UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

17-1166

Bruce Wishnefsky v. Jawad Salameh, et al

3-15-cv-00148

ORDER

Pursuant to Fed. R. App. P. 3(a) and 3rd Cir. LAR 3.3 and Misc. 107.1(a), it is

ORDERED that the above-captioned case is hereby dismissed for failure to timely prosecute insofar as appellant/petitioner failed to pay the requisite fee as directed. It is

FURTHER ORDERED that a certified copy of this order be issued in lieu of a formal mandate.

For the Court,

Marcia M. Waldron

Marcia M. Waldron, Clerk
Date: 12/27/2017

cc: J. Eric Barchiesi, Esq.
Samuel H. Foreman, Esq.
Mary L. Friedline, Esq.
Caitlin J. Goodrich, Esq.
Mr.Joshua Lewis
Kemal A. Mericli, Esq.
Mr. Bruce L. Wishnefsky

A True Copy

Marcia M. Waldron

Marcia M. Waldron, Clerk
Certified order issued in lieu of mandate.

Appendix A

BRUCE L. WISHNEFSKY, Plaintiff, v. M.D. JAWAD A. SALAMEH and PA DEPARTMENT OF CORRECTIONS, Defendants.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
2016 U.S. Dist. LEXIS 174037
Civil Action No. 15-148J
December 16, 2016, Decided
December 16, 2016, Filed

Editorial Information: Prior History

Wishnefsky v. Salameh, 2016 U.S. Dist. LEXIS 161035 (W.D. Pa., Nov. 18, 2016)

Counsel BRUCE L. **WISHNEFSKY**, Plaintiff, Pro se, Somerset, PA.
For M.D. JAWAD A. SALAMEH, Defendant: Samuel H. Foreman, Weber Gallagher Simpson Stapleton Fires & Newby, Pittsburgh, PA.

Judges: Kim R. Gibson, United States District Judge. Magistrate Judge Lisa Pupo Lenihan.

Opinion

Opinion by: Kim R. Gibson

Opinion

MEMORANDUM ORDER

A. Background

This civil action was commenced on May 26, 2015 when Plaintiff filed a Motion for Leave to Proceed *in forma pauperis*. (ECF No. 1.) While that Motion was initially granted (ECF No. 3), the Magistrate Judge later vacated that Order on July 17, 2015 due to the fact that Plaintiff had accumulated at least "three strikes" within the meaning of 28 U.S.C. § 1915(g), and, as such, could not proceed *in forma pauperis* without a showing of imminent danger of serious physical injury, which the Magistrate Judge determined he had not shown in his Complaint. (ECF No. 16.) Plaintiff appealed the Magistrate Judge's ruling to the Court, which denied his objections by Order dated September 2, 2015. (ECF No. 27.) In that Order, Plaintiff was directed to pay the full filing fee if he wanted to proceed with this action. (ECF No. 28.) He did not do so, and the case was ultimately dismissed without prejudice to his right to reopen it if he paid the full filing fee. (ECF No. 30.)

Plaintiff filed an appeal to the Third Circuit Court of Appeals, claiming that this Court had erred in its three strikes determination and its finding that he was not in imminent danger of serious physical injury at the time he filed his Complaint. (ECF No. 33.) The Circuit held that Plaintiff had met the standard to show that he was in imminent danger of serious physical injury based on his claims related to a refusal or failure to treat a medical condition, and therefore reversed and remanded the case for further proceedings. (ECF No. 36.)

Upon remand, Plaintiff filed a Motion to Amend his Complaint (ECF No. 37), which was granted (ECF No. 38). His Amended Complaint was filed on June 29, 2016. (ECF No. 39.) In response, Defendants Dr. Jawad A. Salameh and the Pennsylvania Department of Corrections filed Motions to Dismiss

Appendix B

Plaintiff's Amended Complaint, (ECF No. 40, 48), to which Plaintiff filed Briefs in Opposition (ECF Nos. 51, 54, 59.)

On November 18, 2016, the Magistrate Judge issued a Report and Recommendation recommending that the Motions be granted and that Plaintiff's Amended Complaint be dismissed with prejudice for failure to state a claim. (ECF No. 62.) The parties were informed that, in accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1)(B) and (C), and Local Rule of Court 72.D.2, the parties had fourteen days from the date of service to file objections to the Report and Recommendation. Plaintiff filed timely Objections to the Report and Recommendation on December 5, 2016, (ECF No. 63), along with a Motion to File a Third Amended Complaint (ECF No. 64).

B. Standard of Review

The Court undertakes a *de novo* review of the portions of the Report and Recommendation to which a party has objected. *See* 28 U.S.C. § 636(b)(1); Cont'l Cas. Co. v. Dominick D'Andrea, Inc., 150 F.3d 245, 250 (3d Cir. 1998). The Court "may accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1).

C. Plaintiff's Objections

Plaintiff raises seventeen objections to the Report and Recommendation ("R&R"). (ECF No. 63.) The Court will consider each one.

First, Plaintiff objects to the R&R's recommendation that his Amended Complaint be dismissed with prejudice for failure to state a claim because the Magistrate Judge did not consider his supplemental pleading filed on September 6, 2016. (ECF No. 63, p.l.) While it is true that there is no mention of Plaintiff's supplemental pleading in the R&R, there is also nothing contained within that two-page supplemental pleading that is relevant to the question of whether Plaintiff's claims have merit. Therefore, this first objection is overruled.

Second, Plaintiff objects to the Magistrate Judge's failure to advise him in the R&R that he could file a curative amendment to cure the deficiencies noted in the R&R. (ECF No. 63, p. 1.) However, the Magistrate Judge recommended that all of Plaintiff's claims be dismissed with prejudice, and, contrary to Plaintiff's objection, she did not find any deficiencies that could be corrected with an amendment. While Plaintiff is correct that the court must allow for amendment by a plaintiff in a civil rights case brought under 42 U.S.C. § 1983 before dismissing pursuant to Rule 12(b)(6), irrespective of whether it is requested, it is not required when doing so would be "inequitable or futile." *See* Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc., 482 F.3d 247, 251 (3d Cir. 2007). Although the Magistrate Judge did not specifically state that amendment in this case would be futile, it was implied by her recommendation that all of the claims be dismissed with prejudice. As such, this second objection is overruled.

Third, Plaintiff objects to the fact that the standard of review section in the R&R omitted reference to the law that on a Rule 12(b)(6) motion, the facts alleged by the plaintiff must be taken as true and that reasonable inferences should be drawn from the facts in favor of the plaintiff. (ECF No. 63, pp.1-2.) However, it is noted that Plaintiff does not object to the standard of review *applied by* the Magistrate Judge in the R&R, only that she did not state it in full in the standard of review section. The Court finds that this objection is not relevant to the Magistrate Judge's recommendation as to the disposition of his claims. Nevertheless, a review of the R&R reveals that the Magistrate Judge cited the proper standard of review to be applied in deciding motions to dismiss filed pursuant to Rule 12(b)(6). (ECF No. 62, p.3.) Therefore, this objection is overruled.

Fourth, Plaintiff objects to the statement made by the Magistrate Judge on page 6 of the R&R.

Specifically, the statement, "Plaintiff was upset about being removed from the exemption list and requested the consultation as a result." (ECF No. 63, p.2.) Plaintiff claims that this statement is not supported by any of his factual allegations and impermissibly draws inference against him based on an argument made in Dr. Salameh's brief. As an initial matter, Plaintiffs reference to this statement is taken out of context and not even stated in full. The R&R reads, "Plaintiff alleges no new facts that would suggest that a new or urgent medical issue had emerged which required immediate medical attention at the time of his discussion with Dr. Salameh on November 11, 2014. Rather, it appears that Plaintiff was upset about being removed from the exemption list and requested the consultation as a result." (ECF No. 62, p.6.) The Magistrate Judge did not impermissibly draw any inferences against Plaintiff by making this statement, but instead she simply observed that it could have been the reason behind why Plaintiff requested the consult. Nevertheless, as explained in the next paragraph, Plaintiff's motives in requesting a urology consult were irrelevant to the Magistrate Judge's finding that Dr. Salameh was not deliberately indifferent to Plaintiff's serious medical needs by denying him a consultation with a urologist. Plaintiff's fourth objection is therefore overruled.

In Plaintiff's fifth objection, he states that the Magistrate Judge impermissibly considered his motive in requesting the urology consult. (ECF No. 63, p.2.) However, the Magistrate Judge set forth many reasons as to why Plaintiff had not demonstrated deliberate indifference on the part of Dr. Salameh and not one of those reasons took into consideration Plaintiff's motives for requesting the consultation. The Magistrate Judge simply set forth a theory as to why Plaintiff requested the consult but she went on to explain the many reasons why the Amended Complaint failed to state a deliberate indifference claim against Dr. Salameh for denying Plaintiff the urology consult; namely, (1) that Plaintiff's Benign Prostatic Hyperplasia ("BPH") has been known since he was initially incarcerated in 1998 and it has not gone untreated while he has been in state custody, (ECF No. 62, p.6); (2) there were no previously unknown conditions or symptoms and no new or urgent medical issues with Plaintiff's BPH that required a consultation, (ECF No. 62, p.6.); (3) he was not in substantial risk of serious harm, (ECF No. 62, p.7); and (4) he did see two other doctors about his urinary issues, although neither was a urologist, and one of those doctors told Plaintiff that Dr. Salameh would not approve a consultation with a urologist unless there were a complete blockage of Plaintiff's urine, (ECF No. 62, p.8). Plaintiff's motivation for requesting the consult was clearly irrelevant to the Magistrate Judge's finding. As such, this objection is overruled.

In Plaintiff's sixth objection, he appears to contend that, contrary to what is in the R&R, new developments in his physical condition did in fact prompt his request for the urology consult. (ECF No. 63, pp.2-3.) In this regard, he has submitted a proposed Third Amended Complaint in which he alleges that he was having "increased urinary problems" sometime around October 27, 2014, and in response was seen by Dr. Mihaly, who increased his Hytrin dosage from 15 mg to 20 mg, the maximum dosage permitted, and allegedly told him that other treatments should be considered. (ECF No. 64-1, p. 17.) Plaintiff also states that on November 18, 2014, Dr. Mihaly prescribed him Ditropan, which reduced his urinary frequency and increased the force of urination. He also prescribed Amantidine in December 2014 to reduce Plaintiff's tremors, which Plaintiff says seemed to work at first but soon lost its efficacy. These new allegations do not alter the Magistrate Judge's deliberate indifference analysis, and, if anything, they demonstrate that Plaintiff's condition was being treated, with some success, at the time Dr. Salameh denied the urology consult. Therefore, this objection is overruled.

In Plaintiff's seventh objection, he objects to the Magistrate Judge's finding that the facts alleged in the Amended Complaint do not support a finding that Plaintiff was at "substantial risk of serious harm." (ECF No. 63, p.3.) In support, he cites to the Third Circuit's Order in this case dated June 6, 2016, which reversed this Court's Order finding that Plaintiff had not satisfied the imminent danger exception to the three strikes rule found in 28 U.S.C. § 1915(g). In the Circuit's Order, the court stated that

Plaintiff had "met the standard to show that he was in imminent danger of serious physical injury based on his claims relating to a refusal or failure to treat a medical condition . ..." (ECF No. 36, p.2.) However, with respect to this objection, it must be noted that Plaintiff filed an Amended Complaint following the Circuit's reversal and remand of this case. (ECF No. 39.) In the Amended Complaint, Plaintiff did not assert a claim of refusal or failure to treat his medical condition like he did in his original Complaint that was before the Circuit. Instead, Plaintiff claimed that Dr. Salameh was deliberately indifferent to his serious medical needs by denying him a consultation with a urologist. (ECF No. 39-1, ¶¶ 84-86.) His complaint against Dr. Salameh was not about the treatment he was allegedly receiving or not receiving for his BPH, and the Magistrate Judge correctly pointed out that Plaintiff had alleged no facts that would suggest he had a new or urgent medical issue which required medical attention. Moreover, by Plaintiff's own admissions in his Amended Complaint, he was being treated for his BPH. Therefore, this objection is overruled.

In Plaintiff's eighth objection, he claims that the Magistrate Judge did not state the full holding of Monmouth Cty. Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326 (3d Cir. 1987). On page eight of the R&R, the Magistrate Judge cited Monmouth for the proposition that allegations of malpractice and disagreement as to proper medical treatment of a prisoner do not support a claim of an Eighth Amendment violation. However, Plaintiff claims that the Magistrate Judge ignored its holding that deliberate indifference is demonstrated when prison authorities prevent an inmate from seeing physicians capable of evaluating the need for such treatment. With regard to this objection, it is factually incorrect as the Magistrate Judge did not cite Monmouth for its holding. She cited Monmouth for its acknowledgment regarding an inmate's allegations of malpractice and disagreement as to proper medical care when asserting an Eighth Amendment violation. Additionally, Plaintiff's objection is legally incorrect because the holding in Monmouth concerned the constitutionality of a county order requiring inmates to secure court-ordered releases to obtain abortions while in county custody. What Plaintiff cites to in his objections is a quote from Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 762 (3d Cir. 1979), and simply the Third Circuit's recognition of what can constitute deliberate indifference. Nevertheless, this objection is without merit because it has no effect on the Magistrate Judge's recommendation as to the disposition of his claims.

In Plaintiff's ninth objection, he objects to the cases cited in the Magistrate Judge's R&R that hold the failure to provide a prisoner with alternative forms of drug testing does not constitute deliberate indifference. (ECF No. 63, pp.3-4.) Plaintiff's objection to the holdings of these cases has no effect on the Magistrate Judge's recommendation as to the disposition of his claims and is therefore without merit.

In Plaintiff's tenth and eleventh objections, he objects to the Magistrate Judge's analysis of his retaliation claim under Title V, 42 U.S.C. § 12203(a) of the ADA. (ECF No. 63, pp.4-5.) Specifically, he claims that to establish the first prong for a claim for retaliation under the ADA, he need only show that he engaged in conduct specified in the statute - "opposed any act or practice made unlawful under [the ADA]" or "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the ADA]." The Magistrate Judge found that Plaintiff's described protected activity in his Amended Complaint was his assistance to inmate Eugene Watson in Mr. Watson's action against the DOC and Dr. Salameh. She determined that the activity described was not protected because there is no constitutional right to offer legal assistance to other prisoners, and, in any event Plaintiff's assistance amounted only to taking notes and arranging papers at Mr. Watson's direction. Plaintiff asserts that the Magistrate Judge was incorrect in her analysis and that he did satisfy the first prong of his retaliation claim.

Plaintiff ignores the fact that the Magistrate Judge found, in the alternative, that Plaintiff could not satisfy the third prong of his retaliation claim even if he could somehow meet the first two prongs.

Specifically, she found that he could not establish a causal connection between his conduct and the adverse action because there was more than a four year gap between when Plaintiff assisted Mr. Watson with note-taking and when Dr. Salameh took away his drug testing exemption. In Plaintiff's twelfth objection, he states that the Magistrate Judge ignored his allegation that Dr. Salameh told him "that although he knows that Plaintiff likes to file grievances and lawsuits he had decided that Plaintiff's exemption from urine testing no longer exists, which is certainly circumstantial evidence that Plaintiff's litigation/grievances activities were still on Dr. Salameh's mind and were being considered before he made his decision." (ECF No. 63, p.5.) Even taking this statement as true, it does not establish a causal connection between the protected activity and adverse action. The protected activity alleged in this claim is not Plaintiff's filing of grievances and lawsuits, but rather his assistance to Mr. Watson in his lawsuit-two different activities. Therefore, this objection, as well as objections ten and eleven, is without merit.

Plaintiff's thirteenth objection is to the Magistrate Judge's conclusion that Dr. Salameh terminated his exemption based on a medical judgment. Plaintiff claims that under Pennsylvania DOC policy, medical judgments are documented and objective findings must be noted to justify a medical assessment or plan. He claims that Dr. Salameh did not terminate his exemption based on a medical judgment because Dr. Salameh did not make any objective findings to support his conclusion. This objection is without merit because whether or not Dr. Salameh complied with DOC policy has no affect as to whether or not his decision to remove Plaintiff from the exemption list was a medical judgment call. Accordingly, this objection is overruled.

Plaintiff's fourteenth objection is that the Magistrate Judge incorrectly stated that "[Dr. Salameh] told Plaintiff that he would reevaluate the situation at a later point and, if necessary, extend his allotted time." (ECF No. 62, p. 14.) Plaintiff claims that Dr. Salameh actually said that "he may extend the time." (ECF No. 63, p.6.) Not only is this distinction irrelevant, but Plaintiff's objection is also irrelevant and does not alter the Magistrate Judge's recommendation as to the disposition of his claims.

Plaintiff's fifteenth objection is to the Magistrate Judge's reliance on Terbush v. Mass. Ex rel. Hampden Cty. Sheriff's Office, 987 F. Supp. 2d 109, 121-2 (D. Mass. 2013), which involved events that took place prior to the enactment of the ADA. (ECF No. 62, p.6.) In the R&R, the Magistrate Judge cited Terbush as an example of a case where the court found that Shy Bladder Syndrome did not constitute a disability. However, Plaintiff states that the ADA liberalized the standards for being a qualified individual with a disability, and therefore, the Magistrate Judge should not have cited to this case.

Plaintiff's objection is without merit because, despite citing Terbush, the Magistrate Judge made an independent determination that Plaintiff does not suffer from a qualifying disability, a finding that Plaintiff objects to in his sixteenth objection. (ECF No. 63, pp.6-7.) While it is true that urination is a major life activity, the Magistrate Judge noted that the disability at issue here was not whether Plaintiff can urinate, but whether he can urinate within a certain time limit for the purpose of drug testing. Nevertheless, the Magistrate Judge considered Plaintiff's ADA claim in the alternative and found that he was unable to state a claim even assuming that he was a qualified individual with a disability, a finding to which Plaintiff does not assert an objection. As such, Plaintiff's fifteenth and sixteenth objections are overruled.

In Plaintiff's seventeenth objection, he objects to the following statement made by the Magistrate Judge in regards to Plaintiff's due process claim: "Plaintiff does not in any way specify how an inmate's parole eligibility may be affected, much less how his own eligibility has been affected." (ECF No. 62, p. 18.) Plaintiff states that he has provided in his proposed Third Amended Complaint details of how custody levels and parole eligibility can be affected. Plaintiff's Third Amended Complaint outlines how an inmate's custody level and parole eligibility could be adversely affected by an inmate

being found guilty of a misconduct. (ECF No. 64-1, pp.32-33.) However, this does not change the fact that Plaintiff is unable to state a due process violation claim because he has not thus far been subject to any sanctions as a result of violating the DOC policy requiring him to submit a urine sample within a specified period of time. An alleged speculative alteration in Plaintiff's custody level and parole eligibility does not state a claim. As such, this objection is overruled.

Therefore, upon an independent review of the record and consideration of the Magistrate Judge's Report and Recommendation, and Plaintiff's Objections thereto, the following Order is entered:

AND NOW, this 16th day of December, 2016.

IT IS HEREBY ORDERED that Defendants' Motions to Dismiss (ECF Nos. 40, 48) are **GRANTED** and Plaintiff's Amended Complaint (ECF No. 39) is dismissed with prejudice for failure to state a claim.

IT IS FURTHER ORDERED that the Magistrate Judge's Report and Recommendation (ECF No. 62) is adopted as the Opinion of the Court.

IT IS FURTHER ORDERED that Plaintiff's Motion to File a Third Amended Complaint (ECF No. 64) is **DENIED** as futile.

IT IS FURTHER ORDERED that the Clerk of Court mark this case **CLOSED**.

AND IT IS FURTHER ORDERED that pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, Petitioner has thirty (30) days to file a notice of appeal as provided by Rule 3 of the Federal Rules of Appellate Procedure.

By the Court:

/s/ Kim R. Gibson

Kim R. Gibson

United States District Judge

BRUCE L. WISHNEFSKY, Plaintiff, v. M.D. JAWAD A. SALAMEH, and PA DEPARTMENT OF CORRECTIONS, Defendants.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
2016 U.S. Dist. LEXIS 161035
Civil Action No. 3:15-cv-00148
November 18, 2016, Decided
November 18, 2016, Filed

Editorial Information: Subsequent History

Adopted by, Objection overruled by, Dismissed by, Motion denied by **Wishnefsky** v. Salameh, 2016 U.S. Dist. LEXIS 174037 (W.D. Pa., Dec. 16, 2016)

Editorial Information: Prior History

Wishnefsky v. Salameh, 2015 U.S. Dist. LEXIS 93306 (W.D. Pa., July 17, 2015)

Counsel BRUCE L. **WISHNEFSKY**, Plaintiff, Pro se, Somerset, PA.

For M.D. JAWAD A. SALAMEH, Defendant: Samuel H. Foreman, Weber Gallagher Simpson Stapleton Fires & Newby, Pittsburgh, PA.

For PA DEPARTMENT OF CORRECTIONS, Defendant: Mary Lynch Friedline, LEAD ATTORNEY, Office of Attorney General, Pittsburgh, PA; J. Eric Barchiesi, Office of Attorney General, Pittsburgh, PA.

Judges: Lisa Pupo Lenihan, United States Magistrate Judge. District Judge Kim R. Gibson.

Opinion

Opinion by: Lisa Pupo Lenihan

Opinion

REPORT AND RECOMMENDATION

I. RECOMMENDATION

For the reasons stated herein, it is respectfully recommended that the Defendants' Motions to Dismiss (ECF No. 40, 48) be granted and that Plaintiff's Amended Complaint (ECF No. 39) be dismissed with prejudice for failure to state a claim.

II. REPORT

A. Allegations

Plaintiff asserts a claim of deliberate indifference under the Eighth Amendment against Dr. Jawad A, Salameh, M.D. In his Amended Complaint, Plaintiff alleges that Dr. Salameh refused to approve a consultation with an urologist for issues related to his Benign Prostatic Hyperplasia (BPH). (ECF No. 39, ¶ 68.) Plaintiff avers that as a result of Dr. Salameh's actions, he suffered from impaired urinary functioning from December 2014 through March 2016, when a cystoscopy was performed. (ECF No. 39-1, ¶ 86.)

Appendix C

Plaintiff also asserts a claim of retaliation against Dr. Salameh and the Pennsylvania Department of Corrections (PA DOC) under 42 U.S.C. § 12203(a) of the Americans with Disabilities Act (ADA) for ordering Plaintiff's drug testing accommodation, in effect since 2004, to be terminated. (ECF No. 39-1, ¶¶ 89-90.) Plaintiff asserts that Dr. Salameh did so because Plaintiff assisted another inmate, Eugene Watson, in Mr. Watson's ADA claim against Dr. Salameh. Id. Plaintiff states that he took notes and arranged papers for Mr. Watson at his direction, and that Dr. Salameh was aware of Plaintiff's assistance in the matter. (ECF No. 54, p. 14.)

Plaintiff alleges that under 42 U.S.C. § 12203(b) of the ADA, Dr. Salameh's action in terminating his accommodation, as well as the PA DOC's action in placing Dr. Salameh's termination order into effect, was done to intimidate him and to interfere with his ADA accommodation. (ECF No. 39-1, ¶ 94.)

Plaintiff also asserts a claim for injunctive relief against the PA DOC, requesting that the Court order the DOC allow him to give an oral fluid sample instead of a urine sample during random drug testing, due to his difficulty urinating on demand and his hand tremors from having Parkinson's Disease. (ECF No. 39-1, ¶ 97.) Plaintiff contends that this refusal to grant this accommodation is discrimination under the ADA. (ECF No. 39-1, ¶ 99.)

Plaintiff asserts a due process violation under the Fourteenth Amendment against the PA DOC. Plaintiff avers that under PA DOC Policy 6.3.12, if an inmate fails to give a urine sample of at least 2 oz. within 2 hours of being ordered to do so, it creates a mandatory presumption that the inmate has refused to comply and the ensuing misconduct report would be used against the inmate during the misconduct hearing. (ECF No. 39-1, ¶ 103-05.) An inmate found guilty of misconduct faces sanctions including loss of contact visits for a period of 180 days to indefinitely. (ECF No. 39-1, ¶ 104.) Plaintiff argues that the presumption of an inmate's intentional failure to obey the order to give a urine sample relieves the PA DOC of the need to prove a refusal and violates the Due Process Clause. (ECF No. 39-1, ¶ 107.)

B. Standard of Review

The United States Court of Appeals for the Third Circuit aptly summarized the standard to be applied in deciding motions to dismiss filed pursuant to Rule 12(b)(6):

> Under the "notice pleading" standard embodied in Rule 8 of the Federal Rules of Civil Procedure, a plaintiff must come forward with "a short and plain statement of the claim showing that the pleader is entitled to relief." As explicated in Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), a claimant must state a "plausible" claim for relief, and "[a] claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Although "[f]actual allegations must be enough to raise a right to relief above the speculative level," Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), a plaintiff "need only put forth allegations that raise a reasonable expectation that discovery will reveal evidence of the necessary element." Fowler, 578 F.3d at 213 (quotation marks and citations omitted); *see also* Covington v. Int'l Ass'n of Approved Basketball Officials, 710 F.3d 114, 117-18 (3d Cir.2013).Thompson v. Real Estate Mortg. Network, 748 F.3d 142, 147 (3d Cir. 2014).

Also, when considering *pro se* pleadings, a court must employ less stringent standards than when judging the work product of an attorney. Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972). When presented with a *pro se* complaint, the court should construe the complaint liberally and draw fair inferences from what is not alleged as well as from what is alleged. Dluhos v. Strasberg, 321 F.3d 365, 369 (3d Cir. 2003). In a § 1983 action, the court must "apply the applicable

law, irrespective of whether the *pro se* litigant has mentioned it by name." Higgins v. Beyer, 293 F.3d 683, 688 (3d Cir. 2002) (quoting Holley v. Dep't of Veteran Affairs, 165 F.3d 244, 247-48 (3d Cir. 1999)). *See also* Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996) ("Since this is a § 1983 action, the [*pro se*] plaintiffs are entitled to relief if their complaint sufficiently alleges deprivation of any right secured by the Constitution.") (quoting Higgins, 293 F.3d at 688). Notwithstanding this liberality, *pro se* litigants are not relieved of their obligation to allege sufficient facts to support a cognizable legal claim. *See, e.g.*, Taylor v. Books A Million, Inc., 296 F.3d 376, 378 (5th Cir. 2002); Riddle v. Mondragon, 83 F.3d 1197, 1202 (10th Cir. 1996).

C. Discussion

1. Official Capacity Claims against Dr. Salameh

As an initial matter, it is unclear in what capacity Plaintiff has sued Dr. Salameh. However, it is noted that Dr. Salameh is not an employee of the PA DOC, or the state, (ECF No. 39, ¶ 5), and therefore he does not have an "official" capacity. Ellibee v. Leonard, 226 Fed. App'x 351, 357 (5th Cir.2007) ("the record shows that the defendants were employees of private companies, not a state or local government, so the defendants had no official capacities in which they could be sued."); Tran v. Michigan Dep't of Human Services, 2007 WL 4326791 (E.D. Mich. Dec. 10, 2007) (same). As such, any and all claims asserted against Dr. Salameh in his official capacity should be dismissed.

2. Deliberate Indifference.

Plaintiff alleges that Dr. Salameh was deliberately indifferent to his serious medical needs by denying him a consultation with an urologist. With regard to the standard for finding deliberate indifference to a prisoner's medical needs to constitute a violation of the Eighth Amendment, this Court has stated:

> . . . . The deprivation of medical treatment rises to the level of a deprivation of a prisoner's Eighth Amendment right not to be subjected to cruel and unusual punishment in situations where it constitutes the "unnecessary and wanton infliction of pain," or where there is a "deliberate indifference to a serious medical need[.]" Spruill v. Gillis, 372 F.3d 218, 235 (3d Cir. 2004) (internal quotation marks and citations omitted). Allegations of medical malpractice, or mere disagreement as to the proper course of medical treatment, are not sufficient to establish a Constitutional violation. Id.
>
> In a situation in which a prisoner alleges deliberate indifference to a medical need, the United States Court of Appeals for the Third Circuit has held that a plaintiff must plead "(i) a serious medical need, and (ii) acts of omissions by prison officials that indicate deliberate indifference to that need." Natale v. Camden County Corr. Facility, 318 F.3d 575, 582 (3d Cir. 2003). With respect to the first requirement, a medical need is serious "if it has been diagnosed by a physician as requiring treatment." Atkinson v. Taylor, 316 F.3d 257, 266 (3d Cir. 2003). A medical need may also be "serious" if even a layperson would recognize the need for a doctor's attention. Morrison v. Phillips, No. 06-812, 2008 U.S. Dist. LEXIS 71205, at *39 (D. N.J. Sept. 16, 2008) (citing Johnson v. Snyder, 444 F.3d 579, 584-85 (7th Cir. 2006)).
>
> With respect to the second prong, deliberate indifference is properly pleaded by factual allegations supporting the conclusion that the official knew of and disregarded an excessive risk to inmate health or safety. Natale, 318 F.3d at 582 (citing Farmer v. Brennan, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)). The official must be "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists." Natale, 318 F.3d at 582. The official must also "draw the inference." Id. The United States Court of Appeals for the Third Circuit has held that this standard is met in several scenarios, including "when a doctor is intentionally inflicting pain on [a] prisoner," and when the denial of "reasonable requests for medical treatment .

. . exposes the inmate to undue suffering[.]" Spruill, 372 F.3d at 235 (internal quotation marks and citations omitted). This standard is also met when "a prison official . . . knows of a prisoner's need for medical treatment but intentionally refuses to provide it" or "delays necessary medical treatment based on a nonmedical reason." Rouse v. Plantier, 182 F.3d 192, 197 (3d Cir. 1999).**Wishnefsky** v. Salameh, No. 08-128J, 2009 U.S. Dist. LEXIS 124600, 2009 WL 8657143, at *5-6 (W.D. Pa. 2009) (footnote omitted).

Plaintiff alleges that Dr. Salameh's actions in denying him a consultation with an urologist constitutes deliberate indifference. In the instant case, it is not disputed that Plaintiff suffers from BPH, which causes difficulty in starting urine flow, and can be problematic for Plaintiff when he is ordered to give a urine sample within a two-hour window during random drug testing. However, Defendant Dr. Salameh argues that Plaintiff has failed to plead facts sufficient to maintain a claim under the Eighth Amendment because Plaintiff's request in December 2014 for a urology consultation, as well as Dr. Salameh's denial of the request, had nothing to do with any actual medical need. (ECF No.41, p. 18.) Rather, Dr. Salameh argues that the consultation request was prompted by his decision to remove Plaintiff from the urinary exemption list. Id.

Plaintiff does not allege that a new development in his physical condition prompted his request for a urology consultation. Plaintiff's BPH has been known since he was incarcerated at SCI Rockview from 1998-2004. (ECF No. 39, ¶ 11.) He was granted an informal accommodation from 2000-2004, when hair samples instead of urine samples were taken during the drug tests. (ECF No. 39, ¶ 24-27.) While at SCI Laurel Highlands, Plaintiff was exempt entirely from random drug testing from 2004 until 2014, at which time Dr. Salameh removed him from the list of exempt inmates. (ECF No. 39, ¶¶ 30, 62.) Plaintiff alleges no new facts that would suggest that a new or urgent medical issue had emerged which required immediate medical attention at the time of his discussion with Dr. Salameh on November 11, 2014. Rather, it appears that Plaintiff was upset about being removed from the exemption list and requested the consultation as a result.

The Supreme Court has found that the Eighth Amendment encompasses a deliberate indifference to serious medical need because the Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency." Estelle v. Gamble, 429 U.S. 97, 102, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976) (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)). Thus, the government has an "obligation to provide medical care for those whom it is punishing by incarceration." Id., at 103. Plaintiff does not deny that he has received medical care for his condition. Indeed, he alleges a detailed history of the treatment process by various doctors for his BPH since his initial incarceration. His allegations regarding the events of November 11, 2014 are not those that the principles in Estelle are meant to safeguard from happening. The deliberate indifference standard is meant to prevent any unwarranted punishment of a prisoner, beyond what is already imposed by incarceration, simply for being sick or needing medical attention.1 Plaintiff's own Amended Complaint makes clear that his BPH has not gone untreated. He does not allege that there appeared some previously unknown condition or symptom that required a consultation which was subsequently denied to him. Even assuming *arguendo* that Plaintiff's long-existing BPH does constitute a "serious medical need" within the context of the situation, he still fails to show that Dr. Salameh's actions rise to the level of deliberate indifference.

The facts alleged support the finding that Dr. Salameh knew of Plaintiff's medical condition, but do not support any finding that there was a "substantial risk of serious harm" or that Dr. Salameh's actions in any way exposed Plaintiff to "undue suffering." What Plaintiff alleges is that Dr. Salameh removed Plaintiff from the exemption list for drug testing, despite Plaintiff's protests that he still has trouble urinating and that his hand tremors which makes it difficult to hold a full specimen cup without spilling it. (ECF No. 39, ¶ 61.) There is no allegation that Plaintiff's physical wellbeing was adversely affected

as a result of Dr. Salameh's decision to remove him from the list, nor is there any allegation that the decision caused Plaintiff any new developments in physical pain or even discomfort. In fact, the grievance that Plaintiff subsequently filed was regarding the exchange wherein Dr. Salameh denied reinstating him on the exemption list, not any physical symptoms that Dr. Salameh failed to treat. (ECF No. 39, ¶ 64.)

However, Plaintiff does allege that as a result of Dr. Salameh's refusal to approve a consult with an urologist, he has suffered from depression as well as deterioration of his urinary functioning. (ECF No. 39-1, ¶ 76.) The Supreme Court is unequivocal that an inadvertent failure to provide adequate medical care does not constitute "an unnecessary and wanton infliction of pain," and that in order to state a cognizable claim of deliberate indifference, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 105-6, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). Mere allegations of malpractice or disagreement as to proper medical treatment of a prisoner do not support a claim of an Eighth Amendment violation. Monmouth Cty. Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 346 (3d Cir. 1987).

In this case, Plaintiff alleges that he did see two other doctors about his urinary issues, although neither doctor was an urologist. (ECF No. 39, ¶ 67.) One of the doctors told Plaintiff that he conferred with Dr. Salameh and was told that Dr. Salameh would not approve a consultation with an urologist unless there were a complete blockage of Plaintiff's urine. Id., at ¶ 68. Plaintiff clearly just disagrees with Dr. Salameh as to whether a consultation with an urologist is appropriate for someone with his medical condition. Moreover, Plaintiff alleges that the discussion he and Dr. Salameh had on November 11, 2014, a few weeks before he put in a sick call slip asking to be evaluated by an urologist, was primarily over the drug testing exemption, and not over any serious medical need that required immediate attention. (ECF No. 39, ¶ 62.) Plaintiff also does not allege any medical need that came up when he put in the sick call slip on December 3, 2014. (ECF No. 39, ¶ 67.) These allegations fail to state a cognizable claim of deliberate indifference on the part of Dr. Salameh.

Courts have found that failure to provide a prisoner with an alternative form of drug testing does not constitute deliberate indifference to a serious medical need. McClintic v. Pa Dep't of Corr., No. 12-6642, 2013 U.S. Dist. LEXIS 160898, 2013 WL 5988956 (E.D. Pa. 2013) (no deliberate indifference found where plaintiff alleged defendants refused to allow him to undergo alternative means of drug-testing for his paruresis, and punished him when he could not provide a urine sample.) *See also* Sheehy v. Palmateer, 68 F. App'x 77 (9th Cir. 2003) (summary judgment properly granted to defendants on plaintiff's Eighth Amendment claims finding no deliberate indifference where prison official imposed disciplinary sanctions after inmate failed to provide urine samples, even if inmate suffered from shy bladder syndrome, where inmate did not provide valid medical excuse.) Accordingly, the undersigned finds that such actions by Dr. Salameh do not rise to the level of deliberate indifference as to cause Plaintiff any "unnecessary and wanton infliction of pain." Defendant Salameh's Motion to dismiss the claim of deliberate indifference should therefore be granted.

3. Retaliation under Title V, 42 U.S.C. § 12203(a) of the ADA

Plaintiff alleges that Dr. Salameh and the PA DOC retaliated against him in violation of Title V, 42 U.S.C. § 12203(a) of the ADA by taking away his drug testing exemption for assisting inmate Eugene Watson in Mr. Watson's action against the DOC .2 As an initial matter, the Third Circuit has not yet addressed whether individuals may be held personally liable under the ADA, and courts are currently split on this issue. *See* Datto v. Harrison, 664 F. Supp. 2d 472, 487 (E.D. Pa. 2009) (collecting cases); *see also* Sutherland v. New York State Dep't of Law, 1999 U.S. Dist. LEXIS 7309, 1999 WL 314186 (S.D.N.Y. May 19, 1999) ("Individual defendants may not be held personally liable for alleged violations of the ADA . . . or the Rehabilitation Act . . . . nor can individuals be named as defendants in

ADA or Rehabilitation Act suits in their official or representative capacities."); Harrison v. Indosuez, 6 F.Supp.2d 224, 229 (S.D.N.Y.1998); Lane v. Maryhaven Ctr. of Hope, 944 F.Supp. 158, 162-63 (E.D.N.Y.1996). However, the Court need not express an opinion on the matter given that Plaintiff has not alleged facts to support a *prima facie* claim for retaliation against Dr. Salameh in violation of the ADA.

Title V, 42 U.S.C. § 12203(a) of the ADA provides: "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter."3 To establish a claim for retaliation under the ADA, a plaintiff must show (1) that he engaged in constitutionally protected conduct; (2) that an adverse action was taken against him by a prison official; and (3) that there is a causal connection between the exercise of his constitutional rights and the adverse action. *See* Williams v. Phila. Housing Auth., 380 F.3d 751, 759 (3d Cir. 2004); Fogleman v. Mercy Hosp., Inc., 283 F.3d 561, 567-68 (3d Cir. 2002); Krouse v. American Sterilizer Co., 126 F.3d 494, 500 (3d Cir. 1997) (setting forth elements of *prima facie* case of retaliation under ADA in the employment discrimination context). Although this test was developed in the employment discrimination context, every circuit to consider the issue has applied the same or a similar test in retaliation cases regarding public programs, *see* Alston v. District of Columbia, 561 F.Supp.2d 29, 40 (D.C. Cir. 2008), and, although rare, the issue has been addressed in the prison context. *See* Wilbon v. Michigan Dep't of Corr., 2015 U.S. Dist. LEXIS 27352, 2015 WL 1004707, at *3 (E.D. Mich. March 6, 2015); Glatts v. Lockett, 2011 U.S. Dist. LEXIS 19379, 2011 WL 772917, at *11 (W.D. Pa. Feb. 28, 2011); Morgan v. California Dep't of Corr. and Rehabilitation, 2008 U.S. Dist. LEXIS 55350, 2008 WL 2788401, at *3 (E.D. Cal. July 18, 2008).

Here, Plaintiff has not alleged that he engaged in a constitutionally protected activity. The activity described in the Amended Complaint is his assistance to inmate Eugene Watson in Mr. Watson's action against the DOC and Dr. Salameh. (ECF No. 39-1, ¶ 89.) However, there is no constitutional right to offer legal assistance to other prisoners. Shaw v. Murphy, 532 U.S. 223, 121 S. Ct. 1475, 149 L. Ed. 2d 420 (2001); Gibbs v. Hopkins, 10 F.3d 373, 378 (6th Cir. 1993).4 In any event, Plaintiff does not allege having provided any legal assistance to Mr. Watson, only that he helped to "take notes and arrange papers at Watson's direction." (ECF No. 54, at p. 14.) It is clear that Plaintiff had no constitutionally protected right to assist Mr. Watson with note-taking, let alone provide any assistance of a legal nature. Moreover, it would appear that reasonable efforts were made during Mr. Watson's case to provide him with assistance when counsel for Dr. Salameh objected to having an inmate assistant for Mr. Watson, but Mr. Watson rejected those proposals. Watson v. Pa. Dep't of Corr., 990 A.2d 164, 165-66 (Commw. Ct. of Pa. 2010). As such, the undersigned finds that Plaintiff has failed to establish the first prong necessary to state a claim of retaliation under Section 12203(a) of the ADA.

Nevertheless, assuming that Plaintiff can somehow meet the standards of the first two prongs of the claim of retaliation, i.e., that he engaged in constitutionally protected conduct, and that an adverse action was taken against him by a prison official, he still fails to satisfy the third prong: establishing a causal connection between his conduct and the adverse action. Inmate Eugene Watson's case was filed on May 12, 2008, with Judgment on the Pleadings granted in favor of Dr. Salameh on April 28, 2009. (ECF No. 41, at p. 5.) Plaintiff alleges that the adverse action taken against him, that is, Dr. Salameh taking away his drug testing exemption, occurred on November 11, 2014. (ECF No. 39, ¶¶ 61-62.) This is more than four years from when Plaintiff assisted Mr. Watson with note-taking. Such an interval is too long to sufficiently establish a causal connection in order to meet the third prong of the claim of retaliation. *See* Watson v. Rozum, 834 F.3d 417, 423 (3d Cir 2016) (timing between lawsuits state prisoner previously filed against prison officials, and the officials' confiscation of prisoner's radio two years later was too remote to suggest a retaliatory motive). As such, Plaintiff has failed to state a retaliation claim under Section 12203(a) of the ADA.

4. Intimidation and Interference under Title V, 42 U.S.C. § 12203(b) of the ADA

Plaintiff alleges that Dr. Salameh's order to terminate his drug testing accommodation was "done to intimidate [him] and to interfere with his ADA accommodation that has been in effect since at least 2004." (ECF No. 39-1, ¶ 94.) In this regard, section 12203(b) of the ADA states:

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.42 USCA § 12203(b). The Third Circuit has noted that the provision of the ADA "arguably sweeps more broadly" than § 12203(a). Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778, 789 (3d Cir. 1998). To establish a claim under § 12203(b), a plaintiff must show that when the defendant "coerced," "threatened," "intimidated," or "interfered," the plaintiff was exercising or enjoying a right protected by the ADA. *See* Romero v. Allstate Ins. Co., 3 F.Supp.3d 313, 335 (E.D. Pa. Mar. 13, 2014).

Here, Plaintiff does not allege aiding or encouraging any other individual in the exercise or enjoyment of any right granted in the ADA. Instead, he alleges interference with his own exercise and enjoyment of his drug testing accommodation. However, there is currently no case law which addresses whether a prisoner's drug testing accommodations or exemptions are a protected right or activity under the ADA. Nonetheless, Plaintiff has failed to properly allege that Dr. Salameh interfered with his enjoyment of his exemption. Plaintiff's allegations go only as far as supporting an assertion that Dr. Salameh terminated his exemption based on a medical judgment.

Plaintiff alleges that Dr. Salameh initially had the mistaken belief that Plaintiff had had a TURP procedure, which would have improved his urinary function. (ECF No. 39, ¶ 61.) While Dr. Salameh's assumption may have been incorrect, his removing Plaintiff's exemption at this point was not an intentional effort to interfere with his exemption. When Plaintiff corrected Dr. Salameh and explained that he neither had a TURP nor a cystoscopy, Dr. Salameh acknowledged that it may take Plaintiff more than the two hours allotted to produce a urine sample, but he still could not find any legitimate reasons for the exemption. (ECF No. 39, ¶ 62.) He told Plaintiff that he would reevaluate the situation at a later point and, if necessary, extend his allotted time. Id.

These allegations make clear that Dr. Salameh's decision not to reinstate Plaintiff's exemption was purely medically related and not done for a reason made unlawful under § 12203(b). Therefore, Plaintiff has failed to state a proper claim under this subsection. *See, e.g.*, Iseley v. Beard, 200 Fed. Appx. 137, 142 (3d Cir. 2006); Fitzgerald v. Corr. Corp. of Am., 403 F.3d 1134, 1144 (10th Cir. 2005) ("[P]urely medical decisions . . . do not ordinarily fall within the scope of the ADA or the Rehabilitation Act."); Thomas v. Pa. Dep't of Corr., 615 F. Supp. 2d 411, 429 (W.D. Pa. 2009) (plaintiff's requests for a handicap cell that were denied based on a medical determination that they were not warranted did not support discriminatory treatment in violation of Title II of the ADA).

5. Denial of ADA Accommodation

Plaintiff argues that the PA DOC's refusal to grant him the accommodation of allowing him to provide an oral fluid sample during drug tests, based on his inability to urinate in a timely way and his hand tremors, is discrimination under Title II of the ADA.

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Title II applies to the state prisons, Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 209-10, 118 S. Ct.

1952, 141 L. Ed. 2d 215 (1998), and authorizes private lawsuits for both money damages and injunctive relief against public entities that violate its provisions. 42 U.S.C. § 12133. Under Title II, the failure of a public entity to provide disabled persons with reasonable modifications constitutes discrimination within the meaning of the Act. *See, e.g.*, Townsend v. Quasim, 328 F.3d 511, 517 (9th Cir. 2003); Muhammad v. Ct. Com. Pl. of Allegheny Cty., Pa, Civil No. 2:09-1255, 2011 U.S. Dist. LEXIS 105784, 2011 WL 4368394, at *7 (W.D. Pa. Aug. 25, 2011). *See also* 28 C.F.R. § 35.130(b)(7) (requiring public entity to make "reasonable modifications in policies, practices, or procedures when modifications are necessary to avoid discrimination on the basis of disability").

While the Pennsylvania Department of Corrections is entitled to Eleventh Amendment immunity, the 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. United States v. Georgia, 546 U.S. 151, 159, 126 S. Ct. 877, 163 L. Ed. 2d 650 (2006). In order for this to happen, a plaintiff must first be able to state a claim under the ADA by showing that (1) he is a qualified individual; (2) with a disability; and (3) that he was excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or was subjected to discrimination by any such entity; (4) by reason of his disability. Bowers v. National Collegiate Athletic Ass'n, 475 F.3d 524, 550 (3d Cir. 2007).

A disability, as defined by the ADA, is "a physical or mental impairment that substantially limits one or more major life activities of such individual; [or] a record of such an impairment." 42 U.S.C. § 12102(1). However, it is "insufficient for individuals attempting to prove disability status [under the ADA]. . .to merely submit evidence of a medical diagnosis of an impairment." Pritchett v. Ellers, 324 F. App'x 157, 159 (3d Cir. 2009) (citing Toyota v. Motor Mfg., 534 U.S. 184, 198, 122 S. Ct. 681, 151 L. Ed. 2d 615 (2002) (overruled on other grounds by the ADA Amendments Act of 2008, Pub.L. 110-325 122 Stat. 3553 (2008)). "Merely having an impairment does not make one disabled for the purpose of the ADA." Toyota, 534 U.S. at 195.

In the instant case, Plaintiff has failed to allege facts that would support the claim that not being able to urinate within a certain time limit for the purpose of a drug test qualifies as an impairment that substantially limits a major life activity as contemplated by the ADA. The United States District Court of Massachusetts has found, in the most updated case that is on point, that difficulty urinating does not adequately rise to the level of a disability. *See* Terbush v. Mass. Ex rel. Hampden Cty. Sheriff's Office, 987 F. Supp. 2d 109, 121-2 (D. Mass. 2013) (Inmate's Shy Bladder Syndrome was not a disability under the ADA where inmate's impairment only prevented him from urinating while standing in front of others for purposes of a drug test, and inmate was able to urinate in front of others for drug tests when allowed to sit.) Plaintiff states in his Amended Complaint that after the exemption was terminated, he was called to give a urine sample on May 29, 2015, and was able to do so upon being placed in a separate cell and given a hand held urinal. (ECF No. 39-1, ¶ 75.) Plaintiff was again allowed the same conditions on June 2, 2016 when called to give a urine sample, and was able to provide a sample. (ECF No. 39-1. ¶ 82.) There is no evidence that Plaintiff suffers from a qualifying disability, or, even assuming he does, that the DOC subjected him to discrimination when it did not extend the drug testing exemption that Plaintiff sought, but instead gave him other options that resulted in him complying with the drug testing requirements.

Moreover, even assuming that Plaintiff is a qualified individual with a disability, he does not state a claim under the ADA because his claim is based upon his disagreement with Dr. Salameh's medical determination that he no longer qualified for a drug test exemption. *See, e.g.*, Iseley v. Beard, 200 Fed. Appx. 137, 142 (3d Cir. 2006); Fitzgerald v. Corr. Corp. of Am., 403 F.3d 1134, 1144 (10th Cir. 2005) ("[P]urely medical decisions . . . do not ordinarily fall within the scope of the ADA or the Rehabilitation Act."); Lesley v. Chie, 250 F.3d 47, 55 (1st Cir. 2001) ("[A] plaintiff's showing of medical unreasonableness must be framed within some larger theory of disability discrimination."); Thomas v.

Pa. Dep't of Corr., 615 F. Supp. 2d 411, 429 (W.D. Pa. 2009) (plaintiff's requests for a handicap cell that were denied based on a medical determination that they were not warranted did not support discriminatory treatment in violation of Title II of the ADA).

6. Due Process violation

Plaintiff alleges that under PA DOC Policy 6.3.12, if an inmate fails to give a urine sample of at least 2 oz. within 2 hours of being ordered to do so, it creates a mandatory presumption that the inmate has refused to comply and the ensuing misconduct report would be used against the inmate during the misconduct hearing. He claims that this constitutes a due process violation.

A prisoner's due process rights are violated when he is deprived of a legally cognizable liberty interest, which occurs when the prison "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995). Here, Plaintiff has not established that he was denied a liberty or property interest. Plaintiff was never found in violation of the PA DOC policy 6.3.12. He was given a misconduct charge on two previous occasions when he could not produce the urine sample within the prescribed time limit, but at the hearings the charges were dismissed based on evidence of his prostate condition. (ECF No. 39, ¶¶ 17, 22.) No other instance of misconduct based on his inability to produce a urine sample has been alleged. Secondly, even if Plaintiff were to have been found in violation of the drug interdiction policy, the sanctions Plaintiff enumerates are not enough to establish a liberty interest that requires due process protections.

The Due Process Clause of the Fourteenth Amendment does not protect every change in the conditions of confinement having a substantial adverse impact on a prisoner. Meachum v. Fano, 427 U.S. 215, 224, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976). A liberty interest inherent in the Constitution arises when a prisoner has acquired a substantial, although conditional, freedom such that the loss of liberty entailed by its revocation is a serious deprivation requiring that the prisoner be accorded due process. Gagnon v. Scarpelli, 411 U.S. 778, 781, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973); see also Mitchell v. Horn, 318 F.3d 523, 531 (3d Cir. 2003) (A plaintiff's "procedural due process rights are triggered by deprivation of a legally cognizable liberty interest."). The baseline for determining what is "atypical and significant hardship. . .in relation to the ordinary incidents of prison life" is ascertained by what a sentenced inmate may reasonably expect to encounter as a result of his or her conviction in accordance with due process of law. Griffin v. Vaughn, 112 F.3d 703, 706 (3d Cir. 1997). Interests recognized by the Supreme Court that fall within this category include the revocation of parole, Morrissey, 408 U.S. at 471, and the revocation of probation, Gagnon, 411 U.S. at 778. Access to contact visits is not a recognized liberty interest. Henry v. Dep't of Corr., 131 F. App'x 847, 849 (3d Cir. 2005) (Pennsylvania regulations did not create a liberty interest in a particular type of prison visitation, and thus, restriction of an inmate to non-contact visitation did not implicate any liberty interest.)

Here, Plaintiff names loss of contact visits for 180 days up to indefinitely as a sanction for refusing to give a urine sample, and alleges that it "may also adversely affect Plaintiff's custody level and parole eligibility." However, Plaintiff does not in any way specify how an inmate's parole eligibility may be affected, much less how his own eligibility has been affected. As Plaintiff has already clearly stated, he has thus far not been subject to any sanctions as a result of the DOC policy. Thus, Plaintiff has failed to sufficiently allege a due process violation claim.

III. CONCLUSION

For the aforementioned reasons, it is respectfully recommended that the Defendants' Motion to Dismiss (ECF No. 48) be granted and that Plaintiff's Amended Complaint (ECF No. 39) be dismissed with prejudice for failure to state a claim.

In accordance with the applicable provisions of the Magistrate Judges Act, 28 U.S.C. § 636(b)(1)(B)&(C), and Rule 72.D.2 of the Local Rules of Court, Plaintiff shall have fourteen (14) days from the date of the service of this report and recommendation to file written objections thereto. Plaintiff's failure to file timely objections will constitute a waiver of his appellate rights.

Dated: November 18, 2016.

/s/ Lisa Pupo Lenihan

Lisa Pupo Lenihan

United States Magistrate Judge

Footnotes

1

Plaintiff does allege that he never received the Transurethral Resection of the Prostate (TURP) and cystoscopy procedures, which had been recommended by an urologist back in 2007. (ECF No. 39, ¶¶ 43-44). Plaintiff alleges that on June 25, 2007, Dr. Salameh cancelled his cystoscopy because Plaintiff had told him that he was able to void his bladder without being catheterized but still had difficulty starting his stream. Id. ¶¶ 46-47. However, Plaintiff makes explicit that all of his claims are "based on the events that took place beginning from November 11, 2014, to the present time." (ECF No. 54, at p. 20.)

2

"Plaintiff need not be 'disabled' to prosecute a claim for retaliation or coercion under the ADA, rather 'a reasonable good faith belief that the statute has been violated suffices.'" Romero v. Allstate Ins. Co., 3 F.Supp.3d 313, 335-36 (E.D. Pa. Mar. 13, 2014) (quoting Selenke v. Med. Imaging of Colorado, 248 F.3d 1249 (10th Cir. 2001); *see also* Krouse v. American Sterilizer Co., 126 F.3d 494, 502 (3d Cir. 1997) ("Unlike a plaintiff in an ADA *discrimination* case, a plaintiff in an ADA *retaliation* case need not establish that he is a 'qualified individual with a disability'").

3

There is confusion among courts as to what remedies are available to those who claim that they have been victims of retaliation under the ADA. The Third Circuit has not yet addressed this issue, but district courts in our Circuit have uniformly held that the anti-retaliation provisions of the ADA do not authorize the award of compensatory and punitive damages. *See* Weaver v. County of McKean, 2012 U.S. Dist. LEXIS 61920, 2012 WL 1564661, at *6 (W.D. Pa. Apr. 9, 2012) (citing cases). Since compensatory and punitive damages are not available, the sole remedy for Plaintiff's ADA retaliation claim is equitable. However, he is seeking only compensatory and punitive damages, and, therefore, his claim could be dismissed on this basis alone. (ECF No. 39-1, p.5, ¶ 91.)

4

Prison officials may not, however, prevent such assistance or retaliate for providing such assistance where no reasonable alternatives are available. Gibbs, 10 F.3d at 378 (citing Johnson v. Avery, 393 U.S. 483, 490, 89 S. Ct. 747, 21 L. Ed. 2d 718 (1969)).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-1166

BRUCE L. WISHNEFSKY,
Appellant

v.

M.C. JAWAD A. SALAMEH, ET AL.

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 3-15-cv-00148)
District Judge: Honorable Kim R. Gibson

SUR PETITION FOR REHEARING

Present: SMITH, *Chief Judge*, McKEE, AMBRO, CHARGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, BIBAS, NYGAARD*, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who

---

* Judge Nygaard's vote is limited to panel rehearing only.

Appendix D

concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ L. Felipe Restrepo
Circuit Judge

Dated: March 5, 2018
CLW/cc: Mr. Bruce L. Wishnefsky
Samuel H. Foreman, Esq.
Caitlin J. Goodrich, Esq.
Kemal A. Mericli, Esq.