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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Stephen Louis Rudisill,

Plaintiff,

vs.

Charles Ryan, et al.

Defendants.

No. CV 13-1149-TUC-CKJ

ORDER

Plaintiff has filed a First Amended Complaint (Doc. 19), and Defendants have filed three Motions to Dismiss (Docs. 32, 37, 51).

The Court will screen Plaintiff's First Amended Complaint, deny Defendants' motions, and direct Defendants to file an answer.

I. Background

In September 2013, Plaintiff Stephen Louis Rudisill, who is confined in the Arizona State Prison Complex, Santa Rita Unit, in Tucson, Arizona, initiated this action by filing a pro se civil rights Complaint under 42 U.S.C. § 1983 (Docs. 1-2). Plaintiff alleged that racially segregated housing in the Tucson Prison Complex violated his rights under the Equal Protection Clause (*id.*). He sued four current or former Arizona Department of Corrections (ADC) employees: Director Charles Ryan; Division Director Robert Patton; Tucson Complex Warden Therese Schroeder; and Tucson Complex Deputy Warden Daniel Lundberg (*id.*).

Shortly thereafter, counsel appeared in the case on Plaintiff's behalf (Docs. 8-9, 10, 12).

The Court screened Plaintiff's Complaint pursuant to 28 U.S.C. § 1915A(a) and, in its January 23, 2014 Order, determined that Plaintiff sufficiently stated an equal protection claim and ordered the four Defendants to respond (Doc. 15).

On February 4, 2014, Plaintiff filed his First Amended Complaint, in which he named the same four Defendants and added Governor Janice Brewer as a Defendant (Doc. 19). On February 11 and 12, 2014, Plaintiff executed service of the First Amended Complaint on Brewer, Schroeder, Lundberg, and Ryan (Docs. 20-29).

On March 13, 2014, the four served Defendants filed a Request for Screening of the First Amended Complaint (Doc. 31). That same day, Ryan and Brewer filed separate Motions to Dismiss (Docs. 32-33), and, a few days later, Lundberg and Schroeder filed their Motion to Dismiss (Doc. 37).

Plaintiff then filed a motion to substitute a Defendant in place of Patton and filed Notices of Dismissals for Patton and Brewer (Docs. 42-44). The Court granted the motion for substitution and substituted Carson McWilliams in his official capacity in place of Patton (Doc. 48). The Court dismissed Patton and Brewer as Defendants and denied Brewer's Motion to Dismiss as moot (*id.*).

On June 9, 2014, McWilliams filed his Motion to Dismiss (Doc. 51).

II. Right to Amend Pleading and Screening Requirement

Under Federal Rule of Civil Procedure 15(a)(1), a party is permitted to amend its pleading as a matter of right within "(A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier."

Plaintiff's First Amended Complaint, filed on February 4, 2014, was within the

time in which he could amend his pleading as a matter of right. Thus, Plaintiff's amended pleading is the operative complaint. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992) (after amendment, the original pleading is treated as nonexistent); *Hal Roach Studios v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1990) (amended complaint supersedes the original complaint).

But Plaintiff's service of the First Amended Complaint was premature because it has not yet been screened by the Court. Under the Prison Litigation Reform Act (PLRA), the Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). A defendant is not required to respond to a prisoner complaint prior to screening of the complaint by the court. *See* 42 U.S.C. § 1997e(g). Even though Plaintiff is now represented by counsel, because he is incarcerated, his amended pleading is subject to the PLRA's screening requirement. *See* 28 U.S.C. § 1915A(c) (a "prisoner" is "any person incarcerated or detained in any facility" who had been accused or convicted and sentenced for violations of criminal law); 42 U.S.C. § 1997e(h) (same definition).

III. Screening

The Court must dismiss a complaint or portion thereof if a plaintiff has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1)-(2). A pleading 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). While Rule 8 does not demand detailed factual allegations, "it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Further, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is

plausible on its face.'" *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 "Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. Thus, although a plaintiff's specific factual allegations may be consistent with a constitutional claim, a court must assess whether there are other "more likely explanations" for a defendant's conduct. *Id.* at 681.

IV. First Amended Complaint

In his amended pleading, Plaintiff sets forth one cause of action under the Equal Protection Clause of the Fourteenth Amendment (Doc. 19 ¶¶ 59-64). The named Defendants are Ryan, Schroeder, Lundberg, and McWilliams (*id.* ¶¶ 10-13; Doc. 48). Plaintiff also sues 100 Doe Defendants, identified as DOE 1 through DOE 100 (Doc. 19 ¶ 15).

Plaintiff alleges the following facts:

Plaintiff is an African-American male (*id.* ¶ 19). He arrived at the Tucson Prison Complex on May 31, 2011, and was assigned to the Manzanita Unit (*id.* ¶ 21). Since his arrival at the complex in May 2011, Plaintiff has been housed with African-American inmates only, despite numerous requests to house with inmates of a different race (*id.* ¶ 23). In the two units he has housed in, all inmates are housed according to racial classifications (*id.* ¶ 24). On information and belief, all inmates at the Tucson Prison Complex are segregated in housing units according to race (*id.* ¶ 25).

In the Manzanita Unit and, upon information and belief, in all units at the prison complex, job assignments are assigned according to racial quotas established by Defendants and prison officials (*id.* ¶¶ 27-28). Inmates employed as assistants for

inmates with physical disabilities assist inmates of the same race only (*id.* ¶ 27). Inmates employed as barbers must use separate tools for Caucasian inmates, African-American inmates, Latino inmates, and Native American inmates (*id.* ¶ 29). In the Manzanita and Santa Rita Units, inmate barbers cut the hair of inmates who are of the same race, and the posted barber work schedule lists the name of the barber and each barber's race (*id.* ¶¶ 30-31).

Plaintiff alleges that the institutional segregation promulgated by Defendants and prison officials fosters an environment of racial animus among inmates and leads to self-segregation resulting in threats, intimidation, and violence, which is encouraged or tolerated by officials, including Defendants (*id.* ¶ 33).

Plaintiff states that he sent letters to Ryan and Schroeder describing the racial discrimination and systemic segregation in his unit; however, Ryan and Schroeder refused to amend the policy and confirmed that it would continue to be applied (*id.* ¶¶ 36-38). Plaintiff received Inmate Response Letters from Lundberg stating that the Department is well aware of racial parity, that the housing unit balance complies with policy, and that all jobs are racially balanced as much as possible (*id.* ¶¶ 39, 57).

Plaintiff alleged that he then initiated the ADC grievance process to complain about segregation in the areas of housing, dining, barbers, and job assignments (*id.* ¶ 43; *see id.* ¶¶ 44-52). He avers that in October 2013, after his Inmate Grievance Appeal was denied by an appeals officer and Ryan, Plaintiff sent Inmate Letters requesting to be housed with someone of a different race (*id.* ¶¶ 52-54).

Plaintiff was transferred to the Santa Rita Unit on November 4, 2013, and shares a bunk with an inmate of the same race (*id.* ¶ 58).

Plaintiff claims that Defendants' policy of racial segregation violates the Equal Protection Clause of the Fourteenth Amendment (*id.* ¶¶ 61-63). He sues Defendants in

both their official and individual capacities, and he seeks declaratory and injunctive relief and damages (*id.* ¶¶ 10-13, 66).

V. Discussion

A. Equal Protection Clause

The Equal Protection Clause requires that all persons who are similarly situated should be treated alike. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985); *Lee v. City of L.A.*, 250 F.3d 668, 686 (9th Cir. 2001). Prisoners are protected from racial discrimination by the Equal Protection Clause, *Walker v. Gomez*, 370 F.3d 969, 973 (9th Cir. 2004), and express racial classifications are immediately suspect, *Johnson v. Cal.*, 543 U.S. 499, 509 (2005). A plaintiff alleging denial of equal protection under § 1983 based on race "must plead intentional unlawful discrimination or allege facts that are at least susceptible of an inference of discriminatory intent." *Monteiro v. Tempe Union High School Dist.*, 158 F.3d 1022, 1026 (9th Cir. 1998). To state a claim for relief, the plaintiff must allege that the defendant state actor acted at least in part because of the plaintiff's membership in a protected class. *Serrano v. Francis*, 345 F.3d 1071, 1082 (9th Cir. 2003).

B. Liability

There is no respondeat superior liability under § 1983, so a defendant's position as the supervisor of someone who allegedly violated a plaintiff's constitutional rights does not make him liable. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). To state a constitutional claim, a plaintiff must allege some affirmative link or connection between a defendant's actions and the alleged violation. *See Rizzo v. Goode*, 423 U.S. 362, 371-72, 377 (1976). A plaintiff "must allege facts, not simply conclusions, that show an individual was personally involved in the deprivation of his civil rights." *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998).

For an individual to be liable in his official capacity, a plaintiff must allege that the

official acted as a result of a policy, practice, or custom or that the official promulgated a policy, practice or custom resulting in the violation. *See Cortez v. Cnty. of L.A.*, 294 F.3d 1186, 1188 (9th Cir. 2001).

A supervisor in his individual capacity "is only liable for constitutional violations of his subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them." *Taylor*, 880 F.2d at 1045. But where a plaintiff seeks to hold a supervisory official individually liable based on a policy, the Ninth Circuit has explained that

> [w[hen a supervisory official advances or manages a policy that instructs its adherents to violate constitutional rights, then the official specifically intends for such violations to occur. Claims against such supervisory officials, therefore, do not fail on the state of mind requirement, be it intent, knowledge, or deliberate indifference. *Iqbal* itself supports this holding. . . . Advancing a policy that requires subordinates to commit constitutional violations is always enough for § 1983 liability, no matter what the required mental state, so long as the policy proximately causes the harm—that is, so long as the plaintiff's constitutional injury in fact occurs pursuant to the policy.

OSU Student Alliance v. Ray, 699 F.3d 1053, 1076 (9th Cir. 2012). To state a claim under this principle, a plaintiff must plausibly allege that (1) the defendant "promulgate[d], implement[ed], or in some other way possesse[d] responsibility for the continued operation of" the policy and (2) the constitutional violation "occurred pursuant to that policy." *Id.* (citing *Dodds v. Richardson*, 614 F.3d 1185, 1199 (10th Cir. 2010)).

C. Plaintiff's Allegations

Plaintiff alleges sufficient facts to show that he is a member of a protected class and that, during his confinement at two Tucson Prison Complex units, he has been housed only with inmates of the same race and that at these two units, all inmates are segregated by race (Doc. 19 ¶¶ 2, 19, 21-24). Plaintiff also alleges sufficient facts to show that certain prison service jobs in the Manzanita Unit—inmate physical-disability

assistants and barbers—are assigned according to race (*id.* ¶¶ 27, 29-31). These allegations support an inference of discriminatory intent and sufficiently allege equal protection violations. In addition, Plaintiff's factual allegations support a plausible inference that the alleged constitutional violations occur pursuant to a policy.

As stated, Plaintiff is still required to allege a sufficient connection between the purported policy and each Defendant.

1. Ryan

Plaintiff alleges that under state law, Ryan is responsible for establishing and administering ADC operations and policies that directly affect how inmates are housed and employed at the prison complex (Doc. 19 ¶ 10, citing Ariz. Rev. Stat. § 41-1604). Plaintiff further alleges that the alleged unconstitutional policies have been in operation since at least May 2011, when he entered the prison complex, and they continue (Doc. 19 ¶¶ 21, 23, 31, 58). Finally, Plaintiff alleges that he notified Ryan of the complained-of policies when he sent a letter to Ryan describing the racial discrimination and systemic segregation in his unit; however, Ryan refused to amend the policy (*id.* ¶ 36).

The Court finds that these allegations create a plausible inference that Ryan established, administered, or otherwise has some responsibility for policies that assign inmate housing and jobs according to race. *See Starr v. Baca*, 652 F.3d 1202, 1208 (9th Cir. 2011) (finding that the defendant sheriff was "required by statute to take charge of and keep the county jail and prisoners in it, and [was] answerable for the prisoner's safekeeping," and therefore was liable under § 1983 for supervisory omissions that would likely enable subordinates to commit a constitutional injury"). And, as mentioned above, Plaintiff sufficiently alleges an equal-protection violation pursuant to these policies. Plaintiff is not required to allege that Ryan intended to discriminate against him in particular. *See OSU Student Alliance*, 699 F.3d at 1076 (noting that in *Iqbal*, "the Court rejected the invidious discrimination claims against Ashcroft and Mueller because the complaint failed to show that those defendants advanced a policy of purposeful

discrimination . . ., not because it found that the complaint had to allege that the supervisors intended to discriminate against Iqbal in particular") (citing *Iqbal*, 556 U.S. at 682-83). Thus, under *OSU Student Alliance*, Plaintiff's allegations state a claim against Ryan. *See* 699 F.3d at 1076. Plaintiff further supports a § 1983 claim against Ryan with allegations that he is aware of the systemic segregation and harm resulting from these policies and he has failed to take any action to correct harm. *See Taylor*, 880 F.2d at 1045; *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988) (under Ninth Circuit law, the failure to act can form the basis of a § 1983 claim; the inquiry focuses on "each individual defendant whose acts *or omissions* are alleged to have caused a constitutional deprivation") (emphasis added); *contra Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999) (under Sixth Circuit law, § 1983 liability is "based on active unconstitutional behavior and cannot be based upon a mere failure to act") (quotation omitted). Accordingly, Ryan will be directed to respond to the First Amended Complaint.

2. Schroeder

With respect to Schroeder, Plaintiff alleges that as the Warden, she is responsible for day-to-day operations of the prison complex, including the Manzanita and Santa Rita Units, and he avers that under ADC Department Orders, Schroeder is required to report any significant problems arising from, *inter alia*, racial parity and/or imbalance (Doc. 19 ¶ 12). Plaintiff alleges that he wrote a letter to Schroeder about the racial segregation of inmates within the prison complex; however, she refused to amend the policy (*id.* ¶¶ 37, 42). Plaintiff avers that in her Inmate Response Letter, Schroeder stated that Plaintiff's unit was "racially balanced" and that "a racial balance and integrated work crews shall be maintained" (*id.* ¶ 42). Her response also stated that jobs are assigned according to eligibility, inmates choose their barbers, and ADC staff uses the same barber equipment for all staff (*id.*).

Schroeder's statements may demonstrate a material dispute with Plaintiff's allegations as to whether there is racial segregation within the unit, and they may support

a plausible, alternative explanation for job assignments breaking down on racial grounds. But, on screening, the Court must take Plaintiff's allegations as true. *See Cervantes v. United States*, 330 F.3d 1186, 1187 (9th Cir. 2003). Further, where there are two alternative, plausible explanations presented by the parties, a complaint sufficiently states a claim for relief. *See Twombly*, 550 U.S. at 1964-65 (a complaint's factual allegations "must be enough to raise a right to relief above the speculative level"); *Starr*, 652 F.3d at 1216 ("[i]f there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives . . . .").

The Court finds that Plaintiff has sufficiently alleged facts creating a plausible inference that Schroeder has some responsibility for implementing policies that result in segregation of inmates and that she is aware of the resulting segregation and harm but has failed to take any action to correct the harm. *See OSU Student Alliance*, 699 F.3d at 1976; *Leer*, 844 F.2d at 633. Plaintiff therefore states a § 1983 claim against Schroeder, and she will be directed to respond to the First Amended Complaint.

3. Lundberg

Plaintiff alleges that Lundberg, as Deputy Warden, is responsible for the accounting of all beds within the prison complex units, and he required to report any significant problems arising from, *inter alia*, racial parity and/or imbalance (Doc. 19 ¶ 13). Plaintiff also alleges that, under ADC Department Orders, Lundberg has the final approval authority for all housing assignments (*id.*). In Schroeder's Inmate Response Letter to Plaintiff, she stated that "Deputy Warden Lundberg and his leadership team are in charge of the Manzanita [Unit]," and Plaintiff alleges that when Lundberg delivered this response letter to Plaintiff, he told Plaintiff, "nothing going to happen; all letters get filtered back to me, I run the prison" (*id.* ¶ 41).

Plaintiff's allegations against Lundberg are sufficient to create a plausible inference that he has some responsibility for implementing policies at the prison complex

units and, as stated, Plaintiff sufficiently alleges an equal protection violation pursuant to these policies. *See OSU Student Alliance*, 699 F.3d at 1076. Also, Plaintiff adequately alleges that Lundberg is aware of the systemic segregation resulting from these polices but has failed to take any action to remedy the harm. *Leer*, 844 F.3d 633. The Court will direct Lundberg to respond to the First Amended Complaint.

4. McWilliams

When it granted Plaintiff's Motion for Substitution of Public Officer, to substitute current Division Director of Offender Operations McWilliams for Patton, the former Division Director, the Court noted that McWilliams is substituted as a Defendant in his official capacity only (Doc. 48 at 3). The Court refused to dismiss the Division Director on the ground that an official-capacity suit against him is redundant because other Defendants are sued in their official capacity (*id.* at 2-3). As noted in the prior Order, Plaintiff has not named Defendants' employer as a Defendant in this case (*id.*). *See Contreras, ex rel. Contreras v. Cnty. of Glenn*, 725 S. Supp. 2d 1157, 1159-60 (E.D. Cal. 2010) (generally, suits brought against individuals in their official capacity are redundant where the plaintiff also brings suit against the individuals' employer).

In his First Amended Complaint, Plaintiff alleges that the Division Director oversees the Offender Services Bureau, which is responsible, *inter alia*, for offender classification and movement and population management (Doc. 19 ¶ 11). Plaintiff further alleges that under ADC Department Order, the Division Director must monitor racial parity and/or imbalance within the prison complexes (*id.*). These allegations are sufficient to create an inference that the Division Director acts as a result of a policy or promulgates a policy that results in the alleged equal protection violation. *See Cortez*, 294 F.3d at 1188. Accordingly, Plaintiff sufficiently states a § 1983 claim against McWilliams in his official capacity, and McWilliams will be directed to respond to the First Amended Complaint.

5. Doe Defendants

Plaintiff names 100 Doe Defendants (Doc. 19 ¶ 15). He alleges that each of the Doe Defendants is responsible in some manner for the occurrences alleged in his amended pleading and that his injuries were proximately caused by these Defendants (*id.*).

Federal Rules of Civil Procedure 10(a) requires the plaintiff to include the names of the parties in the action. The Ninth Circuit has held that where identity is unknown prior to the filing of a complaint, the plaintiff should be given an opportunity through discovery to identify the unknown defendants, unless it is clear that discovery would not uncover the identities, or that the complaint would be dismissed on other grounds. *Wakefield v. Thompson*, 177 F.3d 1160, 1163 (9th Cir. 1999) (citing *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980)). Where the names of individual defendants are unknown at the time a complaint is filed, a plaintiff may refer to the individual unknown defendants as Doe Defendant 1, Doe Defendant 2, and so on, and allege facts to support how each particular Doe defendant violated the plaintiff's constitutional rights. A plaintiff may thereafter use the discovery process to obtain the names of fictitiously named defendants whom he believes violated his constitutional rights and seek leave to amend to name those defendants.

In this case, however, Plaintiff does not allege any specific facts to support how any of the 100 Doe Defendants violated his constitutional rights. Therefore, the 100 Doe Defendants will be dismissed without prejudice.

VI. Defendants' Motions to Dismiss

A. Federal Rule of Civil Procedure 12(b)(6)

Ryan, Schroeder, and Lundberg all move to dismiss Plaintiff's First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) (Docs. 32, 37). The standard for dismissal under Rule 12(b)(6) is identical to the standard applied on screening under § 1915A(b) ("fail[ure] to state a claim upon which relief may be granted"). Because the Court has screened Plaintiff's First Amended Complaint under

this standard, Defendants' arguments under Rule 12(b)(6) are unnecessary. To the extent they seek dismissal under Rule 12(b)(6), their motions are denied as moot.

B. Damages

The same three Defendants also argue that there are no valid damage claims against them because damages for mental and emotional injuries are statutorily barred absent physical injury and there are no facts to support Plaintiff's claim for punitive damages (Doc. 32 at 9; Doc. 37 at 9).

Under § 1997e(e) of the PLRA, no action may be brought "for mental or emotional injury suffered while in custody without a prior showing of physical injury." The Ninth Circuit has determined that the PLRA's physical-injury requirement applies *only* to claims for mental or emotional injuries and does not bar claims for money damages premised on alleged constitutional violations. *Oliver v. Keller*, 289 F.3d 623, 629-30 (9th Cir. 2002) (even absent physical injury, "[t]o the extent that appellant has actionable claims for compensatory, nominal or punitive damages—premised on violations of his Fourteenth Amendment rights, and not on any alleged mental emotional injuries—we conclude the claims are not barred by § 1997e(e)").

Here, Plaintiff's sole count alleges a violation of his rights under the Equal Protection Clause of the Fourteenth Amendment, and he specifically seeks compensatory and punitive damages (Doc. 19 ¶ 66(b) and (c)). A request for punitive damages is consistent with a claim for nominal damages even when the latter are not specifically requested. *See Oliver*, 289 F.3d at 630. Therefore, to the extent that Plaintiff has an actionable claim for compensatory, nominal, and punitive damages based on an alleged Fourteenth Amendment violation, Plaintiff's claim is not barred by § 1997e(e). Moreover, Plaintiff also seeks declaratory and injunctive relief (Doc. 19 66(a)). Defendants' request for dismissal of the First Amended Complaint on this basis is therefore denied.

Punitive damages are awarded in the jury's discretion. *Smith v. Wade*, 461 U.S. 30, 54 (1983). The jury determines whether a defendant acted with an evil motive or demonstrated reckless indifference to the plaintiff's constitutional rights. *Id.* at 56. The Court cannot conclude, on this record, that Plaintiff is not entitled to punitive damages under this standard. Defendants' request to dismiss the punitive damages claims against them is denied.

C. Qualified Immunity

Ryan, Schroeder, and Lundberg assert that they are entitled to qualified immunity from damages (Doc. 32 at 10; Doc. 37 at 10).

Government officials enjoy qualified immunity from civil damages unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In the qualified-immunity analysis, the court must determine: (1) whether the facts alleged show the defendant's conduct violated a constitutional right; and (2) whether that right was clearly established at the time of the violation. *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001). Courts may address either prong first depending on the circumstances in the particular case, and, regardless of whether or not a constitutional violation occurred, qualified immunity is available if the right allegedly violated was not clearly established. *See Pearson v. Callahan*, 555 U.S. 223, 230-32, 235-36 (2009).

"The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (quotation omitted). To make this determination, a court "need not look to a case with identical or even 'materially similar' facts." *Serrano*, 345 F.3d at 1077. The standard is whether the right at issue has been defined with "sufficient specificity" such that the defendant official had fair warning that her conduct deprived the plaintiff of his rights.

Id. The plaintiff bears the burden of showing that the right at issue was clearly established. *Alston v. Read*, 663 F.3d 1094, 1098 (9th Cir. 2011).

Defendants argue that it is not clearly established that simply mailing a letter to supervisors who have no involvement in the day-to-day operations of different prison complexes makes them liable under § 1983 (Doc. 32 at 11; Doc. 37 at 11).

In his response to Defendants' argument, Plaintiff cites two cases he maintains are sufficiently analogous to show that the right at issue was clearly established (Doc. 41 at 17). In *Johnson v. California*, the Supreme Court held in 2005 that racial classifications in prisons are "immediately suspect" and subject to strict scrutiny, even where policies affect all races equally. 543 U.S. at 508-09. In *Richardson v. Runnels*, a 2010 decision, the Ninth Circuit held that the *Johnson* decision was the "relevant precedent" for evaluating the merits of a prisoner's equal protection claim that arose from a racially-discriminatory lockdown. 594 F.3d 666, 671, 72 (9th Cir. 2010). Plaintiff notes that "the *Richardson* court further held that the defendants' race-based lockdown did not pass muster even under the 'weaker standard, which may govern the qualified immunity question,' and which governed racial classifications in prisons pre-*Johnson*, because the defendants articulated nothing other than a 'belief' or perception to support locking down all African-American inmates when only some of them perpetrated violent acts" (Doc. 41 at 17, citing *Richardson*, 594 F.3d at 671). Plaintiff also cites to numerous district court cases in this Circuit that he asserts support that qualified immunity based on the "clearly-established" prong should be denied (*id.*, citing cases).

The Court finds that Defendants frame the issue too narrowly. *See Jackson v. McIntosh*, 90 F.3d 330, 331-32 (9th Cir. 1996) (defendant doctors state the issue too narrowly where they contend that they are entitled to qualified immunity "because there was no clearly established law requiring them to provide a kidney transplant to a prisoner on dialysis"). Their argument completely ignores the fact that Plaintiff's claims against

them are based in large part on their alleged implementation or management of a policy that resulted in a violation of Plaintiff's rights under the Equal Protection Clause. By 2011, when Plaintiff entered the Tucson Prison Complex, it was well established that prisoners were protected under the Equal Protection Clause. *Walker*, 370 F.3d at 973. And the Court finds Plaintiff has sufficiently demonstrated that, under *Johnson*, it would have been clear to a reasonable prison official in 2011 that it is unlawful to segregate inmates in housing and job assignments based solely on race. Defendants' request for qualified immunity will be denied.

D. McWilliams' Motion to Dismiss

McWilliams moves to dismiss the official-capacity claim against him on the ground that this claim is redundant because Plaintiff sues three other officials in their official capacity (Doc. 51). As set forth above, the Court addressed and rejected this argument when it substituted McWilliams as a Defendant for Patton (Doc. 48). McWilliams presents no basis for reconsideration of the Court's prior Order; therefore, his Motion to Dismiss will be denied.

IT IS ORDERED:

(1) Doe Defendants, identified as DOE 1 through DOE 100, are dismissed without prejudice.

(2) Defendants Ryan, Schroeder, Lundberg, and McWilliams must answer the First Amended Complaint.

(3) Any answer or response must state the specific Defendant by name on whose behalf it is filed. The Court may strike any answer, response, or other motion or paper that does not identify the specific Defendant by name on whose behalf it is filed.

(4) Defendant Ryan's Motion to Dismiss (Doc. 32) is **denied**.

(5) Defendants Schroeder and Lundberg's Motion to Dismiss (Doc. 37) is **denied**.

(6) Defendant McWilliams' Motion to Dismiss (Doc. 51) is **denied**.

Dated this 22nd day of July, 2014.

Cindy K. Jorgenson
United States District Judge