

IN THE UNITED STATES SUPREME COURT
FOR THE THIRD CIRCUIT
WASHINGTON, DISTRICT OF COLUMBIA

MONSERRATE ZAPATA : U.S. S. CT.
(Petitioner) :

VS. : DOCKET NO.

PECO, PHILA. ELECTRIC CO., :
(Defendants) :

APPENDIX TO PETITION FOR
WRIT OF CERTIORARI

- A. Last Certified Judgment with copy of Opinion filed in lieu of formal MANDATE by Ms. Patricia S. Dodsweitz, Clerk, U.S. Ct. of Appeals, E. D. Pa. No. 17-3441 . . . 6 pages.
- B. Order denying Reconsideration October 20, 2017 Pg. 1.
- C. Memorandum by U.S. Dist. Ct. E.D. Pa. 9/14/2017 Pgs. 5
- D. Notice of Risk Termination of PECO'S METER Act 129 Pg. 1.
- E. NOTICE of Legal Action October 11, 2016 Pg. 1.
- f. Last Notice to take Legal Action In Deceit Pg. 1.

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT
CLERK

UNITED STATES COURT OF APPEALS
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
Website: www.ca3.uscourts.gov

TELEPHONE
215-597-2995



May 8, 2018

Kate Barkman, Clerk
United States District Court for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street
Room 2609
Philadelphia, PA 19106

RE: Monserrate Zapata v. PECO, et al
Case Number: 17-3441
District Court Case Number: 2-17-cv-03699

Dear District Court Clerk,

Enclosed herewith is the certified judgment together with copy of the opinion or certified copy of the order in the above-captioned case(s). The certified judgment or order is issued in lieu of a formal mandate and is to be treated in all respects as a mandate.

Counsel are advised of the issuance of the mandate by copy of this letter. The certified judgment or order is also enclosed showing costs taxed, if any.

Very truly yours,

s/ Patricia S. Dodszuweit
Clerk
By: Legal Assistant/mb
267-299-4911

cc: Monserrate M. Zapata

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-3441

MONSERRATE ZAPATA,
Appellant

v.

PECO; PHILADELPHIA ELECTRIC COMPANY

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 17-cv-03699)
District Judge: Honorable Joseph F. Leeson, Jr.

Submitted Pursuant to Third Circuit LAR 34.1(a)
February 20, 2018
Before: SHWARTZ, KRAUSE and FISHER, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on February 20, 2018. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the orders of the District Court entered September 14, 2017 and October 23, 2017, be and the same is hereby affirmed.

Costs will not be taxed against the appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: February 21, 2018



Certified to a true copy and issued in lieu
of a formal mandate on 5/8/18

Teste: *Patricia S. Dodszuweit*
Clerk, U.S. Court of Appeals for the Third Circuit

NOT PRECEDENTIAL

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 17-3441

**MONSERRATE ZAPATA,
Appellant**

v.

PECO; PHILADELPHIA ELECTRIC COMPANY

**On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 17-cv-03699)
District Judge: Honorable Joseph F. Leeson, Jr.**

**Submitted Pursuant to Third Circuit LAR 34.1(a)
February 20, 2018
Before: SHWARTZ, KRAUSE and FISHER, Circuit Judges
(Opinion filed February 21, 2018)**

OPINION*

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

PER CURIAM

Pro se appellant Monserrate M. Zapata appeals the District Court's orders dismissing his complaint and denying his motion for reconsideration. We will affirm the District Court's judgment.

In September 2017, Zapata filed a pro se civil rights complaint pursuant to 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Pennsylvania against the Philadelphia Electric Company ("PECO"). Zapata alleges that PECO violated his Fourteenth Amendment due process and equal protection rights when it issued two "shut off notices" on October 4, 2016, and July 11, 2017, because Zapata failed to give PECO access to inspect its meter. He claims that he never denied PECO access to the meter and, in fact, replied to PECO that "upon advance notice that [he] would be at his home, or will have someone at home to open the doors so that PECO could inspect [their] electric meter." Zapata also contends that the meter is functional, that he is billed excessively, and that his monthly bills, including additional charges incurred in connection with a "shut off," could result in his losing his home.

The District Court dismissed Zapata's complaint pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), concluding that PECO is not a state actor for purposes of § 1983, and that Zapata had failed to state a constitutional violation. In October 2017, Zapata filed a "Petition for Review of the Memorandum and Order of the U.S. District Court 9/14/17,"

which the District Court construed as a motion for reconsideration and subsequently denied. Zapata appeals.

We have jurisdiction under 28 U.S.C. § 1291. We exercise plenary review of the District Court's *sua sponte* dismissal under 28 U.S.C. 1915(e)(2)(B)(ii) for failure to state a claim. See Allah v. Seiverling, 229 F.3d 220, 223 (3d Cir. 2000). “[W]e accept all factual allegations as true [and] construe the complaint in the light most favorable to the plaintiff.” Warren Gen. Hosp. v. Amgen Inc., 643 F.3d 77, 84 (3d Cir. 2011) (quoting Pinker v. Roche Holdings, Ltd., 292 F.3d 361, 374 n.7 (3d Cir. 2002)). We review the District Court's denial of the motion for reconsideration for an abuse of discretion. See Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 673 (3d Cir. 1999).

We agree with the District Court's disposition of this case. To assert a claim under § 1983, a plaintiff “must establish that [he] was deprived of a federal constitutional or statutory right by a state actor.” Kach v. Hose, 589 F.3d 626, 646 (3d Cir. 2009). As Zapata acknowledged in his complaint, PECO is a “corporate structure.” SEC filings¹ reveal that Exelon Corporation is a registered public utility holding company and that PECO is an operating company wholly owned by Exelon. In virtually identical circumstances, the Supreme Court held that a privately owned and operated Pennsylvania

¹ We may take judicial notice of these filings. See Schmidt v. Skolas, 770 F.3d 241, 249 (3d Cir. 2014).

utility corporation was not a state actor in connection with its decision to shut off an individual's electricity. Jackson v. Metro. Edison Co., 419 U.S. 345, 358 (1974). Zapata did not plead anything in his complaint to differentiate his case from Jackson.

In his appellate brief, Zapata argues that PECO was acting in accordance with "State law 129."² However, "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State." Id. at 350; see also Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) ("That a private entity performs a function which serves the public does not make its acts state action."); Crissman v. Dover Downs Entm't Inc., 289 F.3d 231, 243 (3d Cir. 2002) ("regulation – even detailed regulation, as we have here – does not equate to state action," nor does "the flow of funds . . . implicate the state in private activity"). Accordingly, Zapata cannot establish a claim under § 1983.

Finally, the District Court did not abuse its discretion in denying Zapata's motion for reconsideration because he did not establish any bases for reconsideration. See Max's Seafood Café, 176 F.3d at 677.

For the foregoing reasons, we will affirm the District Court's judgment.

² Act 129 of 2008 amended Pennsylvania's Public Utility Code for the purpose of reducing energy consumption and demand by setting in motion a multi-phase implementation process that addressed electric distribution companies and default service provider responsibilities, conservation service providers, smart meter technology, time-of-use rates, real-time pricing plans, default service procurement, market misconduct, alternative energy sources, and cost recovery. See Romeo v. Pa. Pub. Util. Comm'n, 154 A.3d 422, 424 (Pa. Commw. Ct. 2017) (discussing Act of October 15, 2008, P.L. 1592, No. 2008-129).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-3441

MONSERRATE ZAPATA,
Appellant

v.

PECO;
PHILADELPHIA ELECTRIC COMPANY

(D.C. No. 2-17-cv-03699)

Present: SMITH, Chief Judge, MCKEE, AMBRO, CHAGARES,
JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ,
KRAUSE, RESTREPO, BIBAS and FISHER¹, Circuit Judges

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by Appellant, Monserrate Zapata 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 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/ D. Michael Fisher
Circuit Judge

¹ Judge Fisher's vote is limited to panel rehearing only.

Dated: Monday, April 30, 2018
MB/cc: Monserrate M. Zapata

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

MONSERRATE ZAPATA,
Plaintiff,

v.

PECO, PHILADELPHIA, ELECTRIC
COMPANY,
Defendant.

CIVIL ACTION

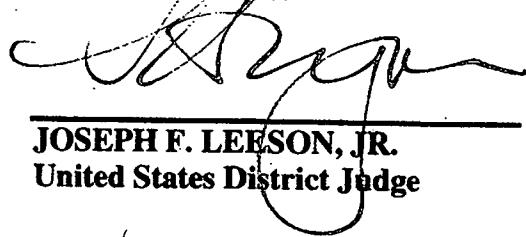
NO. 17-3699

FILED OCT 20 2017

ORDER

AND NOW, this 20th day of October, 2017, upon consideration of plaintiff's "Petition for Review of the Memorandum and Order of the U.S. District Court 9/14/17," ECF No. 6, which the Court has construed as a motion for reconsideration, it is hereby ORDERED that the motion is DENIED.¹

BY THE COURT:


JOSEPH F. LEESON, JR.
United States District Judge

¹ In a memorandum and order entered September 14, 2017, the Court dismissed plaintiff's complaint against PECO. The complaint asserted constitutional claims against PECO pursuant to 42 U.S.C. § 1983, based on the fact that PECO sent plaintiff notices of its intent to shut off his electricity because he failed to allow PECO to inspect his meter. The Court concluded that PECO was not a state actor for purposes of § 1983 and that, in any event, plaintiff failed to plead a plausible constitutional violation.

Plaintiff seeks reconsideration of the Court's dismissal of his complaint. As in his complaint, he contends that his rights were violated because PECO's notice was based on falsehoods in light of the fact that he never prevented PECO from accessing the meter. The Court has already explained in its memorandum why that allegation does not suffice to state a claim here. Plaintiff's motion does not provide any basis for reconsidering that conclusion. See *Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999) (explaining that a party seeking reconsideration must establish "(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available [at the time of the Court's prior ruling]; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice").

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

MONSERRATE ZAPATA

CIVIL ACTION

v.

PECO, PHILADELPHIA, ELECTRIC
COMPANY

NO. 17-3699

MEMORANDUM

FILED SEP 14 2017

LEESON, J.

SEPTEMBER 13, 2017

Plaintiff Monserrate Zapata brings this civil action against PECO based on the fact that PECO notified him it planned to shut off his electricity.¹ Plaintiff seeks leave to proceed *in forma pauperis*. The Court will grant plaintiff leave to proceed *in forma pauperis* and dismiss his complaint.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff received two “shut off notices” from PECO, one on October 4, 2016 and one on July 11, 2017. The reason for the notices, according to PECO, was because plaintiff “did not give [PECO] access to inspect [its] meter.” Plaintiff alleges that he never denied PECO access to the meter and that PECO issued the notices without any basis. He further alleges that he replied to PECO “upon advance notice that [he] would be at his home, or will have someone at home to open the doors so that PECO could inspect their electric meter.” (Compl. at 4.) Plaintiff adds that the meter is functional, that he is billed excessively, and that his monthly bills, including additional charges incurred in connection with a shut off, could result in him losing his home.

ENTERED

SEP 14 2017

¹ Although the complaint identifies “Peco, Philadelphia, Electric Company” as defendants in this matter, it is apparent that PECO is the only defendant.

CLERK OF COURT

Before filing this civil action, plaintiff filed a motion to proceed *in forma pauperis* and a "petition for preliminary injunction" eight days after receiving the July 11, 2017 shut off notice.

See Zapata v. PECO, E.D. Pa. 17-mc-121 (E.D. Pa.). The petition was docketed as a miscellaneous action, presumably because it did not correspond with any pending civil action filed in this Court at the time. The petition sought an injunction prohibiting PECO from shutting off plaintiff's electricity.

Plaintiff attached PECO's notice to his motion, which reflects that PECO advised him of its intention to shut off his electricity on or after 8:00 a.m. on July 23, 2017. The notice, which is essentially a form notice, indicated that the reason for the notice was because plaintiff had not given PECO access to the meter. PECO did not indicate on the notice that any payment was due although, as the notice appears to be a form, it includes information letting plaintiff know that PECO would not shut off his electricity if he paid any amount owed in full, showed a paid receipt, or disputed the bill; that portion of the notice appears to be inapplicable to plaintiff's situation.² The notice also provided phone numbers plaintiff could call to provide access to the meter, and indicated that if plaintiff or anyone in the home was seriously ill, PECO would not shut off services if his doctor verified the condition and indicated that it would be aggravated if the electricity were shut off. Plaintiff alleged in his petition that he is going blind, cannot hear, and is sick, such that he cannot call on a phone or "spend many hours at PECO'S CUSTOMER SERVICES." *See Zapata v. PECO*, E.D. Pa. 17-mc-121 (E.D. Pa.) (ECF No. 1-1 at 2.) He did not indicate whether he intended to have his doctor contact PECO.

The Court denied plaintiff leave to proceed *in forma pauperis* without prejudice in the miscellaneous action because he failed to provide the Court with sufficient financial information.

² Plaintiff attached documents reflecting that his account was up to date at the time of the notice and that his July electric bill was not yet due.

The Court gave plaintiff leave to return with an amended application and instructed him to establish the basis for the Court's jurisdiction over his filing.

Plaintiff responded by filing a civil complaint against PECO pursuant to 42 U.S.C. § 1983, which was docketed as the instant civil action. He alleges that PECO's issuance of the shut off notices denied him due process and equal protection in violation of the United States Constitution. He seeks an injunction against PECO and a hundred million dollars in damages. It is not clear whether PECO ultimately shut off plaintiff's electricity.

II. STANDARD OF REVIEW

Plaintiff's motion to proceed *in forma pauperis* is granted because it appears that he is incapable of paying the fees to commence this civil action. Accordingly, 28 U.S.C. § 1915(e)(2)(B)(ii) requires the Court to dismiss the complaint if it fails to state a claim. To survive dismissal for failure to state a claim, the complaint must contain "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotations omitted). "[M]ere conclusory statements[] do not suffice." *Id.* As plaintiff is proceeding *pro se*, the Court construes his allegations liberally. *Higgs v. Att'y Gen.*, 655 F.3d 333, 339 (3d Cir. 2011).

III. DISCUSSION

"To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988). Whether an entity is acting under color of state law—i.e., whether the entity is a state actor—depends on whether there is "such a close nexus between the State and the challenged action' that seemingly private behavior may be fairly treated as that of the State itself." *Leshko v. Servis*,

423 F.3d 337, 339 (3d Cir. 2005) (internal quotations omitted). “To answer that question, [the Third Circuit has] outlined three broad tests generated by Supreme Court jurisprudence to determine whether state action exists: (1) whether the private entity has exercised powers that are traditionally the exclusive prerogative of the state; (2) whether the private party has acted with the help of or in concert with state officials; and (3) whether the state has so far insinuated itself into a position of interdependence with the acting party that it must be recognized as a joint participant in the challenged activity.” *Kach v. Hose*, 589 F.3d 626, 646 (3d Cir. 2009) (internal quotations and alteration omitted).

In *Jackson v. Metropolitan Edison Co.*, the Supreme Court held that a privately owned and operated utility corporation was not a state actor in connection with its decision to shut off an individual’s electricity. 419 U.S. 345, 358 (1974) (no state action where company “was a heavily regulated, privately owned utility, enjoying at least a partial monopoly in the providing of electrical service within its territory, and . . . elected to terminate service to petitioner in a manner which the Pennsylvania Public Utility Commission found permissible under state law”). More recently, the Honorable Nitza I. Quiñones Alejandro held that, although PECO could be a state actor under certain circumstances, it was not a state actor when it terminated a customer’s electricity because the customer would not allow installation of a new meter. *See Benlian v. PECO Energy Corp.*, CV 15-2128, 2016 WL 3951664, at **6-7 (E.D. Pa. July 20, 2016). In light of those decisions, there is no basis for finding state action in this case.

It is also worth noting that, even if PECO were a state actor, plaintiff has not stated a plausible constitutional violation. “Fundamentally, procedural due process requires notice and an opportunity to be heard” in a meaningful time and manner. *Mancini v. Northampton Cnty.*, 836 F.3d 308, 315 (3d Cir. 2016) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). PECO

clearly gave plaintiff notice that it intended to shut off his electricity, and the notices provided an explanation for how plaintiff could avoid the shut off. Furthermore, Pennsylvania law sets out procedures for addressing the shut off of one's electricity, handled by the Public Utility Commission and Bureau of Consumer Services. *See Benlian*, No. CV 15-2128, 2016 WL 3951664, at *7 n.14 (E.D. Pa. July 20, 2016). As it appears that plaintiff proceeded directly to federal court rather than contacting PECO or invoking state procedures, it is difficult to conclude that a due process violation has occurred here, even if plaintiff's electricity was in fact shut off or if PECO issued the notice in error. *See Goadby v. Philadelphia Elec. Co.*, 639 F.2d 117, 122 n.5 (3d Cir. 1981); *cf. Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 71 (2009) (a plaintiff raising a due process challenge is in an "awkward position" if he fails to first avail himself of available state procedures).

There is no other basis for a plausible constitutional claim here. The conduct in the complaint is not "conscience-shocking" in a manner that would give rise to a substantive due process claim. *See Miller v. City of Philadelphia*, 174 F.3d 368, 375 (3d Cir. 1999). Plaintiff has also failed to state an equal protection claim, as none of his allegations indicate that he was treated differently than similarly situated individuals. *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 243 (3d Cir. 2008).

IV. CONCLUSION

For the foregoing reasons, the Court will dismiss plaintiff's complaint. Plaintiff will not be given leave to amend because it appears that amendment would be futile. An appropriate order follows, which shall be docketed separately.

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

MONSERRATE ZAPATA

CIVIL ACTION

v.

PECO, PHILADELPHIA, ELECTRIC
COMPANY

NO. 17-3699

FILED SEP 14 2017

ORDER

AND NOW, this 13^b day of September, 2017, upon consideration of plaintiff's motion to proceed *in forma pauperis* (ECF No. 1) and his *pro se* complaint, it is ORDERED that:

1. Leave to proceed *in forma pauperis* is GRANTED.
2. The complaint is DISMISSED with prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), for the reasons discussed in the Court's memorandum.
3. The Clerk of Court shall CLOSE this case.

BY THE COURT,


JOSEPH F. LEESON, JR., J.

ENTERED

SEP 14 2017

CLERK OF COURT

**Additional material
from this filing is
available in the
Clerk's Office.**