In the United States Supreme Court

Michael Williamson, No.:

Petitioner,

v.

Karen Slusher, et al.,

Defendants.

Petition for Writ of Certiorari

Appendix 1

Decision and Opinion of the U.S. 6th Circuit Court of Appeals, Williamson v. Slusher, 2018 U.S. App. LEXIS 30693 (dec. 10.29.2018)

Reported at: 2018 U.S. App. LEXIS 30693 (6th Cir. 2018)

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 17-4271

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 29, 2018
DEBORAH S. HUNT, Clerk

MICHAEL WILLIAMSON,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	ON APPEAL FROM THE UNITED
	)	STATES DISTRICT COURT FOR
KAREN SLUSHER, et al.,	)	THE NORTHERN DISTRICT OF
	)	OHIO
Defendants-Appellees.	)	
	)	
	)	

ORDER

Before: CLAY, GILMAN, and WHITE, Circuit Judges.

Michael Williamson, an Ohio prisoner proceeding pro se, appeals the district court's judgment dismissing his civil action. He has also filed a motion for the appointment of counsel. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In his complaint, Williamson, a prisoner at the Richland Correctional Institution ("RCI"), alleged that his rights under the Constitution, Ohio law, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131–12165, had been violated in connection with his confinement at RCI. Specifically, he alleged that the defendants had improperly: (1) restricted his access to RCI's law library; (2) denied his administrative grievances; (3) denied him adequate medical care; (4) failed to ensure his access to RCI facilities and programs; (5) confiscated his surge protector; and (6) engaged in a "Campaign of Physical Harassment." He named as defendants in

their individual and official capacities Karen Slusher, Timothy Milligan, Trinity Floyd. Kelly Rose, Alfred Granson, Sheila Jordan, Kelly Riehle, Unknown Spears, John Doe, and Christo Montgomery. He named Maggie Bradshaw as a defendant in her official capacity. He requested compensatory damages. punitive damages, and injunctive relief. Defendants moved to dismiss Williamson's complaint for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(6). The district court granted defendants' motion, finding that Williamson could not bring an official-capacity claim for monetary damages against any of the defendants under § 1983, that his individual-capacity state-law claims were subject to dismissal because there was no certification by an Ohio court of claims that the defendants were not entitled to personal immunity as required by state statute, and that he failed to state a First Amendment access-to-court claim, an Eighth Amendment deliberate-indifference claim, or an ADA claim.

On appeal, Williamson argues that the district court erred by dismissing his complaint. Specifically, he appears to contend that he raised valid First Amendment retaliation claims that were not addressed by the court. He also asserts that the court erred by dismissing his individual-capacity state-law claims.

I. Abandonment

We consider issues raised in a "perfunctory manner, unaccompanied by some effort at developed argumentation," to be abandoned. *Langley v. DaimlerChrysler Corp.*, 502 F.3d 475, 483 (6th Cir. 2007) (quoting *Indeck Energy Servs. v. Consumers Energy Co.*, 250 F.3d 972, 979 (6th Cir. 2000)). Although pro se pleadings are to be construed liberally, *Pilgrim v. Littlefield*, 92 F.3d 413, 416 (6th Cir. 1996), we have recognized that the requirement for developed argumentation applies even to pro se litigants, *see Geboy v. Brigano*, 489 F.3d 752, 767 (6th Cir. 2007).

Williamson has abandoned review of his claims, other than his individual-capacity state-law claims and his retaliation claims, by failing to make any developed argumentation in support of them on appeal. *See id.* He addresses his retaliation claims and his individual-capacity state-law claims in his appellate filings, but avers, with respect to his remaining claims, only that "his

complaint met the sufficiency of stating a claim" and that he is deferring to this court's "de novo review of his pleadings" for his argument as to those claims.

II. Williamson's Retaliation Claims

In his complaint, Williamson alleged that he had been improperly targeted because of his status as a "high filer," which he defined as a prisoner who routinely raises legal challenges to the validity of his conviction, sentence, or conditions of confinement. He claimed that the defendants retaliated against him by committing each of the six previously identified violations—namely, they restricted his law-library access, denied his administrative grievances, denied him adequate medical care, failed to ensure his access to prison facilities and programs, confiscated his surge protector, and physically harassed him.

We review de novo a district court's dismissal under Federal Rule of Civil Procedure 12(b)(6). *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 433 (6th Cir. 2008). That rule provides that a complaint is subject to dismissal if it fails "to state a claim upon which relief may be granted." Fed. R. Civ. P. 12(b)(6). In order to state a claim upon which relief may be granted, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A complaint must have "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint that offers "labels and conclusions," "formulaic recitation[s] of the elements of a cause of action," or "'naked assertion[s]' devoid of 'further factual enhancement'" will not survive a motion to dismiss. *Id.* (second alteration in original) (quoting *Twombly*, 550 U.S. at 555, 557).

To prevail on a retaliation claim, a plaintiff must show (1) that he "engaged in protected conduct," (2) that "an adverse action was taken against [him] that would deter a person of ordinary firmness from continuing to engage in that conduct," and (3) the existence of a causal connection between the first two elements—that is, that the adverse action was motivated, at

least in part, by the protected conduct. *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc).

Williamson failed to state a retaliation claim. The district court did not address whether Williamson stated a retaliation claim, but we may nonetheless affirm because it is clear from the record that Williamson did not state a claim. *See Angel v. Kentucky*, 314 F.3d 262, 264 (6th Cir. 2002) ("[W]e are free to affirm . . . on any basis supported by the record."). Most of Williamson's retaliation subclaims fail because he did not sufficiently plead a causal connection between his high-filer status and the defendants' alleged acts of retaliation. For instance, Williamson summarily asserted that Slusher restricted his access to the law library because of his high-filer status, but he did not allege any facts that would suggest that Slusher's actions were, in fact, subjectively motivated by his high-filer status. *See Thaddeus-X*, 175 F.3d at 399. In this regard, Williamson's case is mostly distinct from *Cody v. Slusher*, No. 17-3764, 2018 WL 3587003 (6th Cir. Mar. 8, 2018), a case upon which Williamson relies because the plaintiff in *Cody* alleged, among other things, that multiple defendants had directly threatened to retaliate against him for filing administrative grievances and lawsuits. *See id.* at *5.

Williamson did make two assertions that arguably suggested a subjective motive by individual defendants to retaliate against him: (1) he alleged that Floyd, when told that Williamson's prescribed rollator (or wheeled walker) broke, stated that "[W]e're not going to get [rollators for] you troublemakers, we don't want them, or you, at [RCI];" and (2) he claimed that Jordan made prior statements to Williamson and other inmates "concerning their high filer status and referencing them suing her, and stating therefore that she is going to prevent them from receiving medical care." But Williamson nonetheless failed to state a retaliation claim against either Floyd or Jordan because he failed to plead that either Floyd or Jordan took an adverse action against him. *See Thaddeus-X*, 175 F.3d at 394. Williamson alleged that both individuals denied him adequate medical care after his rollator broke and he fell. But Williamson noted in his complaint that he, in fact, did receive assistance after his fall. Specifically, he indicated that his dorm's correction officer, C.O. Stone, provided him with a temporary wheelchair and later a replacement rollator. Because Williamson did not identify an actual adverse action to which he

was subjected, he failed to state a retaliation claim. *See id.* at 396–97 (quoting *Bart v. Telford*, 677 F.2d 622 625 (7th Cir. 1982) ("[A]s a tort statute, § 1983 requires injury and 'it would trivialize the First Amendment to hold that harassment for exercising [First Amendment rights] was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise.'").

III. Williamson's Individual-Capacity State-Law Claims

The district court properly dismissed Williamson's individual-capacity state-law claims. Before an Ohio official may be sued in an individual capacity for a violation of state law, an Ohio court of claims must determine whether the official is entitled to personal immunity under Ohio Revised Code § 9.86. *See* Ohio Rev. Code § 2743.02(F); *see also McCormick v. Miami Univ.*, 693 F.3d 654, 664–65 (6th Cir. 2012). Williamson did not indicate that any of the defendants in his action had been determined to lack personal immunity, and he therefore failed to state an individual-capacity state-law claim against any defendant. *See McCormick*, 693 F.3d at 664-65.

Williamson alleges that we should hold that sections 9.86 and 2743.02(F) are unconstitutional, but he provides no clear support for his position. He cites *Martin v. Henderson*, No. 07CA28, 2007 WL 2965606 (Ohio Ct. App. Oct. 10, 2007), for the proposition that the statutes are illegal, but *Martin* did not so hold. *See id.* at *1-3. He also cites *Haywood v. Drown*, 556 U.S. 729 (2009), a case in which the Supreme Court determined that New York's Correction Law § 24, which effectively stripped New York trial courts of jurisdiction to hear § 1983 claims, ran afoul of the Supremacy Clause. *See id.* at 731, 742. *Haywood*'s holding was based on the principle that states "lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies." *Id.* at 736. Sections 9.86 and 2743.02(F) do not nullify federal causes of action, and *Haywood* is accordingly inapplicable.

For the foregoing reasons, we **AFFIRM** the district court's judgment. We also **DENY** Williamson's motion for the appointment of counsel as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

In the United States Supreme Court

Michael Williamson, No.:

Petitioner

v.

Karen Slusher, et al.,

Defendants.

Petition for Writ of Certiorari

Appendix 2

Decision and Opinion of the U.S. District Court for the Northern District of Ohio Williamson v. Slusher, 2017 U.S. Dist. LEXIS 217940 (dec. 10.31.2017)

Reported at: 2017 U.S. Dist. LEXIS 217940 (N.D. Ohio 2017)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL WILLIAMSON, *Pro Se,*	)	Case No.: 1:17 CV 0106
	)	
Plaintiff	)	
	)	
v.	)	JUDGE SOLOMON OLIVER, JR.
	)	
KAREN SLUSHER, *et al.*,	)	
	)	
Defendants	)	ORDER

I. INTRODUCTION

Currently pending before the court in the above-captioned case is Defendants' Karen Slusher, Trinity Floyd, Timothy Milligan, Alfred Granson, Kelly Rose, Sheila Jordan, Maggie Bradshaw, Lt. Spears, Christo Montgomery, and John Doe (collectively, "Defendants") Motion to Dismiss (ECF No. 6) for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Procedure 12(b)(6). For the reasons set forth below, Defendants' Motion to Dismiss is granted.

II. BACKGROUND

Pro Se Plaintiff Michael Williamson ("Plaintiff") is currently serving twelve consecutive life terms for rape at Richland Correctional Institution ("RICI"). (Compl. 4, ECF No. 1.) On January 13, 2017, Plaintiff filed this civil action pursuant to 42 U.S.C. § 1983 against Defendants, seeking injunctive relief from and monetary compensation for the alleged violations of Plaintiff's constitutional rights in connection with his incarceration at RICI. (*Id.*) Among his constitutional claims, Plaintiff alleges violations of the First, Fifth, Sixth, and Fourteenth Amendments to the U.S.

Constitution. (*Id.*) Plaintiff also alleges discrimination due to his status as a "high filer," one who aggressively uses his or her access to the courts to challenge the wrongfulness of their conviction and sentence, and the wrongfulness of the conditions of their confinement. (*Id.*) In addition, Plaintiff alleges violations of the American with Disabilities Act (ADA), as the result of wrongful retaliation and discrimination against him as a disabled person. (*Id.*) Finally, Plaintiff alleges a number of pendent state law claims stemming from violations of the Ohio State Constitution, Ohio Administrative Regulations, and Ohio contract and tort law. (*Id.*) On May 9, 2017, Defendants collectively filed their Motion to Dismiss Plaintiff's Complaint for failure to state a claim upon which relief can be granted.

III. LAW AND ANALYSIS

A. Defendants' Motion to Dismiss

The court examines the legal sufficiency of the Plaintiff's claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See Mayer v. Mulod*, 988 F.2d 635, 638 (6th Cir. 1993). The United States Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) and in *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949–50 (2009) clarified the law regarding what the plaintiff must plead in order to survive a motion made pursuant to Rule 12(b)(6).

When determining whether the plaintiff has stated a claim upon which relief can be granted, the court must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. The plaintiff's obligation to provide the grounds for relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555. Even though a complaint need not contain

"detailed" factual allegations, its "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the Complaint are true." *Id.* A court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

The Court, in *Iqbal,* further explained the "plausibility" requirement, stating that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 556 U.S. at 678. Furthermore, "[t]he plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant acted unlawfully." *Id.* This determination is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.

1. Jurisdiction Over State Employees in Their Official Capacities

Plaintiff is correct, and Defendants rightly concede, that a § 1983 claim for injunctive relief against officials sued in their official capacities is not barred by the Eleventh Amendment. *See Hafer v. Melo*, 502 U.S. 21, 27 (1991); *McKenna v. Bowling Green State Univ.*, 568 F. App'x 450, 456 fn.1 (6th Cir. 2014) ("[A] state official in his or her official capacity, when sued for injunctive relief, would be a person under §1983."). Thus, if the court determines that Plaintiff has properly stated a claim of deprivation of a federal right, injunctive relief is available.

To the extent that Plaintiff seeks to hold Defendants liable for money damages in their respective official capacities, such claims are absolutely barred by the Eleventh Amendment. *See Will v. Mich. Dept. of State Police*, 491 U.S. 58, 71 fn.10 (2007) (recognizing the distinction between the availability of injunctive relief and monetary damages for claims brought under § 1983).

Accordingly, Defendants' Motion to Dismiss is granted with respect to all claims seeking to hold Defendants liable for monetary damages in their official capacities.

2. Plaintiff's First Amendment Access to the Courts Claims

In his Complaint, Plaintiff alleges that his constitutional right to access to the courts was violated when Defendants: (1) failed to follow Ohio Administrative Regulations with respect to Plaintiff's law library access at RICI; and (2) denied Plaintiff's administrative grievances, allegedly in retaliation for Plaintiff's status as a "high filer." (Compl. 10-24.) Defendants contend that: (1) the failure to adhere to internal policies with respect to law library access or internal grievances does not rise to the level of a deprivation of a constitutional right; and (2) Plaintiff cannot demonstrate actual prejudice to any nonfrivolous court proceeding to satisfy the requirements of an access to the courts claim. (Mot. Dismiss 5-6, 9-15.)

A prisoner's ability to access the courts is a fundamental constitutional right that "requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Lewis v. Casey*, 518 U.S. 343, 346 (1996) (quoting *Bounds v. Smith*, 430 U.S. 817, 828 (1977)). While there is no *per se* right to a prison law library or legal assistance programs, these are "means for ensuring a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Lewis*, 518 U.S. at 350 (quoting *Bounds v. Smith*, 430 U.S. at 825). However, unlimited access to a law library is by no means required. *Id.* To be successful in proving a *Bounds* violation, a prisoner must show: (1) actual injury; and (2) conduct on the part of the defendant that goes beyond "mere negligence." *Lloyd v. Mohr*, No. 2:13-CV-1158, 2014 WL 111172, at *3 (S.D. Ohio Jan. 10, 2014) (citing *Lewis*, 518 U.S. at 354). To show actual injury, a

right of access claim must identify and show prejudice to a "nonfrivolous, arguable underlying claim." *Christopher v. Harbury*, 536 U.S. 403, 415 (2002) (citing *Lewis*, 518 U.S. at 353, 353 n.3); *Hadix*, 182 F.3d at 405. "Examples of actual prejudice to pending or contemplated litigation include having a case dismissed, being unable to file a complaint, and missing a court-imposed deadline." *Law v. Stewart*, Case No. 1:09-CV-503, 2011 WL 926863, at *3 (W.D. Mich. Feb. 7, 2011) (quoting *Harbin-Bey v. Rutter*, 420 F.3d 571, 578 (6th Cir.2005)).

Restricted access to the law library cannot be equated with restricted access to the courts; it is but "one factor in a totality of factors bearing on the inmate['s] access to the courts which should be considered." *Walker v. Mintzes*, 771 F.2d 920, 931 (6th Cir. 1985). In addition, the Prison Litigation Reform Act ("PLRA") makes clear that "the failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 1997a or 1997c of this title." 42 U.S.C. § 1997e(b); *Keenan v. Marker*, 23 F. App'x 405, 407 (6th Cir. 2001). Thus, to the extent that Plaintiff's access to the courts claim stems from limited access to, or space within, the law library, or the denial of his administrative grievances, Plaintiff has not stated a claim for relief.

Nevertheless, Plaintiff's claim ultimately fails because he cannot show that any alleged barriers erected by Defendants prejudiced a nonfrivolous underlying claim. Plaintiff cites the denial of his appeal application to the Ohio Court of Appeals as evidence of the "negative actions taken against him by the courts" as a result of his inability to reasonably prepare his legal pleadings in the RICI law library. (Compl. 21-22.) However, that Plaintiff was denied relief on appeal, in itself, does not show actual injury to a *nonfrivolous* claim sufficient to state a claim for denial of access to the courts. *Hadix v. Johnson*, 182 F.3d 400, 404-05 (6th Cir. 1999) (citing *Lewis v. Casey*, 518 U.S. 343,

352-53, 353 n.3 (1996)). To the contrary, the Ohio Court of Appeals decided on the merits that Plaintiff's claims were "wholly frivolous," and Plaintiff provides no reason why the outcome of that appeal would have been different had Plaintiff had greater access to RICI's law library. *State v. Williamson*, Case No. 102320, 2015 WL 8484180, at *2 (Ohio Ct. App. Dec. 9, 2015), *appeal not allowed by* 144 Ohio St.3d. 1507 (Feb. 24, 2016); *see also State v. Williamson*, Case No. 104294, 2016 WL 5620133 (Ohio Ct. App. Sept. 29, 2016) (determining that the trial court was not required to issue findings of fact or conclusions of law in denying Williamson's petition to vacate or set aside his judgment of conviction or sentence where, by filing the petition more than thirteen and a half years later, Williamson did not meet the requirements for filing an untimely or successive petition under O.R.C. § 2953.23(A)(1)). Accordingly, Defendants' Motion to Dismiss Plaintiff's First Amendment access to the courts claim is granted.

3. Denial of Medical Treatment

Plaintiff's claim of inadequate medical treatment arises under both the Eighth Amendment prohibition against cruel and unusual punishment and the Americans with Disabilities Act, 42 U.S.C. § 12101.

According to the Complaint, Plaintiff has a severely degenerative disk disease, tibia and fibula fractures in his left leg, and high blood pressure. (Compl. 32.) These conditions have resulted in Plaintiff's limited mobility. While incarcerated at Marion Correctional Institute ("Marion"), Plaintiff was prescribed a rollator by his treating physician, Defendant Granson. Granson was also Plaintiff's treating physician at RICI at the time Plaintiff filed this lawsuit. (*Id.*) On or around February 15, 2016, Plaintiff's prescribed rollator became defective and, subsequently, broke, causing Plaintiff to fall. (*Id.*) After making a number of sick calls requesting a medical doctor and being

refused, Plaintiff eventually "half-crawled, half-limped" to his dorm's correctional officer, C.O. Stone. (*Id.* at 33.) C.O. Stone allegedly called the infirmary at that time and spoke with someone who Plaintiff believes was Defendant Jordan. (*Id.*) The person on the call told C.O. Stone that no help would be coming. (*Id.*) C.O. Stone then loaned Plaintiff a Red Cross wheelchair from storage. (*Id.*) A week later, C.O. Stone indicated that Plaintiff could visit RICI's Maintenance Shop, which is staffed by other inmates, in order to repair his wheelchair. (*Id.*) There, Plaintiff was able to obtain a "Chinese rollator." (*Id.* at 33-34.) Plaintiff alleges that, although he has been using the replacement rollator ever since his fall, that rollator is not of the same quality as the one prescribed by Granson while he was incarcerated at Marion, and it is in immediate threat of being seized as "non-prescribed contraband." (*Id.* at 33.) Plaintiff alleges that he is entitled not only to the kind of rollator that was prescribed by his doctor at Marion, but also to an MRI, a prognosis from an independent physician, and further effective treatment for his back condition. Plaintiff contends that the denial of his requests "risks further permanent disability." (*Id.* at 34-35.) Plaintiff also alleges that, because he does not have an adequate rollator, he is denied access to institutional programs that are not in his dorm's building. (*Id.* at 35.)

Plaintiff further alleges that the denial of adequate medical treatment was a direct result of Defendants Floyd, Jordan, and Bradshaw's refusal to allow Plaintiff to see a doctor, process his medical service request, and prescribe him a replacement rollator when his original one became defective. (*Id.* at 32.) Plaintiff also alleges that Defendants Floyd and Granson further contributed to these violations when they failed to adequately train Defendant Jordan to recognize the need to see a prescribing doctor or nurse based off a patient's health service report. (*Id.* at 36.)

a. Eighth Amendment

An Eighth Amendment claim of cruel and unusual punishment consists of both objective and subjective components. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Hudson v. McMillian*, 503 U.S. 1, 8 (1992); *Wilson v. Seiter*, 501 U.S. 294, 298 (1991); *Brooks v. Celeste*, 39 F.3d 125, 127-28 (6th Cir. 1994); *Hunt v. Reynolds*, 974 F.2d 734, 735 (6th Cir. 1992). The objective component requires that the deprivation be "sufficiently serious." *Farmer*, 511 U.S. at 834; *Hudson*, 503 U.S. at 8; *Wilson*, 501 U.S. at 298. To satisfy the objective component of an Eighth Amendment claim, a prisoner must show that he "is incarcerated under conditions posing a substantial risk of serious harm," *Farmer*, 511 U.S. at 834; *Stewart v. Love*, 796 F.2d 43, 44 (6th Cir. 1982), or that he has been deprived of the "minimal civilized measure of life's necessities," *Wilson*, 501 U.S. at 298 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). The Constitution "'does not mandate comfortable prisons.'" *Wilson*, 501 U.S. at 298 (quoting *Rhodes*, 452 U.S. at 349). Rather, "routine discomfort 'is part of the penalty that criminal offenders pay for their offenses against society.'" *Hudson*, 503 U.S. at 9 (quoting *Rhodes*, 452 U.S. at 347).

To establish the subjective component of an Eighth Amendment violation, a prisoner must demonstrate that the official acted with the requisite intent. *Farmer*, 511 U.S. at 834; *Wilson*, 501 U.S. at 297, 302-03. The plaintiff must show that the prison officials acted with "deliberate indifference" to a substantial risk that the prisoner would suffer serious harm. *Farmer*, 511 U.S. at 834; *Wilson*, 501 U.S. at 303; *Helling v. McKinney*, 509 U.S. 25, 32 (1993); *Woods v. Lecureux*, 110 F.3d 1215, 1222 (6th Cir.1997); *Street v. Corr. Corp. of Am.*, 102 F.3d 810, 814 (6th Cir.1996); *Taylor v. Mich. Dep't of Corr.*, 69 F.3d 76, 79 (6th Cir.1995). "[D]eliberate indifference describes a state of mind more blameworthy than negligence." *Farmer*, 511 U.S. at 835. The plaintiff must establish that "the official knows of and disregards an excessive risk to inmate health or safety; the

official must both be aware of facts which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837.

Not all medical conditions are sufficiently serious to implicate the Eighth Amendment. *Comstock v. Mcrary*, 273 F. 3d 693, 702-03 (6th Cir. 2001) (quoting *Farmer*, 511 U.S. at 834). A plaintiff may only sustain a claim for inadequate medical treatment if they can demonstrate that the defendant acted with deliberate indifference to a serious medical need. *Farmer*, 511 U.S. at 835. An objectively serious medical need is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Blackmore v. Kalamazoo Cty.*, 390 F.3d 890, 897 (6th Cir. 2004) (quoting *Gaudreault v. Mun. of Salem*, 923 F.2d 203, 208 (1st Cir. 1990)). Mere negligence in diagnosing or treating a medical condition does not violate the Eighth Amendment. *Farmer*, 511 U.S. at 835; *see also Graham ex rel. Estate of Graham v. Cty. of Washtenaw*, 358 F.3d 377, 385 (6th Cir. 2004) ("Where a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments and to constitutionalize claims that sound in state tort law.") Thus, even if an independent doctor would disagree with the treatment provided, such disagreement over the adequacy of treatment would not state a constitutional claim. *Graham*, 358 F.3d at 385.

It is undisputed that Defendant Granson was serving as Plaintiff's treating physician at all of the relevant times in question. It is also undisputed that Granson had examined, talked to, observed, diagnosed, and prescribed a rollator for Plaintiff's condition prior to February 15, 2016. However, even assuming Defendants acted with deliberate indifference, the fact that Plaintiff's replacement rollator is not of the same quality as the one originally prescribed does not state a constitutional claim

because it does not amount to a sufficiently serious medical need. Plaintiff provides no basis for the assumption that the prescription for a rollator he received from Defendant Granson at Marion required he be issued only a specific type of rollator. As a result, there is nothing to support the claim that any of Defendants Granson, Floyd, or Bradshaw were deficient in not communicating such a need to Defendant Jordan, or that Jordan was deficient in not providing an identical rollator on her own initiative. Even if such evidence existed as to Defendants Granson, Floyd, or Bradshaw, § 1983 claims cannot be maintained on the basis of a *respondeat superior*, or supervisor, theory of liability for failure to train without some evidence of encouragement or direct participation. *Petty v. Franklin Cty.*, 478 F.3d 341, 349 (6th Cir. 2007); *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999) ("a supervisory official's failure to supervise, control or train [an] offending individual is not actionable unless the supervisor either encouraged the specific incident of misconduct or in some other way directly participated in it."); *Hays v. Jefferson Cty.*, 668 F.2d 869 (6th Cir. 1982). Additionally, Plaintiff has not shown that, after his fall, his condition worsened to such a degree that even a layperson would be aware of his serious need for additional medical care beyond the replacement of his rollator. Finally, although Plaintiff alleges that his replacement rollator is at risk of being confiscated, there is no evidence that Defendants, or any other officials at RICI, have any intention of removing the replacement rollator from Plaintiff's possession. To the contrary, Defendants point to Plaintiff's use of the replacement rollator as a reason why there is no violation here. (Defs.' Reply Mot. Dismiss 6, ECF No. 20.) Accordingly, Defendants' Motion to Dismiss Plaintiff's Eighth Amendment denial of medical treatment claim for failure to state a claim is granted.

b. Americans With Disabilities Act (ADA)

Next, Plaintiff alleges that the denial of an identical replacement rollator has resulted in his

being denied access to programs outside of his dormitory, including the law library. (Compl. 35.) Plaintiff also alleges that the law library facilities themselves are not ADA-compliant. (*Id.* at 38-44.)

Title II of the ADA provides, in relevant part, 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. The ADA applies to both state and federal prisons. *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 209-10 (1998). The term "qualified individual with a disability" includes "an individual with a disability who, with or without ... the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). The use of a prison library qualifies as an activity or public service under the ADA. *Crawford v. Ind. Dep't of Corr.*, 115 F.3d 481, 483 (7th Cir. 1997); *Perez v. Arnone*, 600 F. App'x 20, 22 (2nd Cir. 2015).

To state a claim under Title II of the ADA, a plaintiff must show that: (1) he is disabled under the statute; (2) he is otherwise qualified for the program, services or activities of the public entity; and (3) he is being excluded from participation in, or denied the benefits of, the program, services or activities by reason of his disability, or is being subjected to discrimination by reason of his disability. *See S.S. v. E. Ky. Univ.*, 532 F.3d 445, 453 (6th Cir. 2008). Exclusion may be demonstrated by a showing that the defendants failed to provide "meaningful access" to the program or services sought. *Perez*, 600 F. App'x at 22. The proper defendant under a Title II claim is the public entity or an official acting in his or her official capacity. *Carten v. Kent State Univ.*, 282 F.3d 391, 396-97 (6th Cir. 2002). Title II does not allow for damages against a public official acting in his or her individual capacity. *Everson v. Leis*, 556 F.3d 484, 501 n.7 (6th Cir. 2009).

There is no dispute that Plaintiff qualifies as a disabled individual under the statute. However, Plaintiff has not shown that he is being denied the benefit of any program, service, or activity by reason of his disability. Plaintiff admits that he currently has access to and uses the replacement rollator, and, as discussed above, the rollator is not in danger of being removed from Plaintiff's possession. (Compl. 34.) Even if Plaintiff takes issue with the amount of time it took for him to receive the replacement rollator–approximately one week–a short term denial of services fails to state a claim under the ADA. *Cox v. Johnson*, 579 F. Supp. 2d 831, 851 (E.D. Mich. 2008) (citing *Kiman v. N.H. Dep't of Corr.*, 451 F.3d 274, 285 (1st Cir. 2006)); *cf. Moore v. Curtis*, 68 F. App'x 561, 563 (6th Cir. 2003) (allegations of isolated instances of failing to accommodate disabled prisoner's condition does not state a claim under the ADA).

Further, although the replacement rollator may not be as comfortable as the one originally prescribed by Defendant Granson, Plaintiff has not provided any reason why the replacement rollator prevents him from accessing programs outside of his dormitory, including the law library. *Id.* at 34-35; *see Burgess v. Goord*, Case No. 98 Civ. 2077, 1999 WL 33458, at *7 (S.D.N.Y. Jan. 26, 1999) (dismissing ADA claim where inmate did not allege that he was prevented from using recreation yard or attending religious services even though he had severe difficulty walking on stairs). It is also clear that, while the amount of space provided in the law library may be less than ideal, Plaintiff has not alleged any facts to support the claim that he is being denied meaningful access to the law library because of its limited space. Compl. 38-44; *see Alster v. Goord*, 745 F. Supp. 2d 317, 340 (S.D.N.Y. 2010) (finding that the deficiencies in various prisons facilities alleged by the plaintiff did not show that he was prevented altogether from accessing them); *Carrasquillo v. City of N.Y.*, 324 F. Supp. 2d 428, 443 (S.D.N.Y. 2004) (explaining that when an ADA claim does not state that a plaintiff was

excluded from a prison service or program because of his disability, it must be dismissed); *Devivo v. Butler*, Case No. 97 Civ. 7919, 1998 WL 788787, at *4 (S.D.N.Y. Nov. 10, 1998) (dismissing ADA claim where blind inmate failed to allege that he was denied services in prison because he was blind); *compare to Perez*, 600 F. App'x at 22 (remanding for evidentiary hearing where plaintiff showed that defendants deprived him of a computer, word processing programs, adequate writing tools, envelopes for the blind, and an electronic magnifier). Thus, based on the facts as alleged, Plaintiff has not stated a claim under the ADA. Accordingly, Defendants' Motion to Dismiss on this ground is granted.

4. Ohio State Law Claims

Pursuant to Ohio Revised Code § 9.86, as a precondition to asserting claims against a state employee in their individual capacity, the Ohio Court of Claims must first make a determination that the employee is not entitled to immunity. *Leonard v. Moore*, Case No. 2:10-CV-347, 2:10-CV-951, 2012 WL 5830251, at *9 (S.D. Ohio 2012) (citing *McCormick v. Miami Univ.*, 693 F.3d 654, 665 (6th Cir. 2012). Throughout his Complaint, Plaintiff alleges numerous state law claims against various combinations of Defendants. (*See, e.g.*, Compl. 16, 25, 32, 38, 47.) However, at present, the court has not been advised of any Ohio Court of Claims statutory immunity determinations with respect to any of Defendants. As a result, all state law claims against Defendants in their individual capacities arising from performance of their official state duties must be, and are hereby, dismissed.

5. Defendants' Assertion of Qualified Immunity

Defendants assert they are protected by qualified immunity against all of Plaintiff's claims. Qualified immunity is an affirmative defense and may be asserted as a bar "from liability for civil damages insofar as [an official's] conduct does not violate clearly established statutory or

constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Blake v. Wright*, 179 F.3d 1003, 1007 (6th Cir. 1999). When asserted, the burden then shifts to the plaintiff to show that the defendant officials are not entitled to immunity. *Burgess v. Fischer*, 735 F.3d 462, 472 (6th Cir. 2013) (citing *Chappell v. City of Cleveland*, 585 F.3d 901, 907 (6th Cir. 2009)). However, because Plaintiff has failed to state any claims upon which relief can be granted, it is not necessary for the court to make a qualified immunity determination.

IV. CONCLUSION

For the foregoing reasons, the court grants Defendants' Motion to Dismiss the Complaint for failure to state a claim upon which relief can be granted.

IT IS SO ORDERED.

/S/ SOLOMON OLIVER, JR.
UNITED STATES DISTRICT JUDGE

October 31, 2017