IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TRACEY NADIRAH SHAW, Plaintiff, vs. PENNSYLVANIA DEPARTMENT OF CORRECTIONS, DR. REBECCA BURDETTE and DR. LAWRENCE ALPERT, *Medical Director at SCI Cambridge Springs*, Defendants.	No. 1:17-cv-00229-SPB Magistrate Judge Baxter ***Electronically Filed.***

BRIEF IN SUPPORT OF DEPARTMENT OF CORRECTIONS'
MOTION TO DISMISS FIRST AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM

I. STATEMENT OF THE CASE

Plaintiff, Tracey Nadirah Shaw ("Plaintiff"), raises issues related to her confinement in the custody of the Pennsylvania Department of Corrections ("DOC") at the State Correctional Institution at Cambridge Springs ("SCI-Cambridge Springs"). The present action was initiated through counsel on or about August 21, 2017, with the filing of a Complaint (Doc. # 1). Plaintiff subsequently filed a First Amended Complaint ("FAC")(Doc. # 12) on October 31, 2017.

Plaintiff brings this action against the Pennsylvania Department of Corrections ("DOC") and two medical defendants from SCI-Cambridge Springs[1] and alleges violations of the Americans with Disabilities Act (42 U.S.C. §§ 12101-12213)("ADA") and the Rehabilitation Act of 1973 (29 U.S.C. §§ 701-797b). These claims are premised on specific factual allegations that "[o]n or about December 23, 2016, a decision was made to strip Ms. Shaw of her job purportedly because her medical conditions were suddenly too serious to permit her to perform basic janitorial tasks as a

[1] The two medical defendants are represented by their own counsel and have separately moved to dismiss the claims against them.

block worker on the honor unit where she resides" and "[o]n December 16, 2016, the day after CHCA Anderson reproached Ms. Shaw for exercising her constitutionally and statutorily protected rights to file grievances and disability accommodation requests, Defendant Alpert ordered her wheelchair taken from her." See FAC, at ¶¶ 69, 91.

With respect to her ADA claim against the DOC, Plaintiff alleges that she is a qualified individual with a disability, and that the DOC "discriminated against [her] by removing her from her job on the basis of her disability without offering a replacement in violation of Title II of the Americans with Disabilities Act" and that the DOC "failed to provide [her] with reasonable accommodations for her disability, causing her to be excluded from participation in programs and denied services of a public entity." See FAC, at ¶¶ 116-119. Plaintiff makes similar allegations in support of her claim under the Rehabilitation Act, alleging that the DOC "caused [her] to be excluded from participation in programs and denied access to services at SCI Cambridge Springs, a public entity, due to her disability." FAC, at ¶¶ 128-129.

Plaintiff asserts that the foregoing allegations state violations of her rights under the ADA and the Rehabilitation Act. The DOC now moves to dismiss the First Amended Complaint.

II. STANDARD OF REVIEW

The well-known standard against which motions to dismiss under Rule 12(b)(6) must be reviewed has been lucidly reiterated as follows:

> In light of the Supreme Court's decision in Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), a complaint may be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) if it does not allege 'enough facts to state a claim to relief that is plausible on its face.' Phillips v. County of Allegheny, 515 F.3d 224, 234 (3d Cir. 2008)(*quoting* Twombly, 550 U.S. at 570). While Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), allowed dismissal of a claim only if 'no set of facts' could support it, under Twombly, and most recently, Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868,

2009 WL 1361536 (May 18, 2009), a claim for relief under Rule 12(b)(6) now 'requires more than labels and conclusions' or 'a formulaic recitation of the elements of a cause of action.' Twombly, 550 U.S. at 555; Iqbal, 129 S.Ct. at 1950.

In Iqbal, the Supreme Court held that a claim is facially plausible when its factual content allows the court to draw a reasonable inference that the defendants are liable for the misconduct alleged. Marangos v. Swett, 175 Cal.App.4th 324, 95 Cal.Rptr.3d 880, 2009 WL 1803263, *2 (2009), *citing* Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868, 2009 WL 1361536, *12. The plausibility standard in Iqbal 'asks for more than a sheer possibility that a defendant has acted unlawfully.' Swett, *quoting* Iqbal. While well-pleaded factual content is accepted as true for purposes of whether the complaint states a plausible claim for relief, legal conclusions couched as factual allegations or '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,' are not entitled to an assumption of truth. Swett, *quoting* Iqbal, at *13. 'Where the well-pleaded facts do not permit the court to infer more than a mere possibility of misconduct, the complaint has alleged-but it has not "show[n]"—"that the pleader is entitled to relief."' Iqbal, *quoting* Fed. R.Civ. P. 8(a)(2).

In order to satisfy the requirement of Fed. R.Civ. P. 8(a)(2) that a plaintiff include a 'short and plain statement of the claim showing that the pleader is entitled to relief,' a plaintiff must aver sufficient factual allegations which 'nudge' its claims 'across the line from conceivable to plausible.' Iqbal, at 1951.

In considering a Rule 12(b)(6) motion, a court accepts all of the plaintiff's allegations as true and construes all inferences in the light most favorable to the non-moving party. Umland v. Planco Fin. Servs., 542 F.3d 59, 64 (3d Cir. 2008)(*citing* Buck v. Hampton Twp. Sch. Dist., 452 F.3d 256, 260 (3d Cir. 2006)). However, a court will not accept bald assertions, unwarranted inferences, or sweeping legal conclusions cast in the form of factual allegations. See In re Rockefeller Ctr. Props., Inc. Sec. Litig., 311 F.3d 198, 215 (3d Cir. 2002); Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 n. 8 (3d Cir. 1997). A court is not required to consider legal conclusions; rather, it should determine whether the plaintiff should be permitted to offer evidence in support of the allegations. Maio v. Aetna, 221 F.3d 472, 482 (3d Cir. 2000).

Therefore, a plaintiff must put forth sufficient facts that, when taken as true, suggest the required elements of a particular legal theory. See Wilkerson v. New Media Tech. Charter Sch., Inc., 522 F.3d 315 (3d Cir. 2008)(*citing* Phillips, 515 F.3d at 224). However, this standard does not impose a heightened burden on the claimant above that already required by Rule 8, but instead calls for fair notice

> of the factual basis of a claim while 'rais[ing] a reasonable expectation that discovery will reveal evidence of the necessary element.' Weaver v. UPMC, 2008 WL 2942139 (W.D.Pa. 2008)(*citing* Phillips, 515 F.3d at 234; *and* Twombly, 550 U.S. at 555).

Murdock v. Jin, 2015 WL 1524462, *1-*2 (W.D.Pa. 2015). See also Singer v. Heckler, 2015 WL 8992438, *5 (W.D.Pa. 2015).

III. ARGUMENT

A. Plaintiff cannot state a claim against the DOC under Title II of the ADA or under the Rehabilitation Act; therefore, all claims against the DOC should be dismissed.

The claims asserted against the DOC are found in Count I, entitled "Discrimination by a Public Entity in Violation of the Americans with Disabilities Act" and Count IV, entitled "Exclusion from Services of a Federally Funded Entity in Violation of the Rehabilitation Act." See FAC, at 15 (Count I), 17 (Count IV). It has been observed that "'[w]hether suit is filed under the Rehabilitation Act or under the [ADA], the substantive standards for determining liability are the same.' McDonald v. Pa. Dep't of Pub. Welfare, 62 F.3d 92, 95 (3d Cir. 1995). However, the Rehabilitation Act also requires plaintiff to show that the he was excluded from a 'program or activity receiving Federal financial assistance.' 29 U.S.C. § 794(a)." Payne v. Kerestes, 2017 WL 1028148, *8 (M.D.Pa. 2017), *appeal dismissed*, 2017 WL 4765400 (3d Cir. 2017).

Under Title II of the ADA, "No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits or the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." See 42 U.S.C. § 12132. See Parms v. Harlow, 2012 WL 4540275, *3, *report and recommendation adopted*, 2012 WL 4511423 (W.D.Pa. 2012).

In order to establish a violation under Title II, plaintiff must demonstrate: (1) that she is a qualified individual; (2) with a disability; and (3) that she was denied the opportunity to participate

in or benefit from the services, programs, or activities of a public entity, or was otherwise subject to discrimination by that entity; (4) by reason of her disability. See Bowers v. National Collegiate Athletic Association, 475 F. 3d 524, 553 n. 32 (3d Cir. 2007). See also Parms v. Harlow, 2012 WL 4540275, at *3.[2] These same standards govern claims brought pursuant to Section 504 of the Rehabilitation Act. See Chambers *ex rel.* Chambers v. School District of Philadelphia Board of Education, 587 F.3d 176, 189 (3d Cir. 2009).

From a fair reading of the First Amended Complaint it appears that Plaintiff is asserting two separate claims against the DOC. First, that the DOC "discriminated against Plaintiff Tracey Shaw by removing her from her job on the basis of her disability without offering a replacement in violation of Title II of the Americans with Disabilities Act." Complaint, at ¶ 118. Second, with respect to the removal of her wheelchair and other accommodations for her mobility impairment, that the DOC "failed to provide Plaintiff Tracey Shaw with reasonable accommodations for her disability, causing her to be excluded from participation in programs and denied services of a public entity." Complaint, at ¶ 119. These claims will be addressed *seriatim*:

Removal from Prison Employment. It has been determined under the ADA that "prison inmates are not considered employees under Title I and are, thus, not entitled to that Title's protections." See Parms v. Harlow, 2012 WL 4540275, at *3 (*citing* Battle v. Minnesota Department of Corrections, 40 F.App'x 308 (8th Cir. 2002)(upholding dismissal of inmate's claim under Title I of the ADA because inmate was not an employee for purposes of that Title) *and* Murdock v. Washington, 193 F.3d 510, 512 (7th Cir. 1999)(concluding that Title I of the ADA does not apply to inmates). Accordingly, Plaintiff's ADA claim may be cognizable only to the

[2] Title II of the ADA has been held to apply to state correctional facilities. See Pennsylvania Department of Corrections v. Yeskey, 524 U.S. 204 (1998).

extent it is being brought pursuant to Title II or the Rehabilitation Act. Nevertheless, any claim related to Plaintiff's prison job fails to state a claim under Title I of the ADA.

In any event, Plaintiff cannot state a claim under Title II or the Rehabilitation Act. Initially, because Plaintiff has alleged that she has been returned to her original job, see Complaint, at ¶ 78 ("In May 2017, Ms. Shaw's job was finally reinstated"), any claim asserted under either Title II of the ADA or the Rehabilitation Act is now moot. Indeed, Article III of the Constitution restricts federal courts to the resolution of cases and controversies. U.S.C.A. Const. Art. 3, § 2, cl. 1. To qualify as a case fit for federal court adjudication, an actual controversy must be extant at all stages of review. Davis v. Federal Election Commission, 554 U.S. 724 (2008). A case must be dismissed on grounds of mootness unless the controversy exists at all stages of the proceedings. Preiser v. Newkirk, 422 U.S. 395, 401 (1975).

In her Complaint, Plaintiff makes no specific claim for relief with respect to her prison employment. See Complaint, at 17 (Prayer for Relief). Thus, in light of her return to her prison job in May of 2017, no controversy currently exists with regard to Plaintiff's prison employment. As argued below, Plaintiff cannot sufficiently demonstrate an entitlement to monetary damages in her Title II ADA claims.[3] As a result, there is no actual controversy and this claim is moot. Accordingly, the Defendant requests that this Court dismiss this matter as moot.

Alternatively, Title II of the ADA did not abrogate the Department's sovereign immunity as an agency of the State of Pennsylvania from claims for damages in this type of case. Without

[3] Moreover, to the extent Plaintiff is making any claim against the DOC for punitive damages, such claim must be dismissed because punitive damages are not available in private suits under Title II of the ADA or under § 504 of the Rehabilitation Act. See Davila v. Commonwealth of Pennsylvania, 2016 WL 861884, *3 (M.D.Pa. 2016)(*citing* Barnes v. Gorman, 536 U.S. 181 (2002)).

a valid abrogation of immunity, the Eleventh Amendment bars this action.[4] As observed by this Court, "[t]he Supreme Court of the United States has held that Title II of the ADA validly abrogates sovereign immunity *as to state conduct that actually violates the Constitution*." See Wareham v. Pennsylvania Department of Corrections, 2014 WL 4231280, *1 (W.D.Pa. 2014)(*citing* United States v. Georgia, 546 U.S. 151, 159 (2006)(emphasis added).

After the United States Supreme Court issued its decision in United States v. Georgia, *supra*, the Third Circuit announced its three-step abrogation analysis for ADA Title II claims in Bowers v. National Collegiate Athletic Association, 475 F.3d at 553. This analysis requires courts to: (1) identify which aspects of the state's alleged misconduct violates Title II of the ADA, (2) identify to what extent that conduct also violates the Fourteenth Amendment, and (3) insofar as the alleged conduct violates Title II but not the Fourteenth Amendment, determine whether Congress's purported abrogation of sovereign immunity as to the class of conduct is nevertheless valid. See Mohney v. Commonwealth, 809 F.Supp.2d 384, 395 (W.D.Pa. 2011)(*citing* Bowers, 475 F.3d at 553). This third step requires application of the Supreme Court's analysis articulated in City of Boerne v. Flores, 521 U.S. 507 (1997).

Applying the steps outlined in Bowers, it is clear that the DOC remains immune from suit for damages on the basis of the claims asserted by Plaintiff. In Baxter v. Pennsylvania Department of Corrections, 2016 WL 1165977, *report and recommendation adopted*, 2016 WL 1223344 (W.D.Pa. 2016), *aff'd*, 661 F.App'x 754 (3d Cir. 2016), this Court followed this analysis where an

[4] It is, by now, beyond dispute that, as an agency of the Commonwealth of Pennsylvania, the DOC is entitled to assert the immunities afforded to the States by the Eleventh Amendment. See, e.g., Lavia v. Pennsylvania, Department of Corrections, 224 F.3d 190, 195 (3d Cir. 2000)(*cited in* Turner v. Attorney General Pennsylvania, 505 F.App'x 95, 98 (3d Cir. 2012). See also Jackson v. Carter, 2017 WL 4326107, *3, *report and recommendation adopted sub nom.* Jackson v. PA Department of Corrections, 2017 WL 4296809 (W.D.Pa. 2017).

inmate plaintiff alleged that he was removed from a prison vocational program in violation of Title II of the ADA. Initially, the Court outlined the applicable law:

> For money damages to be awardable against a state under Title II of the ADA when the state's conduct violates Title II but not the Fourteenth Amendment, damages must be 'a congruent and proportional means of preventing and remedying' the violation of Title II. See Bowers v. NCAA, 475 F.3d 524, 554-55 (3d Cir. 2007)(A damages remedy under Title II against a state university for disability discrimination against a student athlete held ineligible for Division I scholarship athletics due to a learning disability is a congruent and proportional remedy.) There is no precedential authority after Bowers saying in what other contexts money damages might be a congruent and proportional remedy against a state. Although it pre-dated United States v. Georgia and Bowers v. NCAA, the most on-point interpretation of the interaction between the Eleventh Amendment and the ADA remains Cochran v. Pinchak, 401 F.3d 184, *vacated*, 412 F.3d 500 (3d Cir. 2005), which concerned a blind inmate denied his cane and other assistive devices. As the Supreme Court directed in Garrett and Lane, the Cochran panel applied the three-part analysis of City of Boerne v. Flores, 521 U.S. 507 (1997), to determine whether money damages were appropriate: first the court must identify 'with some precision' the scope of the constitutional right at issue; second, Congress must have identified a history and pattern of disability discrimination by the States concerning that right; and third, the court must determine whether subjecting States to money damages is a proportionate response to the constitutional violation.

Baxter v. Pennsylvania Department of Corrections, 2016 WL 1165977, at *2.

The Baxter court then proceeded with the City of Boerne analysis, first noting that "[h]ere, as in Cochran, the relevant right is to be free from invidious discrimination under the Equal Protection Clause. More precisely, the right is of an inmate with a disability to vocational education programs. The Supreme Court has recognized that neither persons with disabilities nor inmates constitute a suspect class. Nor is receiving vocational training while incarcerated a fundamental right." Id., at *3. Here, it would seem that the analysis would start in the same manner, except that the right is of an inmate with a disability to prison employment, which is also

not a fundamental right. See Fountain v. Vaughn, 679 F.App'x 117, 120 & n. 2 (3d Cir. 2017)(finding that claims related to inmate's loss of prison employment are not cognizable under the Due Process Clause or Eighth Amendment). Cf. Jackson v. Allsup, 2013 WL 5816960, *3 (S.D.Ill. 2013)("There is no constitutional right to a job, and discriminatory hiring practices do not implicate the minimal civilized measure of life's necessities").

Moving to the second step, the Baxter court observed that, "broadly speaking, Congress passed Title II in response to a history of disability discrimination, some of which was of constitutional dimension and some of which was not. A very broad description of the legislative history was good enough for the Cochran panel, but I believe that a court must identify the relevant history of discrimination at a lower level of abstraction than 'administration of public services and programs generally.'" Baxter v. Pennsylvania Department of Corrections, 2016 WL 1165977, at *3. Consequently, after an extensive discussion, this Court went on to find that Congress had not identified a history and pattern of disability discrimination by the States concerning the right at issue in Baxter:

> There is nothing in the legislative history, discussed but ultimately determined by the Court to be irrelevant in Pennsylvania Department of Corrections v. Yeskev, 524 U.S. 206, 211 (1998) (reference to legislative history was unnecessary when the text of the statute is ambiguous), and nothing pointed out by the parties that suggests remedying disability discrimination in vocational programs for prison inmates (as opposed to persons placed in large-scale residential institutions as a result of handicaps due to mental retardation or mental illness) was contemplated by Congress, or that in Title II of the ADA Congress was responding to a history of such discrimination against inmates, much less that Congress intended in Title II to give inmates a damages remedy that Title I would not give to corrections officers.

Id., at *3.

Similarly, there is nothing in Title II's legislative history and no case has been found to suggest that in Title II of the ADA Congress was responding to a history of disability discrimination against inmates with respect to prison employment. Nevertheless, the Baxter court ultimately concluded that "at the final and dispositive step" any claims for money damages were barred by the Eleventh Amendment:

> But assuming that Baxter gets past the second step of the City of Boerne analysis, at the final and dispositive step the Cochran panel found that since Title II of the ADA conflicted with the general ability of States to operate prisons so long as they complied with the Equal Protection Clause, to permit money damages against states for violations of Title II that were 'rooted in' the Equal Protection Clause but not actual violations of the Equal Protection Clause would in effect re-write Fourteenth Amendment law. Cochran v. Pinchak, *supra*, 401 F.3d at 191, 193. *That conclusion cannot be disputed.* Baxter has no claim for money damages under the ADA. I note that the Supreme Court has not spoken on this issue. San Francisco v. Sheehan, 135 S.Ct. 1765, 1773 (2015) ("[W]e have never decided whether that [the proposition that a public entity can be held liable under the ADA for money damages for the actions of its employees] is correct, and we decline to do so here.")

Id., at *4 (emphasis added).

It would seem that this conclusion is equally applicable in this case, given the similarity of the rights at issue. Indeed, the issue presented here does not implicate the concerns outlined in City of Boerne v. Flores, *supra*. While the three-step City of Boerne analysis can be challenging and complex, suffice it to say that Plaintiff's situation falls more in line with the ADA claims asserted by the inmate plaintiffs in Baxter and Meeks v. Schofield, 2014 WL 1289238 (M.D.Tn. 2014)(inmate who suffered from shy bladder syndrome brought an ADA Title II claim challenging housing and privacy issues). Recognizing the need to afford prison administrators sufficient deference in the execution of practices which in their judgment "are needed to preserve internal order and discipline and to maintain institutional security," the Meeks court reached the third step

in City of Boerne and found that the state's conduct was not sufficiently egregious to warrant abrogation of sovereign immunity, even assuming it amounts to a *per se* ADA violation. See Meeks v. Schofield, 2014 WL 1289238, at *21. Thus, Plaintiff's claim with respect to the removal from her prison job should be dismissed because the Department is protected by it's the immunity conferred the States and their agencies by the Eleventh Amendment.

Removal of wheelchair and other accommodations for mobility impairment. Turning to Plaintiff's second claim, initially, the DOC would submit that any claim brought in this regard under Title II of the ADA is also barred under the Eleventh Amendment under the foregoing analysis. Indeed, the allegations with respect to this claim similarly fail to show a violation of the Fourteenth Amendment. See Meeks v. Schofield, 2014 WL 1289238, at *21. Thus, the claim is barred by the Eleventh Amendment.

Alternatively, the DOC would argue that Plaintiff has failed to state a claim under either Title II of the ADA or the Rehabilitation Act where the allegations in her Complaint show that the DOC has provided her with a reasonable accommodation, even if not the one she requested. Indeed, Plaintiff has alleged that she has been continually provided with a cane for mobility assistance. See Complaint (Doc. # 1), at ¶ 81 ("Ms. Shaw has been granted the use of a Cane to assist her and walking for more than 10 years"). Plaintiff has also alleged that at various times relevant to this action she has received a wheelchair, elevator passes and sit down passes. See Complaint (Doc. # 1), at ¶¶ 31-33, 39, 41, 83-89.

While Plaintiff did not always receive a wheelchair, she was always provided with a reasonable accommodation under the circumstances. As this Court has previously noted, the ADA's "requirement (as glossed by the courts to apply outside its primary applicability to employment) *is reasonable accommodation, not the plaintiff's requested accommodation*." See

Baxter v. Pennsylvania Department of Corrections, 2016 WL 1165977, at *5 (emphasis added). Indeed, "[t]he ultimate inquiry is not whether a plaintiff's actual request for an accommodation is allowed, but whether the accommodation offered to the plaintiff was, in fact, reasonable." See Nelson v. Ryan, 860 F.Supp. 76, 81-82 (W.D.N.Y. 1994)(*citing* Fink v. New York City Department of Personnel, 855 F.Supp. 68, 72 (S.D.N.Y. 1994)("[t]here is no provision requiring the employer to take account of the disabled individual's preferences in choosing the means of accommodation ... [s]o long as the means chosen allow the individual to compete, the employer satisfies his legal obligation")).

Consequently, "'[a]s long as [the defendant] reasonably accommodated [the plaintiff's] disability, they need not provide him with the exact accommodations he demanded.'" Alster v. Goord, 745 F.Supp.2d 317, 340 (S.D.N.Y. 2010)(*quoting* Cole v. Goord, 2009 WL 2601369, *11 (S.D.N.Y. 2009)). Instantly, the DOC provided Plaintiff with reasonable accommodations in the form of a cane for mobility assistance at all times, and other accommodations when deemed medically necessary by the medical staff. Indeed, throughout this process, Plaintiff has alleged that she had access to and was seen by the medical providers at SCI-Cambridge Springs. See FAC, at ¶¶ 11, 22-31, 34-35, 38-44, 47-53, 57-62. Thus, because these accommodations afforded Plaintiff meaningful access to the programs and services at SCI-Cambridge Springs; the DOC was not required to provide Plaintiff with her accommodation of choice.

IV. CONCLUSION

WHEREFORE, it is respectfully requested that the instant motion be granted and that the claims brought in the Complaint against the Pennsylvania Department of Corrections be dismissed from this action.

Respectfully submitted,

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