 91-92, 93v; (Filing No. 51, Verified Am. Compl. at ¶ 133z9).
- Educational programs, *Saylor I*, Third Am. Compl. at ¶ 91-92, 93u; (Filing No. 51, Verified Am. Compl. at ¶ 133*l*, 133z8); and
- Freedom of movement, *Saylor I*, Third Am. Compl. at ¶ 47; (Filing No. 51, Verified Am. Compl. at ¶ 133n);
- Full canteen access, *Saylor I*, Third Am. Compl. at ¶ 91-92, 93q; (Filing No. 51, Verified Am. Compl. at ¶ 133z6);

- Hot water and ice, *Saylor I*, Third Am. Compl. at ¶ 93i; (Filing No. 51, Verified Am. Compl. at ¶ 133p);
- Jobs and work release, *Saylor I*, Third Am. Compl. at ¶ 93f, 93r; (Filing No. 51, Verified Am. Compl. at ¶ 133z7);
- Law library access, *Saylor I*, Third Am. Compl. at ¶ 91-92, 93g; (Filing No. 51, Verified Am. Compl. at ¶ 133s);
- Library access, *Saylor I*, Third Am. Compl. at ¶ 91-92, 93t; (Filing No. 51, Verified Am. Compl. at ¶ 133t);
- Meal quality, *Saylor I*, Third Am. Compl. at ¶ 93i, 93w; (Filing No. 51, Verified Am. Compl. at ¶ 133o);
- Outdoor recreation, *Saylor I*, Third Am. Compl. at ¶ 91-92, 93o; (Filing No. 51, Verified Am. Compl. at ¶ 133z3);
- Phone calls, *Saylor I*, Third Am. Compl. at ¶ 91-92, 93m; (Filing No. 51, Verified Am. Compl. at ¶ 133v);
- Pop, *Saylor I*, Third Am. Compl. at ¶ 93j; (Filing No. 51, Verified Am. Compl. at ¶ l33r);
- Programs and activities, *Saylor I*, Third Am. Compl. at ¶ 91-92; (Filing No. 51, Verified Am. Compl. at ¶ 133z);
- Television, *Saylor I*, Third Am. Compl. at ¶ 91-92, 93p; (Filing No. 51, Verified Am. Compl. at ¶ 133y);

- Visits, *Saylor I*, Third Am. Compl. at ¶ 47, 91-92, 93n; (Filing No. 51, Verified Am. Compl. at ¶ 133u);
- Writing materials and tables, *Saylor I*, Third Am. Compl. at ¶ 91-92, 93c, 93h; (Filing No. 51, Verified Am. Compl. at ¶ 133zl-z2);

Saylor's only new grievances relate to having greater access to emails and microwaves. (Filing No. 51, Verified Am. Compl. at ¶ 133q, 133w). However, this does not constitute a new claim because it arises from the same alleged conditions regarding the above "discriminations." Moreover, the crux of Saylor's requested relief in not new; he again asks for a cell of his own. *Saylor I*, Third Am. Compl. at ¶ 94; (Filing No. 51, Verified Am. Compl. at ¶ 72, 75, 117, 119, 144, A.1-A.3). The reappearance of Saylor's previously alleged injuries and same prayer for relief likewise indicates that the present action is identical to the claims in *Saylor I*. The only identifiable difference between the ADA claim in the second amended complaint in this case and the third amended complaint in *Saylor I* is that the present factual allegations contain subsequent developments. But these allegations concern the continuation of same conduct addressed in *Saylor I*, and even incorporate the events of *Saylor I*. They do not give rise to a new claim.

Saylor's Rehabilitation Act claim is similarly barred, as it also arises from the same nucleus of operative facts. The enforcement, remedies, and rights are the same under both Title II and Section 504, and the prima facie case as to each statutory claim is nearly identical. *B.M. ex rel. Miller v. South Callaway R-11 School Dist.*, 732 F.3d 882, 887 (8th Cir. 2013).

Under Title II, a plaintiff must show that I) he or she is a qualified individual with a disability; 2) he or she was excluded from or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the entity; and 3) that such exclusion, denial of benefits or discrimination was because of his or her disability. 42 U.S.C. § 12132; *Layton v. El-der*, 143 F.3d 469,472 (8th Cir. 1997); *Randolph v. Rodgers*, 170 F.3d 850, 858 (8th Cir. 1999); *see also* 29 U.S.C. § 794(a) (section 504). The Rehabilitation Act contains the additional element that a plaintiff show the program or activity from which he is excluded receives federal funds. *M.P. ex rel. K. and D.P. v. Indep. School Dist. No. 721*, 439 F.3d 865, 867 (8th Cir. 2006). As such, the previous operative facts supporting Saylor's ADA claim in *Saylor I* would have subsumed any potential claim under the Rehabilitation Act.

Saylor points to *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 136 S.Ct. 2292 (2016), for the proposition that "development of new material facts can mean that a new case and an otherwise similar previous case do not present the same claim." Filing 91 at 2 (quoting *Whole Woman's Health*, 579 U.S. at 599, 136 S.Ct. at 2305). Saylor misapprehends what constitute "new material facts" in this context.

The question in *Whole Woman's Health* was whether a post-enforcement, as-applied challenge by two medical clinics were barred by a final judgment in a previous pre-enforcement, facial challenge to a Texas state law requiring abortion providers to have certain admitting-privileges and surgical-center requirements. The Supreme Court said that "Petitioners' postenforcement as-applied challenge is

not 'the very same claim' as their preenforcement facial challenge." *Whole Woman's Health*, 579 U.S. at 599, 136 S.Ct. at 2305). The Court concluded as much by looking to the Restatement (Second) of Judgments ("Restatement") for guidance. One such provision from the Restatement said, "A valid and final personal judgment for the defendant, which rests on the prematurity of the action or on the plaintiff's failure to satisfy a precondition to suit, does not bar another action by the plaintiff instituted after the claim has matured, or the precondition has been satisfied." *Id.*, 579 U.S. at 600, 136 S. Ct. at 2305 (quoting Restatement § 20(2)).

Unlike the situation in *Whole Woman's Health*, where the Court was weighing a pre-enforcement, facial challenge of a statute versus a post-enforcement, as- applied challenge, there was nothing about Saylor's claim to "mature[ ]," nor was there a "precondition to suit" that prevented him from litigating his ADA claim in *Saylor I*. Here, the crux of Saylor's claim is the same as it was in *Saylor I*—namely, that he has been placed in restrictive housing because of his PTSD, and as a result has been excluded from participation in or denied the benefits of certain prison services, programs, and activities.

The Court in *Whole Woman's Health* also found persuasive Restatement § 24, Comment *f*, which said that "where 'important human values—such as the lawfulness of continuing personal disability or restraint—are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought." *Id.*, 579 U.S. at 600, 136 S. Ct. at 2305 (quoting Restatement § 24, Comment *f*). The court then posed

a hypothetical concerning conditions of confinement at a prison:

> Imagine a group of prisoners who claim that they are being forced to drink contaminated water. These prisoners file suit against the facility where they are incarcerated. If at first their suit is dismissed because a court does not believe that the harm would be severe enough to be unconstitutional, it would make no sense to prevent the same prisoners from bringing a later suit if time and experience eventually showed that prisoners were dying from contaminated water. Such circumstances would give rise to a new claim that the prisoners' treatment violates the Constitution. Factual developments may show that constitutional harm, which seemed too remote or speculative to afford relief at the time of an earlier suit, was in fact indisputable. In our view, such changed circumstances will give rise to a new constitutional claim. This approach is sensible, and it is consistent with our precedent.

Id. Saylor analogizes this hypothetical to his situation, but there is no indication that his ADA claim was too remote or speculative when it was

included in the proposed third amended complaint in *Saylor I*.[8]

In *Whole Woman's Health*, the Court also articulated how the effect of the Texas law "changed dramatically since petitioners filed their first lawsuit." *Whole Woman's Health*, 579 U.S. at 602, 136 S. Ct. at 2306. It noted that the petitioners' claim rested "in significant part upon later, concrete factual developments." *Id.* The petitioners in the first suit "brought their facial challenge to the admitting-privileges requirement *prior to its enforcement*—before many abortion clinics had closed and while it was still unclear how many clinics would be affected." *Id.* But the petitioners in the second case brought "an as-applied challenge to the requirement *after* [the law's] *enforcement*—and after a large number of clinics have in fact closed." *Id.* In contrast to the case at bar, "[t]he postenforcement consequences of [the Texas law] were unknowable before it went into effect." *Id.* But here, there are no factual developments or change in circumstances that now exist, but unknowable when Saylor previously filed his third amended complaint in *Saylor I*.[9]

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[8] While Saylor inserts additional allegations complaining of inadequate treatment for his PTSD, such claims are not cognizable under the ADA or the Rehabilitation Act. *See Shelton v. Arkansas Dep't of Human Servs.*, 677 F.3d 837, 843 (8th Cir. 2012) ("a claim based upon improper medical treatment decision[s] may not be brought pursuant to either the ADA or the Rehabilitation Act.").

[9] Saylor discusses at length another ADA and Rehabilitation Act case in a prison setting, *Rinehart v. Weitzell*, 964 F.3d 684 (8th Cir. 2020) (holding inmate diagnosed with diverticulitis sufficiently alleged disability discrimination where prison revoked privileges based on his refusal to move to housing

It is also apparent that Saylor's ADA and BA claims arise out of the same nucleus of operative facts as those portions of the § 1983 claims in *Saylor I* that challenged his placement in solitary confinement. This is aptly demonstrated by Saylor's request for leave to file a third amended complaint in Saylor I, in which he described the proposed pleading:

> Attached to this motion is an unsigned copy of Plaintiff's proposed Third Amended Complaint. Other than renaming the complaint as "Third Amended Complaint", the proposed amendments are set forth in new paragraphs 84 through 94, inclusive [comprising "Eleventh Cause of Action Against All Defendants, Americans With Disabilities Act"].[10] The proposed amendments expand on previous allegations set forth in paragraphs 54 and 73 of the Plaintiff's Second Amended Complaint, and gather those allegations for what they actually comprise, which is a discrimination claim under the Americans with Disabilities Act.

Saylor I, Filing 225 at 2, ¶ 1. Saylor also argued in his brief in support of the request that "he has never had the opportunity to have a merits determination on his factual allegations in their fair context, which is that

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unit in which cells did not contain toilets). See Filing 91 at 24. *Rinehart* has nothing to do with claim preclusion or res judicata, nor does it contain a novel application of law or establish a new or previously ambiguous right.

[10] See *Saylor I*, Filing 225-1, at 30-39.

of the Americans with Disabilities Act. While the ADA context may have been obscure, it was nonetheless adequate." *Saylor I*, Filing 226 at 3, ¶ 9.

Finally, in conjunction with his brief opposing Frakes' motion to dismiss the present action, Saylor filed a "motion requesting consideration of issue of directions" in which he "moves the court to be aware that that ... Plaintiff has not yet completed a proposed second [*sic*] amended complaint" but "still fully intends to request the Court's leave to file a second [*sic*] amended complaint, ..." (Filing 90.) Liberally construing this filing as a motion for extension of time to seek leave to amend, it will be denied and the court will enter judgment dismissing this case with prejudice.

"Although the district court 'should freely give leave [to amend] when justice so requires,' Fed. R. Civ. P. 15(a)(2), a district court does not abuse its discretion in denying leave to amend where the plaintiff made no motion for leave to amend and did not explain the substance of his proposed amendment." *United States ex rel. Ambrosecchia v. Paddock Lab 'ys, LLC*, 855 F.3d 949, 956 (8th Cir. 2017) (internal quotation and citation omitted); *see also Gomez v. Wells Fargo Bank, N.A.*, 676 F.3d 655, 665 (8th Cir. 2012) ("A district court does not abuse its discretion in failing to invite an amended complaint when plaintiff has not moved to amend and submitted a proposed amended pleading."). This court's local rules also provide that a party who move to amend "must file as an attachment to the motion an unsigned copy of the proposed amended pleading that clearly identifies the proposed amendments." NECivR 15.1(a).

The court liberally granted Saylor's repeated motions for extensions of time to respond to Frakes' motion to dismiss, from August 12, 2021, until April 27, 2022, and additional time has passed since then. Saylor chose to stand on his pleadings in the face of Frakes' motion to dismiss, which clearly identified the deficiency of his second amended complaint. *See Milan v. McNiel*, 399 F. App'x 144, 145 (8th Cir. 2010) (finding no abuse of discretion in district court's denial of plaintiff's post-dismissal motion for leave to amend). The court will not allow this case to be drawn out any further.

V. CONCLUSION

Saylor's earlier lawsuit filed in this court, *Saylor v. Kohl*, No. 4:12-CV-3115 ("*Saylor I*"), is res judicata as to all claims alleged in the present action, which will be dismissed with prejudice.

IT IS ORDERED:

1. Defendant's motion to dismiss (Filing 61) is granted, and this action is dismissed with prejudice.

2. Final judgment shall be entered by separate document.

3. Plaintiff's "motion requesting consideration of issue of directions" (Filing 90) is denied in all respects.

Dated this 27th day of June 2022.

BY THE COURT:

Richard G. Kopf

Senior United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JAMES M. SAYLOR, Plaintiff, vs. RANDY KOHL, M.D.; DENNIS BAKEWELL; ROBERT HOUSTON; NATALIE BAKER, M.D.; MOHAMMAD KAMAL, M.D.; CAMERON WHITE, PhD.; MARK WEILAGE, PhD.; FRED BRITTN; KARI PEREZ, PhD.; and CORRECT CARE SOLUTIONS, LLC, Defendants.	No. 4:12CV3115 ORDER

This matter is before the Court on plaintiff's motion to reconsider, Filing No. 225, this Court's Memorandum and Order, Filing No. 222. Defendant Correct Care Solutions, LLC ("CCS") filed a brief in

opposition to plaintiff's motion to reconsider, Filing No. 229. In its Memorandum and Order, this Court dismissed the claims against Kohl, Bakewell, Houston, White, Weilage, Britten, and Perez. The Court also granted defendants Baker's and CCS's motions for summary judgment and dismissed all of Saylor's claims against defendants Baker and CCS. The Court denied defendants Kohl, Bakewell, Houston, White, Weilage, Britten, and Perez's motion for judgment on the pleadings as moot.

Plaintiff asks this Court to allow him to file a third amended complaint and add an entirely new claim for a violation of the American with Disabilities Act allegedly because he has post-traumatic stress syndrome. The Court agrees with the defendant that this will not be allowed. First, plaintiff has made no showing that he has met the standards of Fed. R. Civ. P. 59(e) (motion to alter or amend a judgment) and 60(b) (grounds for relief from order)[1]. Next, plaintiff already amended his complaint in this case. At no point during this time did plaintiff ever ask to include an American Disabilities Act Claim in his case. Motions to reopen a case after dismissal in order to allow amendments to the complaint are "disfavored." *U.S. ex rel. Roop v. Hypoguard USA, Inc.*, 559 F.3d

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[1] These grounds include: (1) mistake, inadvertence, surprise. or excusable neglect: (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b): (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief. Fed. R. Civ. P. 60(b).

818, 824 (8th Cir. 2009). Further, Rule 59(e) motions "serve the limited function of correcting manifest errors of law or fact or to present newly discovered evidence." *U.S. v. Metropolitan St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006) (internal quotation omitted). Plaintiff has not alleged that the Court committed any errors of law or fact. Nor has he contended that he has new evidence for this claim. In fact, it appears that this cause of action has existed throughout the case. The Court finds no good reason to permit the plaintiff to amend his complaint.

THEREFORE, IT IS ORDERED THAT plaintiff's motion to reconsider, Filing No. 225, is denied.

Dated this 6th day of February, 2017.

BY THE COURT:

s/ Joseph F. Bataillon

Senior United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JAMES M. SAYLOR,	4:12CV3115
Plaintiff,	MEMORANDUM AND ORDER
vs.	
RANDY KOHL, M.D.; DENNIS BAKEWELL; ROBERT HOUSTON; NATALIE BAKER, M.D.; MOHAMMAD KAMAL, M.D.; CAMERON WHITE, PhD.; MARK WEILAGE, PhD.; FRED BRITTN; KARI PEREZ, PhD.; and CORRECT CARE SOLUTIONS, LLC,	
Defendants.	

This matter is before the court on defendants Dr. Natalie Baker's and Correct Care Solutions, LLC's ("CCS") motions for summary judgment, Filing No.

201, Filing No. 203, and on defendants Dennis Bakewell, Fred Britten, Robert Houston, Dr. Mohammed Kamal, Dr. Randy Kohl, Dr. Kari Perez, Dr. Mark Weilage, and Dr. Cameron White's (collectively, "State defendants") motion for judgment on the pleadings, Filing No. 206. On interlocutory appeal, the United States Court of Appeals for the Eighth Circuit determined the State defendants are entitled to qualified immunity. *Saylor v. Nebraska*, 812 F.3d 637 (8th Cir. 2016). The case is now remanded with a mandate to dismiss the State defendants and enter any further necessary orders concerning CCS and Baker as are consistent with the rulings above.

Pursuant with the Eighth Circuit's mandate, the claims against the State defendants are dismissed. Accordingly, the State defendants' motion for judgment on the pleadings is denied as moot. Further, for the reasons below, Baker's and CCS's motions for summary judgment are granted.

I. BACKGROUND

This is the second suit plaintiff James Saylor, an inmate in the custody of the Nebraska Department of Correctional Services (NDCS), has brought regarding his treatment while imprisoned. *Saylor*, 812 F.3d at 641.

> In 2002, while a prisoner at the Nebraska State Penitentiary (NSP), Saylor was allegedly attacked, beaten, and raped by other inmates. In 2005 Saylor was diagnosed with Post-Traumatic Stress Disorder (PTSD) as a result of the 2002 attack, and he began seeing Dr. Glen Christensen, a

psychiatrist who contracted with NDCS. Saylor saw . . . Christensen monthly for treatment. In April 2005, Saylor filed a complaint in state court alleging that the State of Nebraska and NDCS failed to protect him from the assault and failed to properly treat him after the assault. The trial was held in 2009, and in 2010 the state court entered an order in favor of Saylor, finding that the staff was negligent in failing to provide him with reasonably adequate protection from the 2002 assault. The court also found that Saylor received inadequate medical treatment from . . . Kamal from 2002 to 2005. Saylor was awarded $250,000 in damages.

In April 2010, Saylor had his last meeting with Dr. Christensen because his contract with the prison was ending in May 2010. . . . Kamal was the only psychiatrist available to work with him at NSP. In May 2010, Saylor stated that he would not work with . . . Kamal . . . . Thus, Saylor agreed to forgo psychiatric care but wanted to continue taking his medications. A multidisciplinary hearing was held in 2010 to discuss the next step for Saylor . . . . Defendants . . . Weilage, ... Perez, and . . . Kamal participated in the meeting, along with others not named in the lawsuit. The group suggested that Saylor could be transferred to Tecumseh State Correctional Institution (TSCI) because .

. . Baker, a psychiatrist providing care at TSCI [through a contract with CCS], could work with Saylor. It is normal procedure for a correctional facility to transfer inmates who need mental health care beyond the resources available in their facility to a facility where such care is available. Warden Bakewell made the final decision, and Saylor was transferred to TSCI in September 2010. Saylor claims that the transfer was unnecessary, retaliatory, and caused his PTSD to worsen.

Saylor was initially classified as an inmate in Protective Custody but was placed in the TSCI hospital upon arrival because he attempted to hang himself before he was transferred. While in the hospital he met with . . . Baker. . . . Baker wanted to gradually take Saylor off Seroquel, one of his medicines. He agreed and decided to continue taking Xanax. Throughout his time at TSCI, Saylor saw Dr. Baker every couple of months and was subjected to monthly Mental Status Reviews, but he often refused to participate. After a week in the hospital, Saylor was placed in the Special Management Unit (SMU) for refusing to move to Protective Custody. SMU is the only facility with single cells, and Saylor specifically asked for his own cell because of his PTSD and fear of roommates. In early October 2010, he was moved to Protective Custody, which

> houses two inmates per cell. In late October 2010, he was placed on immediate segregation again and housed in SMU because he feared for his safety. Thereafter, in the normal course, Saylor's classification was reviewed every four months per policy and procedure, and he was allowed to attend each hearing. As a result of these reviews, TSCI concluded that Saylor could be released into Protective Custody, but he rejected that proposal each time due to his fear of roommates. Therefore, Saylor remained in SMU for the duration of his time at TSCI.

Id. at 641-42.1[12]

Saylor filed the present 42 U.S.C. § 1983 action against CCS, Baker, the State defendants, the State of Nebraska, and NDCS. Filing No. 113, Second Amended Complaint. He alleges that the events described above violated his rights under the First, Eighth, and Fourteenth Amendments. *Id.* Saylor also brings negligence claims against the defendants. *Id.* Saylor seeks nominal, compensatory, and punitive damages, as well as attorney fees and costs. *Id.* at 30. In addition, Saylor requests declaratory and injunctive relief. *Id.* at 25, 30.

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[1] Baker and CCS have submitted statements of undisputed facts in their briefs that are essentially identical to the findings of the Eighth Circuit quoted above. Because Saylor's responsive brief fails to set forth responses to each of Baker's and CCS's statements of fact, under NECivR 56.1(b)(1), the defendants' statements of facts are deemed admitted.

This court dismissed all claims against the State of Nebraska and NDCS on the ground of sovereign immunity, the negligence claims against the State defendants for lack of subject matter jurisdiction, and all claims for monetary damages brought against the State defendants in their individual capacities. Filing No. 124, Memorandum and Order. The State defendants subsequently filed a motion for summary judgment, Filing No. 141, which the court denied, Filing No. 178.

The State defendants then took an interlocutory appeal to the Eighth Circuit. Baker and CCS did not appeal. A split panel of the Eighth Circuit disagreed with this court's ruling, and held that the State defendants were entitled to summary judgment on the basis of qualified immunity. *Saylor*, 812 F.3d 637. In its thorough analysis, the Eighth Circuit found that none of Saylor's First, Eighth, or Fourteenth Amendment rights had been violated. *Id.*

The State defendants now seek judgment on the pleadings to implement the Eighth Circuit's mandate to this court. Filing No. 206, Motion for Judgment on the Pleadings. In addition, Baker and CCS argue they are entitled to summary judgment because the Eighth Circuit effectively determined that Saylor is not entitled to judgment as a matter of law on his remaining claims. Filing No. 201, Motion for Summary Judgment; Filing No. 203, Motion for Summary Judgment.

II. STANDARD OF REVIEW

A motion for judgment on the pleadings under Fed. R. Civ. P. 12(c) is reviewed under the same standards used to review a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *Ashley County, Ark. v. Pfizer,*

Inc., 552 F.3d 659, 665 (8th Cir.2009) (citation omitted). Judgment on the pleadings is appropriate only when there is no dispute as to any material facts and the moving party is entitled to judgment as a matter of law. *Id.* The court is required to accept as true all factual allegations set out in the complaint and to construe the complaint in the light most favorable to the plaintiff, drawing all inferences in her favor. *Id.* However, the court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The evidence must be viewed in the light most favorable to the nonmoving party, giving the nonmoving party the benefit of all reasonable inferences. *Kenney v. Swift Transp., Inc.*, 347 F.3d 1041, 1044 (8th Cir. 2003). "In ruling on a motion for summary judgment, a court must not weigh evidence or make credibility determinations." *Id.*

III. ANALYSIS

A. State Defendants' Motion for Judgment on the Pleadings

After this case was remanded from the Eighth Circuit, the State defendants, who received favorable rulings above, moved for judgment on the pleadings. Filing No. 206, Motion for Judgment on the Pleadings. Saylor urges this court to deny the motion. Filing No. 214, Brief in Opposition to Motion for Judgment on the Pleadings. But the parties' arguments are irrelevant. The decision of a federal appellate court establishes the law binding further action in the litigation by another body subject to its authority, i.e., the district court. *Pearson v. Norris*, 94 F.3d 406, 409 (8th Cir. 1996). The District Court is bound by the appellate decree and must carry it into execution. *Id.* On remand, the district court is without power to do anything contrary to either the letter or spirit of the mandate construed in light of the opinion of the appellate court deciding the case. *Id.* The Eighth Circuit instructed this court, in part, to "dismiss the [State defendants]." *Saylor*, 812 F.3d at 647. Therefore, it is this court's duty to dismiss all of Saylor's claims against the State defendants, regardless of the arguments the parties have raised as to those claims. The State defendants' motion is moot.

B. Constitutional Claims Against Baker and CCS

Baker and CCS argue they are entitled to summary judgment on Saylor's § 1983 claims against them. It is their contention that the Eighth Circuit's opinion explicitly holds that none of Saylor's First, Eighth, or Fourteenth Amendment rights were violated, by any of the defendants' alleged actions. In its mandate, the Eighth Circuit ordered this court to enter "necessary orders concerning [Baker and CCS] as are consistent with the rulings" of the Court above.

Id. at 647. Thus, even though Baker and CCS were not among the appealing defendants, they argue that this court is required to grant their motions for summary judgment.

The Eighth Circuit held that the State defendants were entitled to qualified immunity. The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). There is a two-step sequence for resolving qualified immunity claims. First, a court must decide whether the facts that a plaintiff has alleged (see Fed. Rules Civ. Proc. 12(b)(6), (c)) or shown (see Rules 50, 56) make out a violation of a constitutional right. *Id.* at 232. Second, the court must decide whether the right at issue was "clearly established" at the time of defendant's alleged misconduct. *Id.*

Above, the Eighth Circuit explicitly came to its holding under the first step of the qualified immunity sequence--by finding that the State defendants had *not actually violated Saylor's constitutional rights*; the decision was *not* that any constitutional rights implicated were not clearly established. *See Saylor*, 812 F.3d at 645. Therefore, the Eighth Circuit effectively decided not only the State defendants' qualified immunity but also the merits of Saylor's claims.

The question presented by Baker's and CCS's motions, then, is whether the Eighth Circuit's reasoning above applies to Baker and CCS as it did to the State defendants. Baker was a contractor of CCS

and provided treatment to Saylor once he was transferred to TSCI; neither Baker nor any other CCS agents were involved in the other actions alleged. Filing No. 208 at 4, Brief in Support of Motion for Summary Judgment of Natalie Baker, M.D.; Filing No. 204 at 3-4, Brief in Support of Motion for Summary Judgment of CCS. Therefore, only the allegations regarding Saylor's medical treatment at TSCI apply to the claims against Baker and CCS.

Section 1983 imposes liability for certain actions taken under color of law that deprive a person of a right secured by the Constitution and laws of the United States. *Magee v. Trustees of Hamline Univ., Minn.*, 747 F.3d 532, 535 (8th Cir. 2014). One such right is secured by the Eighth Amendment, which prohibits the infliction of cruel and unusual punishments on those convicted of crimes. *Saylor*, 812 F.3d at 643. In regards to medical care while in prison, the constitutional question is whether a defendant acted with deliberate indifference. *Id.* A prison official is deliberately indifferent if he or she knows of and disregards a serious medical need of a substantial risk to an inmate's health or safety. *Id.*

Above, the Eighth Circuit found that the State defendants had not violated Saylor's rights under the Eighth Amendment because the only changes Baker made to Saylor's treatment plans after Christensen left were either requested, or agreed to by Saylor. *Id.* at 645. The opinion above explicitly holds that the State defendants, and thus necessarily Baker and CCS, "met Saylor's medical needs beyond the minimum standard required. Defendants were aware of his medical needs and took steps to meet those needs." *Id.* Therefore, Baker and CCS are entitled to

summary judgment as a matter of law on the Eighth Amendment § 1983 claims.

First Amendment rights are also protected by § 1983. A plaintiff can succeed on a First Amendment retaliation claim under§ 1983 by showing (1) he or she engaged in a protected activity, (2) the government official took adverse action against him that would chill a person of ordinary firmness from continuing in the activity, and (3) the adverse action was motivated at least in part by the exercise of the protected activity. *Id.* In the present case, as noted above, the Eighth Circuit has held that Baker's psychiatric treatment of Saylor met constitutional requirements. Therefore Baker and CCS have not taken adverse action against Saylor. Thus, Baker and CCS are entitled to summary judgment on the First Amendment claims as well.

Finally, Baker and CCS also are entitled to summary judgment on the Fourteenth Amendment claims because, as the Eighth Circuit noted, to state a claim under the Due Process Clause, some interest must first be violated. *Id.* at 646. As discussed above, none of Baker's treatment decisions violated Saylor's rights. Therefore, Baker and CCS are entitled to summary judgment on the Fourteenth Amendment claims.

C. State-Law Negligence Claims

Baker and CCS also urge this court to decline to extend supplementary jurisdiction over Saylor's negligence claims against them. This court has neither federal question nor diversity subject matter jurisdiction over the negligence claims. But the court does have discretion to extend supplemental subject matter jurisdiction to the negligence claim against

Baker, even after the dismissal of the § 1983 claims against Baker. *See Arbaugh v. Y&H Corp., 546 U.S. 500, 514* ("when a court grants a motion to dismiss for failure to state a federal claim, the court generally retains discretion to exercise supplemental jurisdiction . . . over pendent state-law claims").

The court now declines to retain supplemental jurisdiction over the state-law negligence claims. Therefore, those claims are dismissed.

IT IS ORDERED that:

1. All of Saylor's claims against defendants Kohl, Bakewell, Houston, White, Weilage, Britten, and Perez are dismissed.

2. Defendants Kohl, Bakewell, Houston, White, Weilage, Britten, and Perez's motion for judgment on the pleadings, Filing No. 206, is denied as moot.

3. Defendants Baker's and CCS's motions for summary judgment, Filing No. 201, Filing No. 203, are granted.

4. All of Saylor's claims against defendants Baker and CCS are dismissed.

5. A separate judgment will be entered in accordance with the memorandum and order.

Dated this 28th day of November, 2016.

BY THE COURT:

s/ Joseph F. Bataillon

Senior United States District Judge

APPENDIX F

United States Court of Appeals
For the Eighth Circuit

No. 14-3889

James Saylor

Plaintiff - Appellee

v.

State of Nebraska

Defendant

Randy Kohl, M.D.; Dennis Bakewell; Robert Houston

Defendants – Appellants

Nebraska Department of Correctional Services; Natalie Baker, M.D.; Mohammad Kamal, M.D.

Defendants

Cameron White, PhD.; Mark Weilage, PhD.; Fred Britten; Kari Perez, PhD.

Defendants – Appellants

Correct Care Solutions, LLC.

Defendant

Appeal from United States District Court

for the District of Nebraska – Lincoln

Submitted: November 17, 2015

Filed: January 29, 2016 (Amended March 4, 2016)

Before RILEY, Chief Judge, BEAM and KELLY, Circuit Judges.

BEAM, Circuit Judge.

James Saylor sued the State of Nebraska, the Nebraska Department of Correctional Services (NDCS), Dr. Randy Kohl, Dennis Bakewell, Robert Houston, Dr. Natalie Baker, Dr. Mohammad Kamal, Dr. Cameron White, Dr. Mark Weilage, Fred Britten, Dr. Kari Perez, and Correct Care Solutions, LLC, (collectively "Defendants") under 42 U.S.C. § 1983 alleging violations of his rights under the First, Eighth, and Fourteenth Amendments of the United States Constitution. Defendants filed a motion to dismiss, and the district court dismissed Saylor's claims against the State of Nebraska and NDCS, as well as claims for monetary relief against individual defendants in their official capacities. The remaining defendants then moved for summary judgment on the basis of qualified immunity. The district court denied the motion. We reverse.

I. BACKGROUND

Saylor is a Nebraska inmate convicted of second-degree murder. Dr. Kohl is the Medical Services Director for NDCS. Other medical defendants include Dr. White, Dr. Weilage, and Dr.

Perez.[1] The nonmedical defendants include Houston, Warden Britten, and Warden Bakewell.[2] In 2002, while a prisoner at the Nebraska State Penitentiary (NSP), Saylor was allegedly attacked, beaten, and raped by other inmates. In 2005 Saylor was diagnosed with Post-Traumatic Stress Disorder (PTSD) as a result of the 2002 attack, and he began seeing Dr. Glen Christensen, a psychiatrist who contracted with NDCS. Saylor saw Dr. Christensen monthly for treatment. In April 2005, Saylor filed a complaint in state court alleging that the State of Nebraska and NDCS failed to protect him from the assault and failed to properly treat him after the assault. The trial was held in 2009, and in 2010 the state court entered an order in favor of Saylor, finding that the staff was negligent in failing to provide him with reasonably adequate protection from the 2002 assault. The court also found that Saylor received inadequate medical treatment from Dr. Kamal from 2002 to 2005. Saylor was awarded $250,000 in damages.

In April 2010, Saylor had his last meeting with Dr. Christensen because his contract with the prison was ending in May 2010. In addition, Saylor had monthly Mental Status Reviews with Cathy Moss, a Licensed Mental Health Practitioner. She informed Saylor that Dr. Kamal was the only psychiatrist available to work with him at NSP. In May 2010, Saylor stated that he would not work with Dr. Kamal

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[1] Dr. Natalie Baker, Dr. Mohammad Kamal, and Correct Care Solutions do not appeal the district court's order.

[2] At the time of the events leading up to this lawsuit, Fred Britten was the warden of TSCI and Robert Houston was the warden of NSP.

because Dr. Kohl had removed Dr. Kamal as Saylor's psychiatrist five years ago. Thus, Saylor agreed to forgo psychiatric care but wanted to continue taking his medications. A multidisciplinary hearing was held in 2010 to discuss the next step for Saylor because Dr. Christensen's contract ended and Saylor refused to work with Dr. Kamal. Defendants Dr. Weilage, Dr. Perez, and Dr. Kamal participated in the meeting, along with others not named in the lawsuit. The group suggested that Saylor could be transferred to Tecumseh State Correctional Institution (TSCI) because Dr. Baker, a psychiatrist providing care at TSCI, could work with Saylor. It is normal procedure for a correctional facility to transfer inmates who need mental health care beyond the resources available in their facility to a facility where such care is available. Warden Bakewell made the final decision, and Saylor was transferred to TSCI in September 2010. Saylor claims that the transfer was unnecessary, retaliatory, and caused his PTSD to worsen.

Saylor was initially classified as an inmate in Protective Custody[3] but was placed in the TSCI hospital upon arrival because he attempted to hang himself before he was transferred. While in the hospital he met with Dr. Baker. Dr. Baker wanted to

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[3] When an inmate arrives at TSCI, he is classified. Classifications include "[d]emotion to, continuation of and promotion from all custody grades;" "unit, work and program assignment;" and "[a]ssignment to, continuation of and removal from Administrative Segregation." "Administrative Segregation includes: Administrative Confinement, Intensive Management, Protective Custody, and Transition Confinement." Every four months the prison conducts a review of inmates in Administrative Segregation.

gradually take Saylor off Seroquel, one of his medicines. He agreed and decided to continue taking Xanax. Throughout his time at TSCI, Saylor saw Dr. Baker every couple of months and was subjected to monthly Mental Status Reviews, but he often refused to participate. After a week in the hospital, Saylor was placed in the Special Management Unit (SMU) for refusing to move to Protective Custody. SMU is the only facility with single cells, and Saylor specifically asked for his own cell because of his PTSD and fear of roommates. In early October 2010, he was moved to Protective Custody, which houses two inmates per cell. In late October 2010, he was placed on immediate segregation again and housed in SMU because he feared for his safety. Thereafter, in the normal course, Saylor's classification was reviewed every four months per policy and procedure, and he was allowed to attend each hearing. As a result of these reviews, TSCI concluded that Saylor could be released into Protective Custody, but he rejected that proposal each time due to his fear of roommates. Therefore, Saylor remained in SMU for the duration of his time at TSCI.

Saylor brought suit against Dr. Kohl and the other named Defendants under 42 U.S.C. § 1983. He claims that Defendants retaliated against him in violation of the First Amendment by transferring him to TSCI and reclassifying him, that the transfer and classification review process violated his due process rights under the Fourteenth Amendment, and that Defendants were deliberately indifferent to his PTSD in violation of the Eighth Amendment. Defendants filed a motion to dismiss, and the district court dismissed the State of Nebraska and NDCS from the case, and denied monetary relief against individual defendants in their official capacities. The remaining

defendants then moved for summary judgment based on qualified immunity. The district court stated that "[t]he constitutional right at issue arises under the Eighth Amendment," and thus, did not directly discuss Saylor's First or Fourteenth Amendment claims. On the Eighth Amendment claim, however, the court held, "[T]here are genuine issues of material fact on whether the defendants were deliberately indifferent to his serious medical needs so as to violate the Eighth Amendment." Thus, the court held that summary judgment was inappropriate and denied qualified immunity. In this interlocutory appeal Defendants challenge the district court's denial of summary judgment based on qualified immunity.

II. DISCUSSION

"Faced with an interlocutory appeal from the denial of qualified immunity, we accept as true the district court's findings of fact to the extent they are not 'blatantly contradicted by the record,' and review the district court's conclusions of law de novo." Walton v. Dawson, 752 F.3d 1109, 1116 (8th Cir. 2014) (quoting Scott v. Harris, 550 U.S. 372, 380 (2007)). Summary judgment is only proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Turney v. Waterbury, 375 F.3d 756,759 (8th Cir. 2004). Generally, summary judgment based on qualified immunity is a legal question. Id. at 760. However, "[i]f the district court fails to make a factual finding on an issue relevant to our purely legal review, we 'determine what facts the district court, in the light most favorable to the nonmoving party, *likely* assumed.'" Walton, 752 F.3d at 1116 (quoting Johnson v. Jones, 515 U.S. 304,319 (1995)). If this is

impossible, summary judgment is improper, and the case must be remanded. Id. at 1117.

"Government officials performing discretionary functions are entitled to qualified immunity unless they violate clearly established statutory or constitutional rights of which a reasonable person would have known." Whisman v. Rinehart, 119 F.3d 1303, 1309 (8th Cir. 1997). As in this case, qualified immunity is usually raised in a motion for summary judgment as an affirmative defense to the claims. Id. "To overcome the defense of qualified immunity, a plaintiff must show: (1) the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a constitutional or statutory right; and (2) the right was clearly established at the time of the deprivation." Howard v. Kan. City Police Dep't, 570 F.3d 984, 988 (8th Cir. 2009).

Whether there has been a deprivation of a constitutional right is a fact-intensive analysis. The meaning of "clearly established," however, has been litigated extensively and given a more definite meaning. The Eighth Circuit and the Supreme Court have held that a right is clearly established if "the 'contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" Buckley v. Rogerson, 133 F.3d 1125, 1128 (8th Cir. 1998) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). This is so that an "official is not required to guess the direction of future legal decisions." Id. Essentially, the law must be certain enough to give a "fair and clear warning." United States v. Lanier, 520 U.S. 259,271 (1997). If a plaintiff can show relevant case law in the jurisdiction at the time of the incident that should have put the

government employee on notice, qualified immunity is improper. See Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2086 (2011) (Kennedy, J., concurring).

A. Eighth Amendment Claim

Saylor "alleges that the defendants were deliberately indifferent to his serious medical needs in failing to properly treat him for [PTSD]." Here, Saylor essentially claims that his level of care after Dr. Christensen left NSP was so low as to constitute cruel and unusual punishment. The district court concluded that Defendants were not entitled to summary judgment based on qualified immunity for this claim because "[t]here are genuine disputes concerning the predicate facts material to the qualified immunity issue."[4] Defendants argue that this decision was in error. After reviewing the facts determined by the

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[4] Although we do not have jurisdiction "at this juncture to decide whether 'the district court's determination of evidentiary sufficiency' was correct," Walton, 752 F.3d at 1116 (quoting Thomas v. Talley, 251 F.3d 743, 747 (8th Cir. 2001)),

> we [do] have jurisdiction to decide, viewing the facts in the light most favorable to [the] plaintiff[], whether a reasonable fact-finder could find a violation of plaintiff['s] rights, whether the law establishing the violation was clearly established at the time in question, what was known to a person who might be shielded by qualified immunity, and the reasonableness of defendant[s'] actions.

S.M. v. Krigbaum, 808 F.3d 335, 340 (8th Cir. 2015). Here, we decide the "purely legal matter" of whether "the denial [of qualified immunity] was erroneous." Payne v. Britten, 749 F.3d 697, 700 (8th Cir. 2014).

district court, as well as those likely assumed, we agree.

"The Eighth Amendment 'prohibits the infliction of cruel and unusual punishments on those convicted of crimes.'" Nelson v. Corr. Med. Servs., 583 F.3d 522, 528 (8th Cir. 2009) (quoting Wilson v. Seiter, 501 U.S. 294, 296-97 (1991)). In regards to prison conditions, confinement, and medical care while in prison, "the constitutional question . . . is whether [Defendants] acted with 'deliberate indifference.'" Id. (quoting Wilson, 501 U.S. at 303). "A prison official is deliberately indifferent if she 'knows of and disregards' a serious medical need or a substantial risk to an inmate's health or safety." Id. (quoting Farmer v. Brennan, 511 U.S. 825, 837 (1994)). The deliberate indifference standard has both objective and subjective prongs. Id. at 529. The plaintiff must prove "that he suffered from an objectively serious medical need" and "that [Defendants] actually knew of but deliberately disregarded his serious medical need." Scott v. Benson, 742 F.3d 335, 340 (8th Cir. 2014). A medical condition is "objectively serious" if the prisoner was diagnosed by a doctor or it is so obvious that a lay person would recognize the medical need. Id. It is not contested that Saylor had a serious medical need; Dr. Christensen diagnosed Saylor with PTSD in 2005. Here, the subjective prong is the main issue. The subjective prong of deliberate indifference is an extremely high standard that requires a mental state of "more . . . than gross negligence." Fourte v. Faulkner Cty., Ark., 746 F.3d 384,387 (8th Cir. 2014) (quoting Jolly v. Knudsen, 205 F.3d 1094, 1096 (8th Cir. 2000)). It "requires a mental state 'akin to criminal recklessness.'" Jackson v. Buckman, 756 F.3d 1060, 1065 (8th Cir. 2004) (quoting Scott, 742 F.3d at

340). Even medical malpractice does not automatically constitute deliberate indifference. Id. at 1065-66.

For Houston, Britten, and Bakewell, the nonmedical defendants in this case, Saylor "must allege and show that the supervisor personally participated in or had direct responsibility for the alleged violations" or "that the supervisor actually knew of, and was deliberately indifferent to or tacitly authorized, the unconstitutional acts." McDowell v. Jones, 990 F.2d 433, 435 (8th Cir. 1993). They must have also had a "sufficiently culpable state of mind." Farmer, 511 U.S. at 834 (quoting Wilson, 501 U.S. at 297). Saylor provides no specific evidence to show that any of the nonmedical defendants were involved in, or directly responsible for, his allegedly insufficient medical care.[5] These defendants did not even participate in the multidisciplinary meeting regarding Saylor's transfer. Thus, because they did not have "a reason to believe (or actual knowledge) that prison doctors or their assistants [were] mistreating (or not treating) [Saylor]," they cannot be held liable for cruel and unusual punishment in violation of the Eighth

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[5] Saylor generally states in his complaint that "Defendants Bakewell, Britten and Houston are equally responsible participants in the Plaintiffs transfer, and any reduction in health care services to the Plaintiff [that] resulted from such transfer." Without any specifics, Saylor claims that the nonmedical defendants "continually exposed [him] to intolerable, horrifying, and medically detrimental conditions while he [was] housed at TSCI since 2010." These indiscriminate grievances are not enough to prove that they knew of, participated in, or implicitly authorized, the mistreatment or nontreatment of Saylor, such as is necessary to maintain a claim of deliberate indifference under the Eighth Amendment.

Amendment. Hayes v. Snyder, 546 F.3d 516,527 (7th Cir. 2008) (quoting Spruill v. Gillis, 372 F.3d 218,236 (3d Cir. 2004)).

As for the named medical defendants, Dr. Kohl, Dr. White, Dr. Weilage, and Dr. Perez, none were treating physicians. Thus, these defendants also acted in a supervisory capacity. "To impose supervisory liability, other misconduct [by the medical defendants] must be very similar to the conduct giving rise to liability." Livers v. Schenck, 700 F.3d 340,356 (8th Cir. 2012). This means that there is no real vicarious liability. See McDowell, 990 F.2d at 435. Rather, to be liable under § 1983 the medical defendants had to personally violate Saylor's rights or be responsible for a systematic condition that violates the Constitution. Livers, 700 F.3d at 357. Saylor's main argument is that the treatment that occurred after Dr. Christensen left NSP rises to the level of cruel and unusual punishment. Dr. Christensen's treatment plan was three-part: regular psychotherapy treatment, medication, and a safe environment. The medical defendants attempted to provide Saylor with another psychiatrist at NSP, ultimately found him another psychiatrist at TSCI, continued medication as they saw fit within their independent medical judgment, and gave him his requested private cell. To the extent there was any change in Dr. Christensen's treatment plan, Saylor requested some and agreed to other deviations. Specifically, Saylor stated he was willing to forgo seeing a doctor so long as he could continue taking his medications. After the meeting with Dr. Baker wherein she suggested easing him off Seroquel because it did not seem to be helping and was causing low blood pressure, Saylor agreed to continue taking Xanax.

Throughout his time of incarceration, the record shows that Defendants met Saylor's medical needs beyond the minimum standard required. Defendants were aware of his medical needs and took steps to meet those needs. Because Saylor cannot show that Defendants acted with deliberate indifference, there was no deprivation of his Eighth Amendment rights, and thus, Defendants are entitled to qualified immunity.

B. First and Fourteenth Amendment Claims

Defendants claim that the district court erred by failing to fully discuss the denial of summary judgment based on qualified immunity with regard to these claims. "It is 'certain, and the case law is clear, that [the officials] are entitled to a *thorough determination* of their claim[s] of qualified immunity if that immunity is to mean anything at all.'" Payne, 749 F.3d at 701 (first and third alteration in original) (emphasis added) (quoting O'Neil v. City of Iowa City, Iowa, 496 F.3d 915,917 (8th Cir. 2007)). A thorough determination discusses all of the claims litigated. Here, the court denied qualified immunity by generally denying Defendants' motion for summary judgment but only analyzed the Eighth Amendment claim. Nonetheless, a review of the facts determined by the district court, as well as those likely assumed, reveals no violation of either the First or Fourteenth Amendment, and thus, we reverse and dismiss these claims as well.

Saylor claims that in retaliation against him for filing the state tort case and in violation of the First Amendment, Defendants (1) terminated Dr. Christensen so that Saylor no longer received

adequate psychiatric care, (2) discontinued his medicines, (3) refused to provide him with psychotherapy, (4) transferred him to a new facility, and (5) kept him isolated in Administrative Segregation without review. Similarly, Saylor's Fourteenth Amendment substantive due process claim arises due to his transfer to TSCI and his subsequent confinement in SMU.

In order to succeed on a First Amendment retaliation claim Saylor must show that "(1) he engaged in a protected activity, (2) the government official took adverse action against him that would chill a person of ordinary firmness from continuing in the activity, and (3) the adverse action was motivated at least in part by the exercise of the protected activity." Revels v. Vincenz, 382 F.3d 870, 876 (8th Cir. 2004). The *reason* for the government official's action must have been to prevent the plaintiff from engaging in the protected activity. Id.

First, "inmates have no constitutional right to receive a particular or requested course of treatment, and prison doctors remain free to exercise their independent medical judgment." Meuir v. Greene Cty. Jail Emps., 487 F.3d 1115, 1118 (8th Cir. 2007) (quoting Dulany v. Carnahan, 132 F.3d 1234, 1239 (8th Cir. 1997)). As such, Defendants violated no constitutional right by assigning Saylor to another psychiatrist when Dr. Christensen's contract with NDCS ended or by changing Saylor's medication at the direction of a doctor. Second, "a prisoner enjoys no constitutional right to remain in a particular institution." Goff v. Burton, 7 F.3d 734, 737 (8th Cir. 1993) (quoting Murphy v. Mo. Dep't of Corr., 769 F.2d 502, 503 (8th Cir. 1985)). In fact, "prison officials 'may

transfer a prisoner for whatever reason or for no reason at all.'" Id. (quoting Olim v. Wakinekona, 461 U.S. 238,250 (1983)). However, retaliation against a prisoner cannot be the motivation behind the transfer. Id. Here, the clearly stated, nonretaliatory reason for the transfer was to provide Saylor with necessary psychiatric care. He refused to see Dr. Kamal at NSP, and Dr. Baker was available to work with Saylor at TSCI. Finally, Saylor was kept in Administrative Segregation, specifically SMU, because he requested his own cell due to his PTSD. This is the only area with single prisoner cells. Although he was cleared to be released into Protective Custody, he would have had to share a cell with a roommate, which he refused to do. It is blatantly contradictory to request a private cell with no roommates and then complain about isolation. Because none of Saylor's activities were protected and none of Defendants' actions were retaliatory, Saylor has no First Amendment claim.

"The Fourteenth Amendment's Due Process Clause protects persons against deprivations of life, liberty, or property." Wilkinson v. Austin, 545 U.S. 209, 221 (2005). To state a claim under the Due Process Clause, some interest must first be violated. See Singleton v. Cecil, 176 F.3d 419,424 (8th Cir. 1999). "A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' or it may arise from an expectation or interest created by state laws or policies." Wilkinson, 545 U.S. at 221. In most cases, substantive due process violations involve "marriage, family, procreation, and the right to bodily integrity." Singleton, 176 F.3d at 425 (quoting Albright v. Oliver, 510 U.S. 266,272 (1994)). More generally, the Supreme Court has held that substantive due process

"protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty.'" Id. (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

In regards to Saylor's transfer from NSP to TSCI:

> the Due Process Clause in and of itself [does not] protect a duly convicted prisoner against transfer from one institution to another within the state prison system. Confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose.

Meachum v. Fano, 427 U.S. 215, 225 (1976). Here, Saylor was transferred to a comparable prison for the sole purpose of obtaining psychiatric care. This does not violate the Due Process Clause of the Fourteenth Amendment, and neither does Saylor's confinement in SMU once he arrived at TSCI. Saylor only has a claim under the Fourteenth Amendment if the action by the government officials "impose[d] atypical and significant hardship on [him] in relation to the ordinary incidents of prison life." Sandin v. Conner, 515 U.S. 472, 484 (1995). Segregation due to a prisoner's request to be kept in a single prisoner cell because of PTSD is not an atypical or a significant hardship. Rather, TSCI made special accommodations for Saylor. Accordingly, there has been no constitutional violation, and thus, Saylor has no cognizable Fourteenth Amendment claim. Defendants are entitled to qualified immunity on these two issues.

III. CONCLUSION

The judgment of the district court is reversed, and this case is remanded to the district court with directions to dismiss the appellants and for the entry of any further necessary orders concerning the non-appealing parties as are consistent with the rulings of this court.

KELLY, Circuit Judge, dissenting.

The district court found that the evidence in this case, viewed in the light most favorable to Saylor, demonstrated a genuine dispute as to the facts relevant to qualified immunity. I agree with the district court that the evidence presented by Saylor, though not dispositive as to the merits of his claim, precludes summary judgment on the basis of qualified immunity.

In Saylor's previous state tort lawsuit, the state court found that the Department of Corrections had negligently failed to provide adequate care for Saylor's PTSD between June 11, 2002, and November 22, 2005. As the district court noted, the defendants presented no evidence suggesting that they were unaware of the prior state court judgment. For the purposes of the summary judgment analysis, there is no genuine dispute that all the defendants were actually aware of Saylor's serious medical needs and the risk of harm if he were denied adequate care. The district court found that Saylor had produced evidence—including his treatment records, his communications with prison staff, records of his transfer and administrative segregation, the affidavit of Dr. Christensen, and his own affidavit-to support his contention that the Department of Corrections had reverted to providing inadequate medical treatment

as they had previously. This evidence, viewed in the light most favorable to Saylor, tends to show that shortly after the judgment in his state tort case, Saylor's treatment by Dr. Christensen was abruptly discontinued; his treatment plan, including his drug therapy, was interrupted; the responsible Department of Corrections officials failed to develop an appropriate alternative treatment plan; prison staff returned to their prior practice of failing to respond or responding inadequately to Saylor's communications; and Saylor was transferred and placed on the most restrictive confinement classification possible, despite that classification's incompatibility with his health needs. The evidence does not establish that Saylor caused or consented to the changes to his treatment, or that Saylor's transfer and placement in the Special Management Unit were necessary and consistent with an adequate treatment plan. Moreover, the district court found that there was sufficient evidence of each defendant's involvement in Saylor's care to establish that they may have been personally aware of or involved in this allegedly unconstitutional treatment.

The district court's factual findings, rather than being "blatantly contradicted by the record," are well supported and reflect careful consideration of the record evidence in the light most favorable to Saylor. Walton, 752 F.3d at 1116. Based on these findings, it would be possible to conclude that the defendants "actually knew of, and [were] deliberately indifferent to or tacitly authorized" constitutionally deficient medical care for Saylor. McDowell, 990 F.2d at 435. The facts relevant to qualified immunity are genuinely disputed, precluding summary judgment on this basis. I would therefore affirm the district court's

denial of summary judgment as to Saylor's Eighth Amendment deliberate indifference claim.

With regard to Saylor's First and Fourteenth Amendment claims, the district court did not make any factual determinations or conduct the required "thorough determination" of the defendants' entitlement to qualified immunity. See Payne, 749 F.3d at 701 (quoting O'Neil, 496 F.3d at 918). Without the district court's factual findings, we have no basis for our review of the grant or denial of qualified immunity. Therefore, when the district court fails or refuses to rule on qualified immunity, "our court only exercises its jurisdiction to compel the district court to decide the qualified immunity question." Id. I would remand Saylor's First and Fourteenth Amendment claims to the district court for it to properly conduct the qualified immunity analysis.

APPENDIX G

United States Court of Appeals
For the Eighth Circuit

No. 14-3889

James Saylor

Plaintiff - Appellee

v.

State of Nebraska

Defendant

Randy Kohl, M.D.; Dennis Bakewell; Robert Houston

Defendants – Appellants

Nebraska Department of Correctional Services; Natalie Baker, M.D.; Mohammad Kamal, M.D.

Defendants

Cameron White, PhD.; Mark Weilage, PhD.; Fred Britten; Kari Perez, PhD.

Defendants – Appellants

Correct Care Solutions, LLC.

Defendant

Appeal from United States District Court

for the District of Nebraska – Lincoln

Submitted: November 17, 2015

Filed: January 29, 2016

Before RILEY, Chief Judge, BEAM and KELLY, Circuit Judges.

BEAM, Circuit Judge.

James Saylor sued the State of Nebraska, the Nebraska Department of Correctional Services (NDCS), Dr. Randy Kohl, Dennis Bakewell, Robert Houston, Dr. Natalie Baker, Dr. Mohammad Kamal, Dr. Cameron White, Dr. Mark Weilage, Fred Britten, Dr. Kari Perez, and Correct Care Solutions, LLC, (collectively "Defendants") under 42 U.S.C. § 1983 alleging violations of his rights under the First, Eighth, and Fourteenth Amendments of the United States Constitution. Defendants filed a motion to dismiss, and the district court dismissed Saylor's claims against the State of Nebraska and NDCS, as well as claims for monetary relief against individual defendants in their official capacities. The remaining defendants then moved for summary judgment on the basis of qualified immunity. The district court denied the motion. We reverse.

I. BACKGROUND

Saylor is a Nebraska inmate convicted of second-degree murder. Dr. Kohl is the Medical Services Director for NDCS. Other medical defendants include Dr. White, Dr. Weilage, and Dr.

Perez.[1] The nonmedical defendants include Houston, Warden Britten, and Warden Bakewell.[2] In 2002, while a prisoner at the Nebraska State Penitentiary (NSP), Saylor was allegedly attacked, beaten, and raped by other inmates. In 2005 Saylor was diagnosed with Post-Traumatic Stress Disorder (PTSD) as a result of the 2002 attack, and he began seeing Dr. Glen Christensen, a psychiatrist who contracted with NDCS. Saylor saw Dr. Christensen monthly for treatment. In April 2005, Saylor filed a complaint in state court alleging that the State of Nebraska and NDCS failed to protect him from the assault and failed to properly treat him after the assault. The trial was held in 2009, and in 2010 the state court entered an order in favor of Saylor, finding that the staff was negligent in failing to provide him with reasonably adequate protection from the 2002 assault. The court also found that Saylor received inadequate medical treatment from Dr. Kamal from 2002 to 2005. Saylor was awarded $250,000 in damages.

In April 2010, Saylor had his last meeting with Dr. Christensen because his contract with the prison was ending in May 2010. In addition, Saylor had monthly Mental Status Reviews with Cathy Moss, a Licensed Mental Health Practitioner. She informed Saylor that Dr. Kamal was the only psychiatrist available to work with him at NSP. In May 2010, Saylor stated that he would not work with Dr. Kamal

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[1] Dr. Natalie Baker, Dr. Mohammad Kamal, and Correct Care Solutions do not appeal the district court's order.

[2] At the time of the events leading up to this lawsuit, Fred Britten was the warden of TSCI and Robert Houston was the warden of NSP.

because Dr. Kohl had removed Dr. Kamal as Saylor's psychiatrist five years ago. Thus, Saylor agreed to forgo psychiatric care but wanted to continue taking his medications. A multidisciplinary hearing was held in 2010 to discuss the next step for Saylor because Dr. Christensen's contract ended and Saylor refused to work with Dr. Kamal. Defendants Dr. Weilage, Dr. Perez, and Dr. Kamal participated in the meeting, along with others not named in the lawsuit. The group suggested that Saylor could be transferred to Tecumseh State Correctional Institution (TSCI) because Dr. Baker, a psychiatrist providing care at TSCI, could work with Saylor. It is normal procedure for a correctional facility to transfer inmates who need mental health care beyond the resources available in their facility to a facility where such care is available. Warden Bakewell made the final decision, and Saylor was transferred to TSCI in September 2010. Saylor claims that the transfer was unnecessary, retaliatory, and caused his PTSD to worsen.

Saylor was initially classified as an inmate in Protective Custody[3] but was placed in the TSCI hospital upon arrival because he attempted to hang himself before he was transferred. While in the hospital he met with Dr. Baker. Dr. Baker wanted to

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[3] When an inmate arrives at TSCI, he is classified. Classifications include "[d]emotion to, continuation of and promotion from all custody grades;" "unit, work and program assignment;" and "[a]ssignment to, continuation of and removal from Administrative Segregation." "Administrative Segregation includes: Administrative Confinement, Intensive Management, Protective Custody, and Transition Confinement." Every four months the prison conducts a review of inmates in Administrative Segregation.

gradually take Saylor off Seroquel, one of his medicines. He agreed and decided to continue taking Xanax. Throughout his time at TSCI, Saylor saw Dr. Baker every couple of months and was subjected to monthly Mental Status Reviews, but he often refused to participate. After a week in the hospital, Saylor was placed in the Special Management Unit (SMU) for refusing to move to Protective Custody. SMU is the only facility with single cells, and Saylor specifically asked for his own cell because of his PTSD and fear of roommates. In early October 2010, he was moved to Protective Custody, which houses two inmates per cell. In late October 2010, he was placed on immediate segregation again and housed in SMU because he feared for his safety. Thereafter, in the normal course, Saylor's classification was reviewed every four months per policy and procedure, and he was allowed to attend each hearing. As a result of these reviews, TSCI concluded that Saylor could be released into Protective Custody, but he rejected that proposal each time due to his fear of roommates. Therefore, Saylor remained in SMU for the duration of his time at TSCI.

Saylor brought suit against Dr. Kohl and the other named Defendants under 42 U.S.C. § 1983. He claims that Defendants retaliated against him in violation of the First Amendment by transferring him to TSCI and reclassifying him, that the transfer and classification review process violated his due process rights under the Fourteenth Amendment, and that Defendants were deliberately indifferent to his PTSD in violation of the Eighth Amendment. Defendants filed a motion to dismiss, and the district court dismissed the State of Nebraska and NDCS from the case, and denied monetary relief against individual defendants in their official capacities. The remaining

defendants then moved for summary judgment based on qualified immunity. The district court stated that "[t]he constitutional right at issue arises under the Eighth Amendment," and thus, did not directly discuss Saylor's First or Fourteenth Amendment claims. On the Eighth Amendment claim, however, the court held, "[T]here are genuine issues of material fact on whether the defendants were deliberately indifferent to his serious medical needs so as to violate the Eighth Amendment." Thus, the court held that summary judgment was inappropriate and denied qualified immunity. In this interlocutory appeal Defendants challenge the district court's denial of summary judgment based on qualified immunity.

II. DISCUSSION

"Faced with an interlocutory appeal from the denial of qualified immunity, we accept as true the district court's findings of fact to the extent they are not 'blatantly contradicted by the record,' and review the district court's conclusions of law de novo." Walton v. Dawson, 752 F.3d 1109, 1116 (8th Cir. 2014) (quoting Scott v. Harris, 550 U.S. 372, 380 (2007)). Summary judgment is only proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Turney v. Waterbury, 375 F.3d 756, 759 (8th Cir. 2004). Generally, summary judgment based on qualified immunity is a legal question. Id. at 760. However, "[i]f the district court fails to make a factual finding on an issue relevant to our purely legal review, we 'determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed.'" Walton, 752 F.3d at 1116 (quoting Johnson v. Jones, 515 U.S. 304, 319 (1995)). If this is

impossible, summary judgment is improper, and the case must be remanded. Id. at 1117.

"Government officials performing discretionary functions are entitled to qualified immunity unless they violate clearly established statutory or constitutional rights of which a reasonable person would have known." Whisman v. Rinehart, 119 F.3d 1303, 1309 (8th Cir. 1997). As in this case, qualified immunity is usually raised in a motion for summary judgment as an affirmative defense to the claims. Id. "To overcome the defense of qualified immunity, a plaintiff must show: (1) the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a constitutional or statutory right; and (2) the right was clearly established at the time of the deprivation." Howard v. Kan. City Police Dep't, 570 F.3d 984, 988 (8th Cir. 2009).

Whether there has been a deprivation of a constitutional right is a fact-intensive analysis. The meaning of "clearly established," however, has been litigated extensively and given a more definite meaning. The Eighth Circuit and the Supreme Court have held that a right is clearly established if "the 'contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" Buckley v. Rogerson, 133 F.3d 1125, 1128 (8th Cir. 1998) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). This is so that an "official is not required to guess the direction of future legal decisions." Id. Essentially, the law must be certain enough to give a "fair and clear warning." United States v. Lanier, 520 U.S. 259,271 (1997). If a plaintiff can show relevant case law in the jurisdiction at the time of the incident that should have put the

government employee on notice, qualified immunity is improper. See Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2086 (2011) (Kennedy, J., concurring).

A. Eighth Amendment Claim

Saylor "alleges that the defendants were deliberately indifferent to his serious medical needs in failing to properly treat him for [PTSD]." Here, Saylor essentially claims that his level of care after Dr. Christensen left NSP was so low as to constitute cruel and unusual punishment. The district court concluded that Defendants were not entitled to summary judgment based on qualified immunity for this claim because "[t]here are genuine disputes concerning the predicate facts material to the qualified immunity issue."[4] Defendants argue that this decision was in error. After reviewing the facts determined by the

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[4] Although we do not have jurisdiction "at this juncture to decide whether 'the district court's determination of evidentiary sufficiency' was correct," Walton, 752 F.3d at 1116 (quoting Thomas v. Talley, 251 F.3d 743, 747 (8th Cir. 2001)),

> we [do] have jurisdiction to decide, viewing the facts in the light most favorable to [the] plaintiff[], whether a reasonable fact-finder could find a violation of plaintiff['s] rights, whether the law establishing the violation was clearly established at the time in question, what was known to a person who might be shielded by qualified immunity, and the reasonableness of defendant[s'] actions.

S.M. v. Krigbaum, 808 F.3d 335, 340 (8th Cir. 2015). Here, we decide the "purely legal matter" of whether "the denial [of qualified immunity] was erroneous." Payne v. Britten, 749 F.3d 697, 700 (8th Cir. 2014).

district court, as well as those likely assumed, we agree.

"The Eighth Amendment 'prohibits the infliction of cruel and unusual punishments on those convicted of crimes.'" Nelson v. Corr. Med. Servs., 583 F.3d 522, 528 (8th Cir. 2009) (quoting Wilson v. Seiter, 501 U.S. 294, 296-97 (1991)). In regards to prison conditions, confinement, and medical care while in prison, "the constitutional question ... is whether [Defendants] acted with 'deliberate indifference.'" Id. (quoting Wilson, 501 U.S. at 303). "A prison official is deliberately indifferent if she 'knows of and disregards' a serious medical need or a substantial risk to an inmate's health or safety." Id. (quoting Farmer v. Brennan, 511 U.S. 825, 837 (1994)). The deliberate indifference standard has both objective and subjective prongs. Id. at 529. The plaintiff must prove "that he suffered from an objectively serious medical need" and "that [Defendants] actually knew of but deliberately disregarded his serious medical need." Scott v. Benson, 742 F.3d 335, 340 (8th Cir.2014). A medical condition is "objectively serious" if the prisoner was diagnosed by a doctor or it is so obvious that a lay person would recognize the medical need. Id. It is not contested that Saylor had a serious medical need; Dr. Christensen diagnosed Saylor with PTSD in 2005. Here, the subjective prong is the main issue. The subjective prong of deliberate indifference is an extremely high standard that requires a mental state of "more . . . than gross negligence." Fourte v. Faulkner Cty., Ark., 746 F.3d 384, 387 (8th Cir.2014) (quoting Jolly v. Knudsen, 205 F.3d 1094, 1096 (8th Cir. 2000)). It "requires a mental state 'akin to criminal recklessness.'" Jackson v. Buckman, 756 F.3d 1060, 1065 (8th Cir. 2004) (quoting Scott, 742 F.3d at

340). Even medical malpractice does not automatically constitute deliberate indifference. Id. at 1065-66.

For Houston, Britten, and Bakewell, the nonmedical defendants in this case, Saylor "must allege and show that the supervisor personally participated in or had direct responsibility for the alleged violations" or "that the supervisor actually knew of, and was deliberately indifferent to or tacitly authorized, the unconstitutional acts." McDowell v. Jones, 990 F.2d 433, 435 (8th Cir. 1993). They must have also had a "sufficiently culpable state of mind." Farmer, 511 U.S. at 834 (quoting Wilson, 501 U.S. at 297). Saylor provides no specific evidence to show that any of the nonmedical defendants were involved in, or directly responsible for, his allegedly insufficient medical care.[5] These defendants did not even participate in the multidisciplinary meeting regarding Saylor's transfer. Thus, because they did not have "a reason to believe (or actual knowledge) that prison doctors or their assistants [were] mistreating (or not treating) [Saylor]," they cannot be held liable for cruel and unusual punishment in violation of the Eighth

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[5] Saylor generally states in his complaint that "Defendants Bakewell, Britten and Houston are equally responsible participants in the Plaintiffs transfer, and any reduction in health care services to the Plaintiff [that) resulted from such transfer." Without any specifics, Saylor claims that the nonmedical defendants "continually exposed [him] to intolerable, horrifying, and medically detrimental conditions while he [was] housed at TSCI since 2010." These indiscriminate grievances are not enough to prove that they knew of, participated in, or implicitly authorized, the mistreatment or nontreatment of Saylor, such as is necessary to maintain a claim of deliberate indifference under the Eighth Amendment.

Amendment. Hayes v. Snyder, 546 F.3d 516, 527 (7th Cir. 2008) (quoting Spruill v. Gillis, 372 F.3d 218, 236 (3d Cir. 2004)).

As for the named medical defendants, Dr. Kohl, Dr. White, Dr. Weilage, and Dr. Perez, none were treating physicians. Thus, these defendants also acted in a supervisory capacity. "To impose supervisory liability, other misconduct [by the medical defendants] must be very similar to the conduct giving rise to liability." Livers v. Schenck, 700 F.3d 340, 356 (8th Cir.2012). This means that there is no real vicarious liability. See McDowell, 990 F.2d at 435. Rather, to be liable under § 1983 the medical defendants had to personally violate Saylor's rights or be responsible for a systematic condition that violates the Constitution. Livers, 700 F.3d at 357. Saylor's main argument is that the treatment that occurred after Dr. Christensen left NSP rises to the level of cruel and unusual punishment. Dr. Christensen's treatment plan was three-part: regular psychotherapy treatment, medication, and a safe environment. The medical defendants attempted to provide Saylor with another psychiatrist at NSP, ultimately found him another psychiatrist at TSCI, continued medication as they saw fit within their independent medical judgment, and gave him his requested private cell. To the extent there was any change in Dr. Christensen's treatment plan, Saylor requested some and agreed to other deviations. Specifically, Saylor stated he was willing to forgo seeing a doctor so long as he could continue taking his medications. After the meeting with Dr. Baker wherein she suggested easing him off Seroquel because it did not seem to be helping and was causing low blood pressure, Saylor agreed to continue taking Xanax.

Throughout his time of incarceration, the record shows that Defendants met Saylor's medical needs beyond the minimum standard required. Defendants were aware of his medical needs and took steps to meet those needs. Because Saylor cannot show that Defendants acted with deliberate indifference, there was no deprivation of his Eighth Amendment rights, and thus, Defendants are entitled to qualified immunity.

B. First and Fourteenth Amendment Claims

Defendants claim that the district court erred by failing to fully discuss the denial of summary judgment based on qualified immunity with regard to these claims. "It is 'certain, and the case law is clear, that [the officials] are entitled to a *thorough determination* of their claim[s] of qualified immunity if that immunity is to mean anything at all.'" Payne, 749 F.3d at 701 (first and third alteration in original) (emphasis added) (quoting O'Neil v. City of Iowa City, Iowa, 496 F.3d 915, 917 (8th Cir. 2007)). A thorough determination discusses all of the claims litigated. Here, the court denied qualified immunity by generally denying Defendants' motion for summary judgment but only analyzed the Eighth Amendment claim. Nonetheless, a review of the facts determined by the district court, as well as those likely assumed, reveals no violation of either the First or Fourteenth Amendment, and thus, we reverse and dismiss these claims as well.

Saylor claims that in retaliation against him for filing the state tort case and in violation of the First Amendment, Defendants (1) terminated Dr. Christensen so that Saylor no longer received

adequate psychiatric care, (2) discontinued his medicines, (3) refused to provide him with psychotherapy, (4) transferred him to a new facility, and (5) kept him isolated in Administrative Segregation without review. Similarly, Saylor's Fourteenth Amendment substantive due process claim arises due to his transfer to TSCI and his subsequent confinement in SMU.

In order to succeed on a First Amendment retaliation claim Saylor must show that "(1) he engaged in a protected activity, (2) the government official took adverse action against him that would chill a person of ordinary firmness from continuing in the activity, and (3) the adverse action was motivated at least in part by the exercise of the protected activity." Revels v. Vincenz, 382 F.3d 870, 876 (8th Cir. 2004). The *reason* for the government official's action must have been to prevent the plaintiff from engaging in the protected activity. Id.

First, "inmates have no constitutional right to receive a particular or requested course of treatment, and prison doctors remain free to exercise their independent medical judgment." Meuir v. Greene Cty. Jail Emps., 487 F.3d 1115, 1118 (8th Cir. 2007) (quoting Dulany v. Carnahan, 132 F.3d 1234, 1239 (8th Cir. 1997)). As such, Defendants violated no constitutional right by assigning Saylor to another psychiatrist when Dr. Christensen's contract with NDCS ended or by changing Saylor's medication at the direction of a doctor. Second, "a prisoner enjoys no constitutional right to remain in a particular institution." Goff v. Burton, 7 F.3d 734, 737 (8th Cir. 1993) (quoting Murphy v. Mo. Dep't of Corr., 769 F.2d 502, 503 (8th Cir. 1985)). In fact, "prison officials 'may

transfer a prisoner for whatever reason or for no reason at all.'" Id. (quoting Olim v. Wakinekona, 461 U.S. 238, 250 (1983)). However, retaliation against a prisoner cannot be the motivation behind the transfer. Id. Here, the clearly stated, nonretaliatory reason for the transfer was to provide Saylor with necessary psychiatric care. He refused to see Dr. Kamal at NSP, and Dr. Baker was available to work with Saylor at TSCI. Finally, Saylor was kept in Administrative Segregation, specifically SMU, because he requested his own cell due to his PTSD. This is the only area with single prisoner cells. Although he was cleared to be released into Protective Custody, he would have had to share a cell with a roommate, which he refused to do. It is blatantly contradictory to request a private cell with no roommates and then complain about isolation. Because none of Saylor's activities were protected and none of Defendants' actions were retaliatory, Saylor has no First Amendment claim.

"The Fourteenth Amendment's Due Process Clause protects persons against deprivations of life, liberty, or property." Wilkinson v. Austin, 545 U.S. 209, 221 (2005). To state a claim under the Due Process Clause, some interest must first be violated. See Singleton v. Cecil, 176 F.3d 419, 424 (8th Cir. 1999). "A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' or it may arise from an expectation or interest created by state laws or policies." Wilkinson, 545 U.S. at 221. In most cases, substantive due process violations involve "marriage, family, procreation, and the right to bodily integrity." Singleton, 176 F.3d at 425 (quoting Albright v. Oliver, 510 U.S. 266,272 (1994)). More generally, the Supreme Court has held that substantive due process

"protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty.'" Id. (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

In regards to Saylor's transfer from NSP to TSCI:

> the Due Process Clause in and of itself [does not] protect a duly convicted prisoner against transfer from one institution to another within the state prison system. Confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose.

Meachum v. Fano, 427 U.S. 215, 225 (1976). Here, Saylor was transferred to a comparable prison for the sole purpose of obtaining psychiatric care. This does not violate the Due Process Clause of the Fourteenth Amendment, and neither does Saylor's confinement in SMU once he arrived at TSCI. Saylor only has a claim under the Fourteenth Amendment if the action by the government officials "impose[d] atypical and significant hardship on [him] in relation to the ordinary incidents of prison life." Sandin v. Conner, 515 U.S. 472, 484 (1995). Segregation due to a prisoner's request to be kept in a single prisoner cell because of PTSD is not an atypical or a significant hardship. Rather, TSCI made special accommodations for Saylor. Accordingly, there has been no constitutional violation, and thus, Saylor has no cognizable Fourteenth Amendment claim. Defendants are entitled to qualified immunity on these two issues.

III. CONCLUSION

The judgment of the district court is reversed, and the case is dismissed.

KELLY, Circuit Judge, dissenting.

The district court found that the evidence in this case, viewed in the light most favorable to Saylor, demonstrated a genuine dispute as to the facts relevant to qualified immunity. I agree with the district court that the evidence presented by Saylor, though not dispositive as to the merits of his claim, precludes summary judgment on the basis of qualified immunity.

In Saylor' s previous state tort lawsuit, the state court found that the Department of Corrections had negligently failed to provide adequate care for Saylor's PTSD between June 11, 2002, and November 22, 2005. As the district court noted, the defendants presented no evidence suggesting that they were unaware of the prior state court judgment. For the purposes of the summary judgment analysis, there is no genuine dispute that all the defendants were actually aware of Saylor's serious medical needs and the risk of harm if he were denied adequate care. The district court found that Saylor had produced evidence – including his treatment records, his communications with prison staff, records of his transfer and administrative segregation, the affidavit of Dr. Christensen, and his own affidavit – to support his contention that the Department of Corrections had reverted to providing inadequate medical treatment as they had previously. This evidence, viewed in the light most favorable to Saylor, tends to show that shortly after the judgment in his state tort case, Saylor's treatment by Dr. Christensen was abruptly

discontinued; his treatment plan, including his drug therapy, was interrupted; the responsible Department of Corrections officials failed to develop an appropriate alternative treatment plan; prison staff returned to their prior practice of failing to respond or responding inadequately to Saylor's communications; and Saylor was transferred and placed on the most restrictive confinement classification possible, despite that classification's incompatibility with his health needs. The evidence does not establish that Saylor caused or consented to the changes to his treatment, or that Saylor's transfer and placement in the Special Management Unit were necessary and consistent with an adequate treatment plan. Moreover, the district court found that there was sufficient evidence of each defendant's involvement in Saylor's care to establish that they may have been personally aware of or involved in this allegedly unconstitutional treatment.

The district court's factual findings, rather than being "blatantly contradicted by the record," are well supported and reflect careful consideration of the record evidence in the light most favorable to Saylor. Walton, 752 F.3d at 1116. Based on these findings, it would be possible to conclude that the defendants "actually knew of, and [were] deliberately indifferent to or tacitly authorized" constitutionally deficient medical care for Saylor. McDowell, 990 F.2d at 435. The facts relevant to qualified immunity are genuinely disputed, precluding summary judgment on this basis. I would therefore affirm the district court's denial of summary judgment as to Saylor's Eighth Amendment deliberate indifference claim.

With regard to Saylor's First and Fourteenth Amendment claims, the district court did not make

any factual determinations or conduct the required "thorough determination" of the defendants' entitlement to qualified immunity. See Payne, 749 F.3d at 701 (quoting O'Neil, 496 F.3d at 918). Without the district court's factual findings, we have no basis for our review of the grant or denial of qualified immunity. Therefore, when the district court fails or refuses to rule on qualified immunity, "our court only exercises its jurisdiction to compel the district court to decide the qualified immunity question." Id. I would remand Saylor's First and Fourteenth Amendment claims to the district court for it to properly conduct the qualified immunity analysis.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

JAMES M. SAYLOR,	Case No. 4:12-CV-3115
Plaintiff,	NOTICE OF DENIAL OF CERTIORARI
vs.	
RANDY KOHL, M.D., et al.,	
Defendants.	

This notice serves to advise the Court that the U.S. Supreme Court has denied Plaintiff James Saylor's petition for writ of certiorari. *See Saylor v. Kohl, et al.*, No. 16-5, 580 U.S.___, 2016 WL 3552706 (Oct. 3, 2016), available at: http://bit.ly/2e5djvd.

Submitted October 13, 2016.

RANDY KOHL, M.D.,
CAMERON WHITE, Ph.D.,
MARK WEILAGE, Ph.D.,
ROBERT HOUSTON,
FRED BRITTEN, DENNIS
BAKEWELL, KARI

PEREZ, Ph.D., and MOHAMMAD KAMAL, M.D., Defendants.

By: DOUGLAS J. PETERSON

Attorney General of Nebraska

By: *s/ David A. Lopez*

David A. Lopez, NE #24947

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Attorneys for State Defendants

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2016, I electronically filed the foregoing document with the Clerk of the United States District Court for the District of Nebraska, using the CM/ECF system, causing notice of such filing to be served upon all parties' counsel of record.

By: */s/ David A. Lopez*

APPENDIX I

United States Court of Appeals

For the Eighth Circuit

No. 23-3414

James Saylor

Appellant

v.

Rob Jeffreys, Director of the Nebraska Department of Correctional Services, in his official capacity

Appellee

Appeal from United States District Court for the District of Nebraska – Omaha (8:20-cv-00264-JMG)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 22, 2025

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Susan E. Bindler

APPENDIX J

Pertinent Parts of Operative Complaint (R. Doc. 51)

60. Between September 14, 2010, and April 6, 2021, the date on which this Verified Amended Complaint was filed pursuant to the Prison Mailbox Rule, and continuously, Plaintiff was housed in solitary confinement because he had PTSD, except between July 25, 2016, and January 24, 2018, when Plaintiff was housed on the DCS Mental Health Unit. Plaintiff continues to be housed in solitary confinement because he has PTSD.

61. While housed in solitary confinement between September 14, 2010, and March 22, 2021, Plaintiff was seen by a psychiatrist either irregularly or not at all, prescribed psychiatric medications were often not provided or discontinued, and Plaintiff received no psychotherapy until 2020. Once again, as in the 2002 to 2007 period, Plaintiff adapted to the situation by using solitary confinement to protect him from the source of his ultimate fears - being forced to share a cell with a cellmate. As before, Plaintiff became reliant upon solitary confinement, and the longer he remained in solitary confinement, the greater Plaintiff's reliance became. And as Plaintiff's reliance on solitary confinement grew, his PTSD symptoms worsened.

62. In 2016, after six years of continuous solitary confinement, upon learning of plans to transfer him

back to TSCI, Plaintiff had a breakdown. Instead of treating Plaintiff's breakdown as a health care crisis, prison officials carried out the transfer and placed Plaintiff in a suicide cell where he remained for weeks. Plaintiff's health deteriorated in the suicide cell, and Plaintiff had to be hospitalized. Immediately following hospitalization, Plaintiff was suddenly transferred to the DCS Mental Health Unit where Plaintiff was provided with a single cell and other necessary accommodations. Plaintiff remained on the Mental Health Unit from July 25, 2016, to January 24, 2018.

63. On January 24, 2018, prison staff suddenly and unexpectedly ordered Plaintiff to move off the Mental Health Unit, prepare to have a cellmate, and do without the other accommodations that Plaintiff had received on the Mental Health Unit, e.g. meals on the unit and showering alone. Plaintiff was unable to comply with the order. Staff then placed Plaintiff in LCC C Unit, which was a solitary confinement unit.

64. Plaintiff did not violate any rules or do anything wrong that might have justified his removal from the Mental Health Unit, nor does anyone allege that Plaintiff committed a rule violation or did something wrong.

65. Although numerous transfers have occurred, Plaintiff has remained in solitary confinement because he has PTSD since his removal from the Mental Health Unit on January 24, 2018.

66. In 2020, prison staff made multiple efforts to place Plaintiff in a permanent single cell on the DCS ADA Unit. These efforts were overridden by Director

Frakes and other high-ranking DCS staff members. Plaintiff's need for a reasonable accommodation was denied.

67. Plaintiff is literally trapped in solitary confinement as a result of his disability, PTSD, and has remained in solitary confinement as a result since 2002, except for when a single cell on the protective custody unit was arranged by Dr. Christensen, from October 26, 2007 to September 14, 2010, and when Plaintiff was accommodated on the Mental Health Unit, from July 25, 2016 to January 24, 2018.

68. Since June 11, 2002,Plaintiff has spent more than 170 months in solitary confinement because of his disability, PTSD. Plaintiff remains in solitary confinement because he has PTSD.

. . .

113. Beyond these conventional considerations, Plaintiff has treatment needs that cannot be met in solitary confinement. Solitary confinement is detrimental to Plaintiff's health and health care needs, resulting in the Plaintiff's reliance on solitary confinement and a worsening of Plaintiff's PTSD. Beyond being a "nicer place," the ADA galley or Mental Health Unit would also provide conditions necessary to Plaintiff's health and health care; inmates with a relatively low threat-potential and increased human interaction and socialization.

. . .

130. Plaintiff has a right to effective treatment for his serious medical need, PTSD. DCS has limited Plaintiff in the enjoyment of his right to effective treatment for such, because solitary confinement

prevents PTSD treatment from being effective, and because solitary confinement has caused Plaintiff's PTSD to worsen.

. . .

133. The following is a list of examples of programs, activities, services, aids, etc., that Plaintiff has been denied or to which Plaintiff has had inferior access as a result of Plaintiff's disability. In most cases, the program or activity was denied because Plaintiff was confined in solitary confinement. These are just examples, not a complete listing:

. . .

> b. Adequate PTSD/psychiatric/mental health treatment. Plaintiff has been unable to access this meaningfully because solitary confinement prevents effective treatment of Plaintiff's PTSD. Plaintiff needs proper housing in order to properly access PTSD treatment: in addition, by denying Plaintiff adequate psychiatric and mental health treatment for his PTSD, prison officials have denied Plaintiff the ability to be released from solitary confinement and the ability to access virtually all DCS programs and activities. Had Plaintiff received "timely and necessary" care for his PTSD, Plaintiffs fears of his cellmate and the other inmates would have disappeared, and Plaintiff would have been released from solitary confinement because he would have been able to share a cell with another inmate. In addition, Plaintiff would have been able to participate in all other DCS programs and activities. Such constitutes exclusion from medical services, which is a program, service or activity,

presenting a discrimination claim. *Kiman v. New Hampshire Department of Corrections*, 451 F. 3rd 274, 284, 286-7 (1st cr. 2006). See also *Allah v. Goord*, 405 F. Supp. 2d 265 (S.D.N.Y. 2005); also, if Medical deprivation causes prisoner to be excluded from other services programs, or activities, or constitutes discrimination based on disability, etc. *Kiman*, 451 F.3d. at288-89.

. . .

g. Headache medication. While in solitary confinement, staff maintains the necessary medication that Plaintiff needs for migraine headaches. Staff refuses to let Plaintiff access that medication when he has a migraine headache and needs that medication. Plaintiff is left in pain. Inmates not confined in solitary confinement are permitted to maintain such medication in their cells. Plaintiff cannot access medical without this medication. Such constitutes a denial of access to part of the prison's program of medical services. (See *Kiman*)

. . .

l. Preparation and consideration for parole. Plaintiff has been eligible for parole throughout the entire period he has been in solitary confinement, since 2002. Instead of housing Plaintiff in solitary confinement, DCS had a duty to make sure Plaintiff had a fair shot a getting parole, and DCS had a duty to prepare Plaintiff for parole. Instead, DCS has destroyed Plaintiff's parole status by branding Plaintiff as a violent inmate, security threat, or trouble-maker – just because Plaintiff has a disability.

All denials of programs and activities that denied treatment that resulted in remaining in solitary confinement also apply to parole. But for all these denials, Plaintiff would have received parole.

. . .

n. Freedom from restraints. Plaintiff is chained and restrained head-to-foot whenever out ofhis cell due to solitary confinement status. Plaintiff cannot even take a normal stride when he walks. Inmates not in solitary confinement are not restrained. These restraints have caused injury. Plaintiff has endured fourteen-plus years of being placed in restraints.