

APPENDIX

A

No. 25-1514

FILED
Jun 24, 2026
KELLY L. STEPHENS, Clerk

FILED
Jun 24, 2026
KELLY L. STEPHENS, Clerk

Plaintiff-Appellant,

v.

Defendants-Appellees.

O R D E R

Marlin D. Lowery, a pro se Michigan litigant, has filed a petition for rehearing of this court's order of April 1, 2026, affirming the district court's dismissal of his complaint.

Upon consideration, this panel concludes that it did not misapprehend or overlook any point of law or fact when it issued its order. *See* Fed. R. App. P. 40(b)(1)(A).

We therefore **DENY** the petition for rehearing.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens
Kelly L. Stephens, Clerk

NOT RECOMMENDED FOR PUBLICATION

No. 25-1514

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

*Received
Set 4-11-2026
mdd*

FILED

Apr 1, 2026

KELLY L. STEPHENS, Clerk

MARLIN D. LOWERY,

Plaintiff-Appellant,

v.

CHEBOYGAN, MI AREA PUBLIC SCHOOLS, et
al.,

Defendants-Appellees.

)
)
)
) ON APPEAL FROM THE UNITED
) STATES DISTRICT COURT FOR
) THE EASTERN DISTRICT OF
) MICHIGAN
)
)
)

ORDER

Before: NORRIS, BLOOMEKATZ, and HERMANDORFER, Circuit Judges.

Marlin D. Lowery, a pro se Michigan litigant, appeals the district court's judgment dismissing his complaint filed under 42 U.S.C. § 1983. Some of the defendants move to dismiss Lowery's appeal for lack of subject-matter jurisdiction. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). As set forth below, we deny the defendants' motion to dismiss and affirm the district court's judgment.

Beginning in 2018, Lowery worked as a bus driver for the Cheboygan Area Public Schools during the academic year. He applied for unemployment benefits when his hours were cut for the summer in 2021 and 2022. The Michigan Unemployment Insurance Agency found him to be ineligible for benefits under Michigan Compiled Laws § 421.27(i)(2)'s "school denial period" provision. That provision effectively says that "employees working for an educational institution, who are not teachers, researchers, or principal administrators, may not receive unemployment benefits during summer break if they have a reasonable assurance that they will be working in the

academic year that follows the summer break.”¹ *Adams v. W. Ottawa Pub. Schs.*, 746 N.W.2d 113, 115 (Mich. Ct. App. 2008) (per curiam).

After unsuccessfully appealing the ineligibility determinations through the administrative process and to the Cheboygan County Circuit Court, Lowery filed a § 1983 complaint against the Cheboygan Area Public Schools, Superintendent Spencer Byrd, Human Resources Director Marlene Alexander, and members of the Board of Education (School Defendants) as well as the Michigan Unemployment Insurance Agency, Director Julia Dale, Deputy Director Kimberly Berry, and Internal Controls Division Administrator Teresa Burns (State Defendants). Seeking monetary, injunctive, and declaratory relief, Lowery generally asserted that the defendants violated his rights to procedural and substantive due process under the Fourteenth Amendment.

The State Defendants moved to dismiss Lowery’s complaint for lack of subject-matter jurisdiction and for failure to state a claim, while the School Defendants filed a motion to dismiss for failure to state a claim and for summary judgment. A magistrate judge recommended that the district court dismiss Lowery’s complaint for failure to allege a plausible due process claim. Over Lowery’s objections, the district court adopted the magistrate judge’s report and recommendation, granted the defendants’ motions, and dismissed the complaint for failure to state a claim and for lack of subject matter jurisdiction. Lowery filed a motion for rehearing or reconsideration, which the district court denied.

¹ The provision specifically states:

With respect to service performed in other than an instructional, research, or principal administrative capacity for an institution of higher education . . . or for an educational institution other than an institution of higher education . . . , benefits are not payable based on those services for any week of unemployment . . . that commences during the period between 2 successive academic years or terms to any individual if that individual performs the service in the first of the academic years or terms and if there is a reasonable assurance that the individual will perform the service for an institution of higher education or an educational institution other than an institution of higher education in the second of the academic years or terms.

While his post-judgment motion was still pending, Lowery filed a notice of appeal in the Federal Circuit. Pointing out that Lowery's appeal did not fall within its limited jurisdiction, the Federal Circuit transferred the appeal to this court.

The School Defendants move to dismiss Lowery's appeal, asserting that his failure to sufficiently state a federal claim deprived the district court and this court of subject-matter jurisdiction. Federal district courts "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331; *see also* U.S. Const. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . ."). A case "arises under" federal law when the "causes of action are created by federal law, that is, where federal law provides a right to relief." *Eastman v. Marine Mech. Corp.*, 438 F.3d 544, 550 (6th Cir. 2006). "In determining what 'arises under' federal law, we follow the 'well-pleaded complaint rule,'" which means that "we look to what 'necessarily appears' on the face of the plaintiff's properly pleaded complaint to assess whether a claim under federal law has been asserted." *Patterson v. UnitedHealth Grp. Inc.*, 161 F.4th 415, 421 (6th Cir. 2025) (quoting *Aetna Health Inc. v. Davila*, 542 U.S. 200, 207 (2004)).

On its face, Lowery's complaint asserted § 1983 claims for the alleged violation of his rights to procedural and substantive due process under the Fourteenth Amendment. Therefore, the district court had—and this Court has—subject-matter jurisdiction over Lowery's case. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998). Whether Lowery plausibly alleged a due process claim presents a different issue.

We review de novo the district court's decision granting the defendants' motions to dismiss for failure to state a claim. *See Jackson v. Ford Motor Co.*, 842 F.3d 902, 906 (6th Cir. 2016). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

To state a procedural due process claim, Lowery “must plead a property interest protected by the Due Process Clause, a deprivation of this property interest, and that the State did not give him adequate procedural rights to protect against an erroneous deprivation.” *Kaplan v. Univ. of Louisville*, 10 F.4th 569, 577 (6th Cir. 2021). To have a protected property interest in a benefit, Lowery “must have more than a unilateral expectation of it” and “must, instead, have a legitimate claim of entitlement to it.” *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). The district court concluded that Lowery failed to plausibly allege a procedural due process claim because he did not have a protected property interest in unemployment benefits given that he was never found to be eligible for such benefits. *Cf. Cahoo v. SAS Analytics Inc.*, 912 F.3d 887, 900 (6th Cir. 2019) (recognizing that *recipients* of unemployment benefits have a protected property interest in those benefits).

“Substantive due process prohibits behavior from state actors that shocks the conscience and protects those interests that the Supreme Court has found so rooted in the traditions and conscience of our people as to be fundamental.” *Kerchen v. Univ. of Mich.*, 100 F.4th 751, 763 (6th Cir. 2024) (citation modified). The district court determined that Lowery failed to plausibly allege a substantive due process claim because the allegations in the complaint neither implicated a fundamental right nor involved conscience-shocking behavior.

On appeal, Lowery does not specifically address the district court’s conclusion that he failed to plausibly allege a procedural or substantive due process claim. “[W]here a plaintiff fails to address the district court’s reasoning in disposing of a claim on . . . [a] motion to dismiss, we have deemed the claim forfeited.” *Scott v. First S. Nat’l Bank*, 936 F.3d 509, 522 (6th Cir. 2019) (quoting *Rees v. W.M. Barr & Co., Inc.*, 736 F. App’x 119, 124-25 (6th Cir. 2018)).

Lowery instead asserts that the defendants discriminated against him based on his gender in violation of Title VII of the Civil Rights Act and the Equal Protection Clause of the Fourteenth Amendment by allowing a female bus driver to receive unemployment benefits while denying such benefits to him and other male bus drivers. But Lowery did not assert a Title VII or equal protection claim for gender discrimination in his complaint. He cannot raise a new claim now on appeal. *See Tchankpa v. Ascena Retail Grp., Inc.*, 951 F.3d 805, 817 (6th Cir. 2020).

Lowery further contends that the district court ignored Michigan Compiled Laws § 421.27(i)(5), which provides:

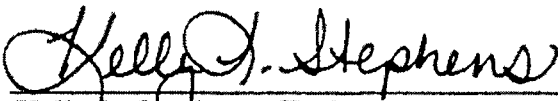
Benefits based upon services in other than an instructional, research, or principal administrative capacity for an institution of higher education are not denied for any week of unemployment commencing during the period between 2 successive academic years or terms solely because the individual had performed the service in the first of the academic years or terms and there is reasonable assurance that the individual will perform the service for an institution of higher education or an educational institution other than an institution of higher education in the second of the academic years or terms, unless a denial is required as a condition for full tax credit against the tax imposed by the federal unemployment tax act, 26 USC 3301 to 3311.

Mich. Comp. Laws § 421.27(i)(5) (effective Dec. 29, 2020, to Apr. 1, 2025). Because Lowery did not provide services for “an institution of higher education,” this subsection does not apply. *See id.* § 421.53(2) (defining “institution of higher education”). And even if § 421.27(i)(5) creates a “school period denial” exception, Lowery has not established that the defendants violated the Due Process Clause by concluding, either explicitly or implicitly, that this alleged exception did not cover his situation.

According to Lowery, the district court also ignored § 104 of Public Law No. 91-373. But Lowery fails to explain how that statute shows that the defendants violated the Due Process Clause. This argument therefore does not remedy the deficiencies in Lowery’s due process claim.

For these reasons, we **DENY** the School Defendants’ motion to dismiss and **AFFIRM** the district court’s judgment dismissing Lowery’s complaint for failure to state a claim.

ENTERED BY ORDER OF THE COURT


Kelly L. Stephens, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Apr 1, 2026
KELLY L. STEPHENS, Clerk

No. 25-1514

MARLIN D. LOWERY,

Plaintiff-Appellant,

v.

CHEBOYGAN, MI AREA PUBLIC SCHOOLS, et
al.,

Defendants-Appellees.

Before: NORRIS, BLOOMEKATZ, and HERMANDORFER, Circuit Judges.

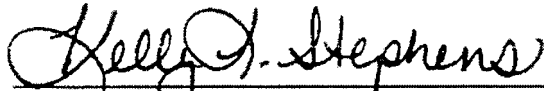
JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Bay City.

THIS CAUSE was heard on the record from the district court and was submitted on the
briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court
is AFFIRMED.

ENTERED BY ORDER OF THE COURT



Kelly L. Stephens, Clerk

APPENDIX

B

No. 1:24-cv-11604

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

July 21, 2025

MARLIN D. LOWERY,

Plaintiff,

v.

Case No. 24-cv-11604
Honorable Linda V. Parker

CHEBOYGAN AREA PUBLIC
SCHOOLS, et al.,

Defendants.

**OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR
REHEARING OR RECONSIDERATION**

On June 20, 2024, Plaintiff filed this pro se action against Defendants pursuant to 42 U.S.C. § 1983. Several defendants subsequently filed a motion to dismiss or for summary judgment (ECF No. 24), which this Court granted in a decision issued on February 26, 2025 (ECF No. 34). Finding that Plaintiff failed to state a claim upon which relief could be granted against the remaining defendants for the reasons the Court dismissed Plaintiff's claims against the moving defendants, the Court sua sponte dismissed those claims as well. The matter is now before the Court on Plaintiff's "motion for rehearing or reconsideration." (ECF No. 36.)

*did not file under
this rule*

*read this &
appeals process*

Eastern District of Michigan Local Rule 7.1(h)(1) precludes motions for reconsideration of final orders or judgments. Instead, motions seeking relief from

a final order or judgment must be filed under Federal Rule of Civil Procedure 59(e) or 60(b). E.D. Mich. LR 7.1(h)(1). Thus the Court construes Plaintiff's filing as seeking relief under Rule 59(e) and/or Rule 60(b). Pro 32

Motions to alter or amend judgment pursuant to Rule 59(e) may be granted only if there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice. *GenCorp., Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999). "Rule 59(e) permits a court to alter or amend a judgment, but it 'may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.'" *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n. 5 (2008) (citing 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2810.1 (2d ed. 1995)); see also *Mich. Flyer LLC v. Wayne Cnty. Airport Auth.*, 860 F.3d 425, 431 (6th Cir. 2017) (quoting *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998)) ("A motion under Rule 59(e) is not an opportunity to re-argue a case."). "A motion to alter or reconsider a judgment is an extraordinary remedy and should be granted sparingly because of the interests in finality and conservation of scarce judicial resources." *In re J & M Salupo Dev. Co.*, 388 B.R. 795, 805 (B.A.P. 6th Cir. 2008) (quoting *Am. Textile Mfrs. Inst., Inc. v. Limited Inc.*, 179 F.R.D. 541, 547 (S.D. Ohio 1998)).

Rule 60(b) allows a court to relieve a party from a final judgment, order, or proceeding for a number of reasons:

(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). The party seeking relief under Rule 60(b) bears the burden of establishing the grounds for such relief by clear and convincing evidence.” Info-Hold, Inc. v. Sound Merchandising, Inc., 538 F.3d 448, 454 (6th Cir. 2008) (internal quotation marks and citations omitted).

Plaintiff fails to satisfy his burden of showing that he is entitled to relief under either rule. His “motion,” which lacks a brief as required by Eastern District of Michigan Local Rule 7.1(d), does not identify any reasons why the Court’s previous decision should be reconsidered. Plaintiff attaches several exhibits to his motion, on which he has made some hand-written notations. However, it is not the Court’s obligation to construct arguments for the parties. *United States v. Jones*, 53 F.4th 414, 417 n.1 (6th Cir. 2022) (citing *Brenay v. Schartow*, 709 F. App’x 331, 337 (6th Cir. 2017) (“[I]t is not for the court to search the record and construct arguments. Parties must do that for themselves.”)).

How else to show error in order? ex exhibits

it was to draw attention to Magistrate's errors

Accordingly,

IT IS ORDERED that Plaintiff's motion for rehearing or reconsideration (ECF No. 36) is **DENIED**.

s/ Linda V. Parker
LINDA V. PARKER
U.S. DISTRICT JUDGE

Dated: July 21, 2025

I hereby certify that a copy of the foregoing document was mailed to counsel of record and/or pro se parties on this date, July 21, 2025, by electronic and/or U.S. First Class mail.

s/Aaron Flanigan
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Feb 26, 2025

MARLIN D. LOWERY,

Plaintiff,

v.

Case No. 24-cv-11604
Honorable Linda V. Parker

CHEBOYGAN AREA PUBLIC
SCHOOLS, SPENCER BYRD,
MARLENE ALEXANDER, LEO
UNEMPLOYMENT INSURANCE
AGENCY, JULIA DALE, UIA
DEPUTY DIRECTOR, TERRY
BURNS, UNIDENTIFIED
EMPLOYEES 1-3, STATE OF
MICHIGAN, DEPARTMENT OF
LABOR AND ECONOMIC
OPPORTUNITY, and
UNEMPLOYMENT INSURANCE
AGENCY,

Defendants.

**OPINION AND ORDER ADOPTING MAGISTRATE JUDGE'S
JANUARY 23, 2025 REPORT AND RECOMMENDATION**

Plaintiff Marlin Lowery, proceeding pro se, commenced this lawsuit pursuant to 42 U.S.C. § 1983 against Cheboygan Area Schools; Spencer Byrd, Cheboygan Schools Superintendent; Marlene Alexander, Cheboygan Schools Human Resource Director; Michigan Labor and Economic Opportunity ("LEO") Unemployment Insurance Agency ("UIA"); Julia Dale, UIA Director; Kimberly

Berry,¹ UIA Deputy Director; Terry Burns,² UIA Internal Controls Division Administrator; and three unidentified state employees (collectively, “Defendants”) on June 24, 2024. (ECF No. 1.) Mr. Lowery, a bus driver for Cheboygan Area Schools,³ alleges that Defendants denied him unemployment benefits starting in June 2021 in violation of his procedural and substantive due process rights under the Fourteenth Amendment. (*Id.*) Mr. Lowery also claims that Defendants’ refusal to provide him unemployment benefits violates the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act. (*Id.*)

This matter is currently before the Court on Defendants’ motion to dismiss, ECF No. 22, Defendants’ motions to dismiss and for summary judgment, ECF No. 24, and Mr. Lowery’s motion to compel, ECF No. 28. The matter has been referred to Magistrate Judge Patricia T. Morris for all pretrial proceedings, including a hearing and determination of all non-dispositive matters pursuant to 28 U.S.C. § 636(b)(1)(A) and/or a report and recommendation on all dispositive matters pursuant to 28 U.S.C. § 636(b)(1)(B). (ECF No. 25.)

¹ The complaint does not identify the UIA Deputy Director, but the record indicates that Kimberly Berry is the Deputy Director. (*See* ECF No. 52 at Pg ID 175.)

² The Complaint identifies Ms. Burns as “Terry,” but the record indicates that her name is Teresa. (*See* ECF No. 22 at Pg ID 157.)

³ Mr. Lowery also notes that he is a collective bargaining representative in the school district. (ECF No. 1 at Pg ID 31.)

On January 23, 2025, Magistrate Judge Morris issued a Report and Recommendation (“R&R”), recommending that the Court grant Defendants’ motions to dismiss and for summary judgment and deny as moot Mr. Lowery’s motion to compel. (See ECF No. 32 at Pg ID 846-47.) She further recommended that the Court *sua sponte* dismiss the case against all Defendants. (*Id.* at Pg ID 855-56.) At the conclusion of her R&R, Magistrate Judge Morris informs the parties that they must file any objections to the R&R within fourteen days. (*Id.* at Pg ID 856.) Mr. Lowery filed objections on February 6, 2025. (See ECF No. 32.)

A party may object to a magistrate judge’s non-dispositive orders. Fed. R. Civ. P. 72(a); 28 U.S.C. § 636(b)(1)(A). The reviewing court must affirm the magistrate judge’s ruling unless the objecting party demonstrates that the magistrate judge’s ruling is “clearly erroneous” or “contrary to law.” *Id.* The “clearly erroneous” standard does not empower a reviewing court to reverse a magistrate judge’s finding because it would have decided the matter differently. *See, e.g., Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985). Instead, the “clearly erroneous” standard is met when despite the existence of evidence to support the finding, the court, upon reviewing the record in its entirety, “is left with the definite and firm conviction that a mistake has been committed.” *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). An order is contrary to law “when

it fails to apply or misapplies relevant statutes, case law, or rules of procedure.”

Catskill Dev. v. Park Place Ent. Corp., 206 F.R.D. 78, 86 (S.D.N.Y. 2002).

When objections are filed to a magistrate judge’s report and recommendation on a dispositive matter, the Court “make[s] a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.” 28 U.S.C. § 636(b)(1)(C). The Court, however, “is not required to articulate all of the reasons it rejects a party’s objections.” *Thomas v. Halter*, 131 F. Supp. 2d 942, 944 (E.D. Mich. 2001) (citations omitted). A party’s failure to file objections to certain conclusions of the report and recommendation waives any further right to appeal on those issues. *See Smith v. Detroit Fed’n of Tchrs. Loc. 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Likewise, the failure to object to certain conclusions in the magistrate judge’s report releases the Court from its duty to independently review those issues. *See Thomas v. Arn*, 474 U.S. 140, 149 (1985).

The Court has reviewed Mr. Lowery’s objections to the R&R and is unconvinced that Magistrate Judge Morris’ ruling that Mr. Lowery’s motion to compel is moot is clearly erroneous or contrary to law. The Court has also made a *de novo* determination of the portions of the R&R relating to Defendants’ motions to dismiss and for summary judgment to which Mr. Lowery objects and reaches the same conclusion as Magistrate Judge Morris.

The Court therefore adopts Magistrate Judge Morris’ recommendations.

Accordingly,

IT IS ORDERED that Defendants' motions to dismiss and for summary judgment pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 56, respectively (ECF Nos. 22, 24), are **GRANTED**.

IT IS FURTHER ORDERED that Mr. Lowery's motion to compel (ECF No. 28) is **DENIED AS MOOT**.

IT IS FURTHER ORDERED that the Court *sua sponte* dismisses the Complaint against all Defendants, even those that have not requested such relief, because Mr. Lowery has failed to sufficiently state any federal claims, depriving the Court of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).

SO ORDERED.

s/ Linda V. Parker
LINDA V. PARKER
U.S. DISTRICT JUDGE

Dated: February 26, 2025

I hereby certify that a copy of the foregoing document was mailed to counsel of record and/or pro se parties on this date, February 26, 2025, by electronic and/or U.S. First Class mail.

s/Aaron Flanigan
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARLIN D. LOWERY,

Plaintiff,

v.

Case No. 24-cv-11604
Honorable Linda V. Parker

CHEBOYGAN AREA PUBLIC
SCHOOLS, SPENCER BYRD,
MARLENE ALEXANDER, LEO
UNEMPLOYMENT INSURANCE
AGENCY, JULIA DALE, UIA
DEPUTY DIRECTOR, TERRY
BURNS, UNIDENTIFIED
EMPLOYEES 1-3, STATE OF
MICHIGAN, DEPARTMENT OF
LABOR AND ECONOMIC
OPPORTUNITY, and
UNEMPLOYMENT INSURANCE
AGENCY,

Defendants.

JUDGMENT

Plaintiff Marlin Lowery, proceeding pro se, commenced this lawsuit pursuant to 42 U.S.C. § 1983 against Cheboygan Area Schools; Spencer Byrd, Cheboygan Schools Superintendent; Marlene Alexander, Cheboygan Schools Human Resource Director; Michigan Labor and Economic Opportunity ("LEO") Unemployment Insurance Agency ("UIA"); Julia Dale, UIA Director; Kimberly

Berry,¹ UIA Deputy Director; Terry Burns,² UIA Internal Controls Division Administrator; and three unidentified state employees (collectively, “Defendants”) on June 24, 2024. (ECF No. 1.) Mr. Lowery, a bus driver for Cheboygan Area Schools,³ alleges that Defendants denied him unemployment benefits starting in June 2021 in violation of his procedural and substantive due process rights under the Fourteenth Amendment. (*Id.*) Mr. Lowery also claims that Defendants’ refusal to provide him unemployment benefits violates the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act. (*Id.*)

In an Opinion and Order entered on this date, the Court adopted Magistrate Judge Patricia T. Morris’ January 23, 2025 Report and Recommendation as to Mr. Lowery’s complaint. (*See* ECF No. 32.)

IT IS ORDERED that Defendants’ motions to dismiss and for summary judgment pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 56, respectively, (ECF Nos. 22, 24) are **GRANTED**.

IT IS FURTHER ORDERED that Mr. Lowery’s motion to compel (ECF No. 28) is **DENIED AS MOOT**.

¹ The complaint does not identify the UIA Deputy Director, but the record indicates that Kimberly Berry is the Deputy Director. (*See* ECF No. 52 at Pg ID 175.)

² The Complaint identifies Ms. Burns as “Terry,” but the record indicates that her name is Teresa. (*See* ECF No. 22 at Pg ID 157.)

³ Mr. Lowery also notes that he is a collective bargaining representative in the school district. (ECF No. 1 at Pg ID 31.)

IT IS FURTHER ORDERED that the Court *sua sponte* dismisses the Complaint against all Defendants, even those that have not requested such relief, because Mr. Lowery has failed to sufficiently state any federal claims, depriving the Court of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).

SO ORDERED.

s/ Linda V. Parker
LINDA V. PARKER
U.S. DISTRICT JUDGE

Dated: February 26, 2025

I hereby certify that a copy of the foregoing document was mailed to counsel of record and/or pro se parties on this date, February 26, 2025, by electronic and/or U.S. First Class mail.

s/Aaron Flanigan
Case Manager

1-23-2025

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

MARLIN D. LOWERY,

Plaintiff,

v.

CHEBOYGAN AREA PUBLIC
SCHOOLS, SPENCER BYRD,
MARLENE ALEXANDER, LEO
UNEMPLOYMENT INSURANCE
AGENCY, JULIA DALE, UIA
DEPUTY DIRECTOR, TERRY
BURNS, UNIDENTIFIED
EMPLOYEES 1-3, STATE OF
MICHIGAN, DEPARTMENT OF
LABOR AND ECONOMIC
OPPORTUNITY, and
UNEMPLOYMENT INSURANCE
AGENCY,

Defendants.

Case No. 1:24-cv-11604

Linda V. Parker
United States District Judge

Patricia T. Morris
United States Magistrate Judge

REPORT AND RECOMMENDATION
TO GRANT DEFENDANTS' MOTIONS TO DISMISS
AND FOR SUMMARY JUDGMENT (ECF Nos. 22, 24)

AND
TO DENY PLAINTIFF'S MOTION TO COMPEL (ECF No. 28) AS MOOT

I. RECOMMENDATION

For the following reasons, **IT IS RECOMMENDED** that Defendants' motions to dismiss and for summary judgment (ECF Nos. 22, 24) be **GRANTED** to

the extent that they seek dismissal. If adopted, Plaintiff's motion to compel (ECF No. 28) should be **DENIED AS MOOT** and the case be dismissed in its entirety.

II. REPORT

A. Introduction

Plaintiff, proceeding *pro se*, filed a complaint alleging four counts,¹ all asserting due process violations under the Fourteenth Amendment of the United States Constitution. The first two counts aver procedural due process violations while the third and fourth allege substantive due process violations, the last count also references the CARES Act. (ECF No. 1).

B. Background

Although the complaint is somewhat difficult to interpret, the following background facts are elucidated in Defendants' briefs with corresponding exhibits. Plaintiff has worked for Defendant School District as a bus driver since 2018. (ECF No. 24, PageID.302). Although Plaintiff has occasionally done some summer driving work, he is technically laid off during summer vacations between academic terms. (*Id.*).

Prior to the summer of 2021, Plaintiff received a letter of reasonable assurance from School District that he would be employed in the fall when school resumed for

¹ I note that the fourth count is also numbered as three (III) but will be construed as the fourth.

the 2021-22 school year and Plaintiff did indeed resume work in the fall of 2021. (*Id.*). Similarly, in the summer of 2022, Plaintiff was laid off and although he contends that he did not receive the letter of reasonable assurance of continued employment, the letter was sent on June 7, 2022, to his school email address as well as placed in the envelope containing his pay stubs for the first June payroll cycle. (*Id.* at PageID.302–03). Plaintiff returned to work in the fall of 2022.

Plaintiff's claims for unemployment compensation for the summers of 2021 and 2022 were denied administratively as barred by Michigan law, specifically Mich. Comp. Laws 421.27(i)(2). (*Id.* at PageID.304). Plaintiff appealed the agency determination and on April 24, 2023, Administrative Law Judge (“ALJ”) Nida R. Samona upheld the agency's determinations denying unemployment claims for 2021 and 2022. (*Id.*). Both decisions from the ALJ relied on Mich. Comp. Laws 421.27(i)(2) as the basis for upholding the denial of unemployment benefits. (*Id.*). Plaintiff continued to seek relief in the administrative realm and on August 23, 2023, the Michigan Unemployment Insurance Appeals Commission (“UIA”) denied Plaintiff's request for review, finding no good cause to reopen the matter; thus, affirming the ALJ's decisions. (*Id.* at PageID.304–05).

Plaintiff then exercised his right to judicial review of the administrative decisions and filed a compliant in the Cheboygan County Circuit Court. On March 28, 2024, the circuit court entered an order affirming the UIA's decisions in their

entirety. (*Id.* at PageID.305). Plaintiff did not file an appeal of the circuit court's decision to the Michigan Court of Appeals but instead brought the instant action in federal court. (*Id.*).

C. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(1), the Court's assessment of jurisdictional issues must precede any evaluation of a claim's merits: once jurisdiction "ceases to exist, the only function remaining to the [C]ourt is that of announcing" its lack of jurisdiction "and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998); *see also Bouye v. Bruce*, 61 F.4th 485, 490 (6th Cir. 2023). Thus, where a defendant moves to dismiss a complaint under both Rule 12(b)(1) and Rule 12(b)(6), the Rule 12(b)(1) challenge must be addressed first because "the Rule 12(b)(6) challenge becomes moot if [the] court lacks subject matter jurisdiction." *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990).

Under Rule 12(b)(1), a defendant may move to dismiss a complaint on the grounds that the district court lacks subject matter jurisdiction. Where subject matter jurisdiction is challenged under Rule 12(b)(1), the plaintiff carries the burden of proving that the district court has jurisdiction. *See id.* The Court will accept the complaint's factual allegations as true insofar as the defendant facially challenges the "sufficiency of the pleading" itself. *Ohio Nat. Life Ins. Co. v. United States*, 922

F.2d 320, 325 (6th Cir. 1990). However, the complaint's factual allegations are not presumptively true where there is a factual controversy. Instead, the Court must "weigh the conflicting evidence to arrive at the factual predicate that subject matter jurisdiction exists or does not exist." *Id.*

If the Court find that it has subject matter jurisdiction, it may then assess whether the complaint contains "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). If the complaint lacks sufficient "factual matter (taken as true) to" provide "plausible grounds to infer" that the elements of a claim for relief could be met, then it must be dismissed for failure to state a claim. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007); *see* Fed. R. Civ. P. 12(b)(6). A complaint must "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Mere labels, conclusory statements, or "formulaic recitations" of the elements of a cause of action are not sufficient to meet this burden if they are unsupported by adequate factual allegations. *Id.* (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). The requirement to provide a plausible claim does not require that a claim be "probable"; however, a claim must be more than merely "conceivable." *Ashcroft v. Iqbal*, 556 U.S. 662, 678–80 (2009).

Summary judgment is appropriate where the moving party "shows that 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). A material fact is one that would affect

“the outcome of the suit under the governing law. . . .” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Court’s role at summary judgment is not “to weigh the evidence and determine the truth of the matter but to determine whether there . . . are any genuine factual issues that properly can be resolved only by a finder of fact. . . .” *Id.* at 249–50, 255. Accordingly, “the evidence, all facts, and any inferences that may be drawn from the facts” must be viewed “in the light most favorable to the nonmoving party.” *Pure Tech Sys., Inc. v. Mt. Hawley Ins. Co.*, 95 F. App’x 132, 135 (6th Cir. 2004). The nonmoving party cannot rebut a Rule 56 motion by merely alleging that a genuine factual dispute exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 n.3 (1986) (quoting Fed. R. Civ. P. 56(e)). Instead, the nonmoving party must show that there is sufficient evidence in the record for “a reasonable finder of fact [to] find in its favor.” *Anderson*, 477 U.S. at 248.

D. Analysis

The Michigan statute that forms the basis for the administrative decisions is Mich. Comp. Laws 421.27(i)(2), which states:

With respect to service performed in other than an instructional, research, or principal administrative capacity for an institution of higher education . . . benefits shall not be paid based on those services for any week of unemployment beginning after December 31, 1977, that commences during the period between 2 successive academic years or term to any individual if that individual performs the service in the first of the academic years or terms and if there is a reasonable assurance that the individual will perform the service for an institution of higher education or an educational institution other than an institution of higher education in the second of the academic years or terms.

Put more plainly, “employees working for an educational institution, who are not teachers, researchers, or principal administrators, may not receive unemployment benefits during summer break if they have a reasonable assurance that they will be working in the academic year that follows the summer break.” *Adams v. West Ottawa Pub. Sch.*, 277 Mich. App. 461, 462 (Mich. Ct. App. Mar. 14, 2008). Since Plaintiff had been given the reasonable assurance that he would be employed in the fall after each of the summer breaks in 2021 and 2022, the ALJ and Cheboygan Circuit Court concurred that Plaintiff was barred from receiving unemployment benefits for the summer vacation periods in 2021 and 2022.

Plaintiff alleges that his Fourteenth Amendment rights to both procedural and substantive due process were violated.

The Fourteenth Amendment of the United States Constitution protects individuals from the deprivation of life, liberty, or property without due process of law. The clause has both a substantive and a procedural component. Procedural due process is traditionally viewed as the requirement that the government provide a fair procedure when depriving someone of life, liberty, or property; substantive due process protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them.

To make out a claim for a violation of procedural due process, the plaintiff has the burden of showing that (1) he had a life, liberty, or property interest protected by the Due Process Clause; (2) he was deprived of this protected interest; and (3) the state did not afford him adequate procedural rights prior to depriving him of the property interest.

EJS Props., LLC v. City of Toledo, 698 F.3d 845, 855 (6th Cir. 2012) (internal

quotation marks and citations omitted).

“Recipients of unemployment compensation have constitutionally protected property interests in unemployment benefits.” *Cahoo v. SAS Analytics, Inc.*, 912 F.3d 887, 900 (6th Cir. 2019). In *Cahoo*, the plaintiffs’ unemployment benefits were terminated without any pre-deprivation process based on suspicion of fraud as detected by the State’s software program. The Sixth Circuit held that the “[p]laintiffs have a significant interest in maintaining eligibility for unemployment benefits” and that while the State’s “legitimate interest in preserving fiscal and administrative resources [from fraud] cannot be ignored, this interest is not so great as to negate the need for adequate notice before interfering with these substantial property interests.” *Id.* This case illustrates that the property interest is created when a person is deemed eligible because the person has an interest in maintaining that eligibility. Similarly, in *Kreps v. Michigan Unemployment Insurance Agency*, No. 22-12020, 2023 WL 4494339 (E.D. Mich. July 12, 2023), the plaintiffs fell into three categories: (1) found eligible, but payments never made; (2) found eligible, then found ineligible, and payments stopped before redeterminations were final; and (3) found eligible, then found ineligible, and UIA sought recollection of overpayments before redeterminations were final. *Id.* at *4. In *Krepps*, like in *Cahoo*, the finding of a protected property interest in “maintaining eligibility” presupposes that there has been a finding of eligibility to maintain.

In the instant case, Plaintiff was never found to be eligible for unemployment benefits, so he was never a “recipient” of such benefits and thus does not have any property interest to be maintained. In other words, Plaintiff has never had a protected interest in unemployment benefits that would trigger procedural due process protection. Accordingly, I recommend that his procedural due process claims (Counts One and Two) be dismissed for failure to state a claim under Rule 12(b)(6).

Substantive due process protects only those rights that are fundamental, *i.e.*, that are “deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty or justice would exist if they are sacrificed.” *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). “[A] careful description of the asserted fundamental interest is essential, otherwise the Clause would turn into a font of tort law to be superimposed upon whatever systems may already be administered by the States.” *Guertin v. State*, 912 F.3d 907, 918 (6th Cir. 2019) (internal quotation marks and citations omitted).

If no fundamental interest is implicated, a plaintiff “could succeed in alleging a substantive due process claim only by setting out conduct that, if true, would ‘shock the conscience.’ ” *Handy-Clay v. City of Memphis*, 695 F.3d 531, 547 (6th Cir. 2012). While the Sixth Circuit “has, on occasion, expressed some doubt about the utility of the ‘shocks the conscience’ test in any arena than that of excessive force . . . [it] ha[s] consistently relied upon this standard in a variety of contexts.” *Menge*

v. City of Highland Park, No. 21-10152, 2022 WL 54544, at *8 (E.D. Mich. Jan. 5, 2022) (quoting *Lillard v. Shelby Cnty. Bd. of Educ.*, 76 F.3d 716, 725 (6th Cir. 1996)).

“It has also ‘recognize[d] the difficulty of determining where conscience-shocking behavior resides on the continuum of actions.’ ” *Id.* (quoting *Range v. Douglas*, 763 F.3d 573, 590 (6th Cir. 2014)).

As noted above, Plaintiff does not assert any protected interest. Further, I suggest that he has not otherwise alleged facts implicating a fundamental right protected by substantive due process. In addition, the conduct alleged, a finding that he is ineligible for unemployment benefits, is not the sort of conduct that could be conscience shocking. I therefore recommend that any substantive due process claims (Counts Three and Four) be dismissed for failure to state a claim under Rule 12(b)(6).

I also note that Plaintiff’s reference to the CARES Act does not assist him since the “CARES Act does not create a private cause of action.” *Mescall v. U.S. Dep’t of Justice*, No. 2-20-CV-13364, 2021 WL 199277, at *2 (E.D. Mich. Jan. 19, 2021). Finally, while Defendants raise other meritorious grounds for dismissal and summary judgment, they need not be addressed due to the above analysis.

In sum, I recommend dismissal of Plaintiff’s constitutional claims because he has not plausibly alleged facts meeting the requirements of either type of due process claim. If this recommendation is adopted, I further recommend that the Court

dismiss *sua sponte* the case against all Defendants, even those that have not filed motions to do so, because Plaintiff's failure to plausibly state any federal claims deprives this Court of jurisdiction under Rule 12(b)(1).

E. Conclusion

For these reasons, **IT IS RECOMMENDED** that Defendants' motions to dismiss and for summary judgment (ECF Nos. 22, 24) be **GRANTED** to the extent that they seek dismissal. If adopted, Plaintiff's motion to compel (ECF No. 28) should be **DENIED AS MOOT** and the case be dismissed in its entirety.

III. REVIEW

Pursuant to Rule 72(b)(2) of the Federal Rules of Civil Procedure, "[w]ithin 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within 14 days after being served with a copy." Fed. R. Civ. P. 72(b)(2); *see also* 28 U.S.C. § 636(b)(1). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Sec'y of Health & Human Servs.*, 932 F.2d 505 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). The parties are advised that making some objections, but failing to raise others, will not preserve all the objections a party may have to this R&R. *Willis v. Sec'y of Health & Human Servs.*, 931 F.2d 390, 401 (6th Cir. 1991); *Dakroub v.*

Detroit Fed'n of Teachers Local 231, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this magistrate judge.

Any objections must be labeled as "Objection No. 1," "Objection No. 2," etc. Any objection must recite precisely the provision of this R&R to which it pertains. Not later than 14 days after service of an objection, the opposing party may file a concise response proportionate to the objections in length and complexity. Fed. R. Civ. P. 72(b)(2); E.D. Mich. LR 72.1(d). The response must specifically address each issue raised in the objections, in the same order, and labeled as "Response to Objection No. 1," "Response to Objection No. 2," etc. If the Court determines that any objections are without merit, it may rule without awaiting the response.

Date: January 23, 2025

s/ PATRICIA T. MORRIS
Patricia T. Morris
United States Magistrate Judge