APPENDIX A
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

No. 19-1705
MING WEI,
Appellant
v.
COMMONWEALTH OF PENNSYLVANIA; PENNSYLVANIA DEPARTMENT OF HEALTH (PADOH); PENNSYLVANIA STATE CIVIL SERVICE COMMISSION (SCSC); VERONICA URDANETA IN HER INDIVIDUAL AND OFFICIAL CAPACITY; STEPHEN OSTROFF IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; TIFFANY BURNHAUSER IN HER INDIVIDUAL AND OFFICIAL CAPACITY; GODWIN OBIRI IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; ROBERT GIALLO IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; KIM STRIZZI IN HER INDIVIDUAL AND OFFICIAL CAPACITY; JOHN DOES 1-5 IN THEIR INDIVIDUAL CAPACITIES

Opinion filed: March 31, 2020
On Appeal from the United States District Court
for the Middle District of Pennsylvania,
(M.D. Pa No. 11-cv-00688)
District Judge: Honorable John E. Jones, III.
SUR PETITION FOR REHEARING

OPINION OF THE COURT

BEFORE: SMITH, Chief Judge, and MCKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, Jr., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, and COWEN*, Circuit Judges

The petition for rehearing filed by appellant, Ming Wei, in the above-captioned matter having been submitted to the judges who participated in the decision of this Court and to all other available circuit judges of the Court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the Court in regular active service who are not disqualified not having voted for rehearing by the Court en banc, the petition for rehearing by the panel and the Court en banc is DENIED.

BY THE COURT,
s/ Paul B. Matey
Circuit Judge

SLC/cc: Ming Wei
Howard G. Hopkirk, Esq.

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*Judge Cowen's vote is limited to panel rehearing only

APPENDIX B
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

No. 19-1705
MING WEI,
Appellant
v.
COMMONWEALTH OF PENNSYLVANIA; PENNSYLVANIA DEPARTMENT OF HEALTH (PADOH); PENNSYLVANIA STATE CIVIL SERVICE COMMISSION (SCSC); VERONICA URDANETA IN HER INDIVIDUAL AND OFFICIAL CAPACITY; STEPHEN OSTROFF IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; TIFFANY BURNHAUSER IN HER INDIVIDUAL AND OFFICIAL CAPACITY; GODWIN OBIRI IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; ROBERT GIALLO IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; KIM STRIZZI IN HER INDIVIDUAL AND OFFICIAL CAPACITY; JOHN DOES 1-5 IN THEIR INDIVIDUAL CAPACITIES

Opinion filed: January 7, 2020
On Appeal from the United States District Court
for the Middle District of Pennsylvania,
(M.D. Pa No. 11-cv-00688)
District Judge: Honorable John E. Jones, III.

OPINION*

Submitted Pursuant to Third Circuit LAR 34.1(a)
January 3, 2020
Before: KRAUSE, MATEY, and COWEN, Circuit Judges.

PER CURIAM.

Ming Wei appeals the District Court's orders granting Appellees' motions for summary judgment and denying his motions for sanctions. For the reasons below, we will affirm the District Court's judgment.

The procedural history of this case and the details of Wei's claims are well known to the parties and need not be discussed at length. Briefly, in 2007, Wei was terminated from his job by the Pennsylvania Department of Health ("the Department"). He challenged his removal before the State Civil Service Commission ("the Commission"). In 2008, the Commission decided that the Department had just cause for the firing because Wei had failed to complete an assignment. Wei appealed the decision to the Commonwealth Court of Pennsylvania which affirmed the Commission's decision. Wei v. State Civil Serv. Comm'n, 961 A.2d 254 (Pa. Commw. Ct. 2008).

In 2011, Wei filed a civil rights complaint, which he subsequently amended, in the District Court for the Middle District of Pennsylvania alleging, inter alia, that he was discriminated against by the Appellees based on his national origin, race, and

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

disability. The Appellees moved to dismiss the Fourth Amended Complaint. The District Court adopted a Magistrate Judge's Report and Recommendation and granted the motion in part but allowed some claims to go forward. The Appellees then filed an answer and moved for summary judgment.

Adopting the Magistrate Judge's Report and Recommendation, the District Court granted summary judgment as to several claims but denied summary judgment with respect to some claims. The District Court noted that because of the number of claims and lack of clarity of Wei's pleadings, Appellees had overlooked some of his claims. It permitted Appellees to file a second motion for summary judgment. Appellees did so, and a Magistrate Judge recommended that summary judgment be granted except for four claims. The District Court adopted the Report and Recommendation and granted summary judgment as to all claims except four.

As the parties were preparing for trial, the District Court reconsidered its decision to adopt the Magistrate Judge's Report and Recommendation. It invited the parties to resubmit their objections to the portion of the Report and Recommendation that recommended denying Appellees' motion for summary judgment and directed Appellees to address specific issues. The parties did so, and the District Court granted summary judgment on all of Wei's remaining claims. Wei filed a timely notice of appeal. We have jurisdiction pursuant to 28 U.S.C. § 1291.

Issue preclusion

Wei first argues that the District Court erred in giving preclusive effect to the Commission's decision that there was just cause for his removal. Seeking to relitigate this issue, Wei devotes several pages of his brief and reply brief to describing the structure of his office, how it handled its workload, and the work he was assigned. However, for the reasons discussed below, we agree with the District Court that the Commission's decision and findings were entitled to preclusive effect. We exercise de novo review over the District Court's grant of summary judgment on the basis of issue preclusion. Dici v. Pennsylvania, 91 F.3d 542, 547 (3d Cir. 1996). A federal court must give preclusive effect to a state court judgment just as another court of that state would. Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 85-87 (1984) (claim preclusion); Allen v. McCurry, 449 U.S. 90, 95-105 (1980) (issue preclusion). If a decision by a state administrative agency has been reviewed by a state court, that decision is given preclusive effect in federal court. Edmundson v. Borough of Kennett Square, 4 F.3d 186, 189 (3d Cir. 1993). The criteria for issue preclusion are: (1) the issue is identical; (2) the judgment was final and on the merits; and (3) there was a full and fair opportunity to litigate. See Bradley v. Pittsburgh Bd. of Educ., 913 F.2d 1064, 1073 (3d Cir. 1990).

The Commission noted that the issues before it were whether there was just cause for Wei's

removal and whether the Department removed him for discriminatory reasons. The Commission found that the Department established that Wei exhibited unsatisfactory work performance and insubordination which provided just cause for his removal. The Commission concluded that Wei had not made a prima facie case of discrimination based on national origin, retaliation, or a serious health condition.

In affirming the Commission's decision, the Commonwealth Court held that: (1) Wei was not entitled to an interpreter; (2) the Commission did not err in limiting the testimony regarding how data had previously been processed; and (3) the Commission properly found that the Department had just cause for Wei's removal from his job due to his insubordination and unsatisfactory work performance. Wei, 961 A.2d at 258. The Commonwealth Court affirmed the Commission's conclusion that Wei was not fired based on his national origin, as retaliation, or for his health condition. With respect to Wei's claims regarding under the Family Medical Leave Act ("FMLA"), it determined that he had not shown that he had requested and was denied leave under the FMLA but rather that he had requested annual leave. The Commonwealth Court rejected Wei's claims that the Department's witnesses had provided false testimony. Id. at 260-61. Wei argues in his brief that the issue of whether he converted the "HARS data" was not the same issue in the Commission's adjudication and the District Court erred in using it to preclude many of his claims. He appears to claim that the Commission's finding of just cause

for his removal was based on the assignment of converting the HARS data but that he was never assigned to convert HARS data. Thus, he contends, the issues are not identical. However, the preclusive issue that the Commission decided and Commonwealth Court affirmed was that there was just cause for Wei's removal from his job due to his insubordination and unsatisfactory work performance.

Wei also asserts that he was not provided a full and fair opportunity to litigate his issues in the state proceedings. While he claims that the Department rejected his request for evidence, he does not describe any specific evidence that he needed for the hearing before the Commission. He argues that he was denied an interpreter during the hearing, but he does not suggest how he was prejudiced by not having one. He does not claim that there were any specific portions of the hearing which he was not able to understand. He also contends that he was not given a second opportunity to correct the hearing record but he does not explain how the minor typographical error he describes caused him any prejudice.

Wei also argues that an exception to preclusion applies: that there have been changes in the controlling facts which render issue preclusion inapplicable. However, he simply repeats his previous argument that he was not assigned to convert the HARS data.[1] The District Court did not

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[1] Wei claims that Appellees admit that he was never assigned to convert the HARS data. However, he takes the statement out of context. In response to an interrogatory from Wei that

err in giving preclusive effect to the Commission's decision.

Summary Judgment

Wei argues that the District Court erred in failing to construe the evidence in the light most favorable to him as the nonmoving party. However, in support of this contention, he points only to one instance in his deposition transcript where the Appellees purportedly submitted a transcript without Wei's changes incorporated into it. Wei does not explain how this impacted the summary judgment analysis.

Wei contends that the District Court failed to provide the reason why it vacated its decision that four claims could proceed to trial. A District Court may reconsider a prior decision if it gives its reasoning for reconsidering the decision and ensures that the parties are not prejudiced by relying on the prior decision. Williams v. Runyon, 130 F.3d 568, 573 (3d Cir. 1997). Here, the District Court noted that, in preparing for trial, it had reviewed the matter, and some arguments had

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asked for the details of "converting HARS HIV/AIDS data files into PA NEDSS," Appellees responded "[The Department] never asked Ming Wei to convert HARS data into PA NEDSS. . . . Wei failed to complete the assignment given to him of unifying into a single format file the backlog of HIV laboratory data so that it could be evaluated, cleaned, and uploaded into PA NEDSS with the rest of the HARS data." App. at 221.

given it pause. It decided to reconsider the remaining claims before "conducting a potentially unnecessary trial." Order, Doc. 397 at 3. The District Court gave the parties an opportunity to submit revised pleadings on the four remaining issues. And when it granted summary judgment for Appellees on those claims, it gave its reasoning. Wei does not argue that he relied on the prior ruling or was prejudiced. He simply states that because the District Court did not give a reason for reconsideration, he does not know how to appeal that decision.

Wei argues that the District Court "cited Defendants' false statements as the reason to rescind the claim against Urdaneta." He appears to challenge the District Court's conclusion that an April 4, 2007 reprimand he received for failing to attend a mandatory meeting was not retaliatory. He asserts that he was never told to attend the meeting while Veronica Urdaneta, his supervisor, stated that she had instructed him to attend the meeting. He also challenges the District Court's statement that a July 2, 2007 reprimand was the result of an inappropriate email Wei sent to his supervisor. The District Court, however, did not rely on any factual statements by Urdaneta in resolving these claims. Rather, it concluded that the reprimands were not an adverse action because they did not result in any change to Wei's duties, assignments, compensation or other terms of his employment [2]. It further determined that the

[2] Wei argues that shortly after the April 4, 2007 reprimand, his assignment was changed. He claimed that on April 9, 2007, Urdaneta

reprimands were not materially adverse because they would not have deterred a reasonable worker from making a charge of discrimination. See Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006). We agree. The reprimands simply gave Wei the feedback that he needed to improve his behavior.

FMLA leave

Wei also appears to challenge the District Court's conclusion that Appellees' denial of Wei's request to use paid annual leave in lieu of unpaid FMLA leave was not discriminatory or retaliatory. The District Court noted that Urdaneta denied Wei's request to use paid annual leave because he was not completing his work duties. In response, Wei argues only that the work he was assigned was not part of his job description.

The District Court also concluded that there was no evidence that Wei notified Urdaneta that his request for annual leave was related to the FMLA leave he had been granted by human resources. In support of his arguments to the contrary, Wei points to an email dated July 2, 2007, in which he requested to use annual leave between July 9 and July 20. He was then informed that he was only approved for *intermittent* absences under the FMLA and would need to fill out a new Serious Health Condition Certification for approval. He

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ordered him to complete processing 600,000 records. However, in her email, Urdaneta did not give Wei a new assignment. Rather, she simply directed Wei to complete the assignment he had already been given.

was informed that, without an approved Serious Health Condition Certification, he would not be able to use annual leave unless it was approved by his supervisor "subject to Management's responsibility to maintain efficient operations." It appears that Wei then submitted another certification because Wei includes a document showing that on July 6, 2007, he was granted full-time unpaid leave under the FMLA through July 13, 2007. The letter also noted that he was previously granted intermittent leave under the FMLA through August 7, 2007. App. at 447. Wei, however, does not assert that he resubmitted any leave request for annual leave after receiving FMLA approval. He does not point to any request to use annual leave in lieu of unpaid leave under the FMLA that fell within the timing and scope of his FMLA approvals and was denied.

Commission

After the Commission decided against him, Wei emailed it several times and demanded that it change its decision. On May 13, 2009, Wei visited the Commission's legal offices. He demanded that the Commission change its decision and punish his coworkers for perjury. When Wei refused to leave, the police were called, and the officers gave Wei a defiant trespass warning. When he came back the next day on May 14, he was arrested. Wei also alleges that three and a half years after his removal, in February 2011, he went to the

Department of Health, and an attorney called the police who stopped and frisked him.

Wei challenges the District Court's conclusion that those persons involved in calling the police were unaware of Wei's protected activity; thus, their calling the police on Wei was not retaliation. However, Wei does not point to any evidence that any protected activity was the cause of the calls to the police. Moreover, Wei's arrest was clearly not retaliation for protected conduct but rather because he violated a no trespass order.

Wei also challenges the District Court's conclusion that the Commission was not acting as an employment agency and could not be sued under Title VII. Wei claims that he went to the Commission looking for job information. However, Appellees noted that no job information is available at the legal office. Moreover, Wei sent an email to a Commission attorney on the afternoon of May 13, 2009, the day before his arrest, with his summary of what had happened that day. He stated that he had discussed his case with the attorney and requested that the alleged perjury by employees be investigated. After being told to leave, Wei stated that he asked to see some documents in his case. Then, the police were called. Wei made no mention of seeking job information. When he was subsequently told that he could not visit the Commission without prior permission, he requested permission to visit the Commission on a weekly basis to search for job information. He was informed that any information he could obtain by visiting the Commission was also available online.

The District Court did not err in determining that the Commission was not acting as an employment agency for the purpose of Wei's claims.

Defamation

Wei brought claims of the denial of due process under 42 U.S.C. § 1983 for several allegedly defamatory statements made by Appellees. In his brief, Wei groups the statements into two categories. First, he argues that those statements made before his termination were the cause of the termination. Here, Wei is again attempting to relitigate the facts surrounding his termination. He appears to be arguing that any statement that implied that he did not finish his assignment was defamatory. However, as noted above, the Commonwealth Court already determined that the Department had just cause for removing Wei based on his failure to complete his assignment.

As for the second category of statements—those made to the EEOC and the courts after his termination —Wei argues that these statements damaged his reputation and caused loss of job opportunity, income, and health. In his brief, Wei points to only one statement as proof that his employment opportunities were damaged. In 2016, the Department of Health filed a form requesting to remove Wei for consideration for employment with the Department. It noted that Wei was dismissed for unsatisfactory performance. App. at 507. Because Wei's removal was, in fact, for

unsatisfactory performance, that statement was true and not defamatory.

Default Judgment and Sanctions

Wei argues that the District Court erred in denying his motion for default judgment because the Appellees' counteroffer in settlement negotiations was filed one day late. This argument is beyond meritless. Wei's claims of fraud are again mere attempts to relitigate the facts surrounding his removal from his employment.

Additional claims

Wei contends that he wanted to add claims but the District Court ignored his request. He does not specify in what pleading he made such a request, and we will not comb through over four hundred pleadings to find it. Nor has he argued that justice would require permitting him to amend his complaint. See Fed. R. Civ. P. 15(a)(2) (after time to amend has expired, party may amend with consent of opposing party or leave of court, which should be given when justice requires).

For the above reasons, as well as those set forth by the District Court, we will affirm the District Court's judgment.

APPENDIX C

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

No. 1:11-cv-688

MING WEI,

Plaintiff,

v.

COMMONWEALTH OF PENNSYLVANIA, et al.,

Defendants,

MEMORANDUM

March 28, 2019

JOHN E. JONES, III, District Judge.

THE BACKGROUND OF THIS MEMORANDUM IS AS FOLLOWS:

By Order dated June 18, 2018 (Doc. 397), the Court invited the Defendants to file renewed objections to the portion of Chief Magistrate Judge Susan E. Schwab's Report and Recommendation that recommended denial of the Defendants' motion for summary judgment (Doc. 298) with respect to the Plaintiff's three remaining claims. We have now received and reviewed the Defendants' renewed objections (Docs. 402 and

410), as well as the Plaintiff's opposition thereto. (Doc. 407). For the reasons that follow, we shall vacate our prior decision wherein we adopted the Magistrate Judge's recommendation to deny the Defendants' summary judgment motion with respect to Plaintiff's remaining claims. Thus, we shall enter summary judgment in favor of the Defendants on these claims, and shall close this case. As a corollary, we shall dismiss the parties' pending motions *in limine* and shall summarily deny the Plaintiff's *seventh* Motion for Sanctions under Rule 11.

I. BACKGROUND

The Court and the parties are well familiar with the extensive procedural and factual background of this lengthy litigation, which was commenced by the *pro se* Plaintiff in 2011. Hereinbelow we shall address only the facts necessary to support our decision, but shall refer the reader to the Magistrate Judge's thorough Report and Recommendation for a full recitation of the factual underpinnings of this case. (Doc. 321). In short, this employment discrimination case arises out of Plaintiff Ming Wei's ("Plaintiff" or "Wei") claims that officials at the Pennsylvania Department of Health ("PADOH") discriminated against him because of his national origin, race, and his disability. He also claims that the PADOH officials retaliated against him because he complained about his working conditions and that they

subjected him to a hostile work environment. The most recent iteration of the Plaintiff's claims are contained in a Fourth Amended Complaint (Doc. 95), which spans 71 pages in length and contains over 100 pages of exhibits.

As the parties are aware, as the result of multiple rounds of pretrial motion practice, only a few claims remain. They are 1) Title VII retaliation claims against the PADOH based on two reprimands given to Plaintiff (April 4, 2007 and July 2, 2007); and 2) Title VII discrimination and retaliation claims against the PADOH and a 42 U.S.C. § 1981 retaliation claim against individual Defendants Urdaneta and Ostroff based on the denial of annual leave pay for Wei's FMLA leave in the summer of 2007.

With respect to the claims based on the denial of annual leave pay for Wei's FMLA leave, we adopted the Magistrate Judge's reasoning and recommendation that summary judgment be denied on the basis that the PADOH had failed to set forth a legitimate, nondiscriminatory reason for not paying Wei for the leave he was granted. (Doc. 321, p. 35). We also adopted the Magistrate Judge's determination that the April 4 and July 2, 2007 reprimands were adverse actions, and that the PADOH failed to provide a legitimate, non-discriminatory reason for them. These are the

rulings that we invited the Defendants' to address in their renewed objections.[1]

A. Title VII Retaliation Claims based on the Written Reprimands

As noted above, we adopted the Magistrate Judge's reasoning and conclusion, over the Defendants' objection, that the reprimands were adverse employment actions in the context of Plaintiffs' discrimination claim, and thus we denied the Defendants' request for summary judgment on Wei's retaliation claim based on the April 4 and July 2, 2007 reprimands. Upon further reflection, however, and for the reasons that follow, we find that these reprimands were *not* adverse employment actions as a matter of law. As such the

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[1] Where objections to a magistrate judge's report and recommendation are filed, the court must perform a *de novo* review of the contested portions of the report. *Supinksi v. United Parcel Serv.*, Civ. A. No. 06-0793, 2009 WL 113796, at *3 (M.D. Pa. Jan. 16, 2009) (citing Sample v. Diecks, 885 F.2d 1099, 1106 n. 3 (3d Cir. 1989); 28 U.S.C. § 636(b)(1)(c)). "In this regard, Local Rule of Court 72.3 requires `written objections which . . . specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for those objections.'" *Id.* (citing *Shields v. Astrue*, Civ. A. No. 07-417, 2008 WL 4186951, at *6 (M.D. Pa. Sept. 8, 2008). Although the standard of review is *de novo*, 28 U.S.C. § 636(b)(1) permits whatever reliance the district court, in the exercise of sound discretion, chooses to place on a magistrate judge's proposed findings and recommendations. *See* United States v. Raddatz, 447 U.S. 667, 674-75 (1980); *see also* Matthews v. Weber, 423 U.S. 261, 275 (1976); Goney v. Clark, 749 F. 2d 5, 7 (3d Cir. 1984). 885 F.2d 1099, 1106 n. 3 (3d Cir. 1989); 28 U.S.C. § 636(b)(1)(c)). "In this regard, Local Rule of Court 72.3 requires `written objections which . . . specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for those objections.'" *Id.* (citing *Shields v. Astrue*, Civ. A. No. 07-417, 2008 WL 4186951, at *6 (M.D. Pa. Sept. 8, 2008).

Defendants are entitled to summary judgment on the retaliation claims.

In the context of a retaliation claim, the plaintiff "must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). Under this standard, "petty slights, minor annoyances, and simple lack of good manners" are not adverse actions because such would not deter a reasonable worker from making or supporting a charge of discrimination. *Id.* "By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position . . . this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination ." *Id.* at 69-70. In *Burlington Northern*, the court held that the plaintiff suffered a materially adverse action that "might have dissuaded a reasonable worker form making or supporting a charge of discrimination" because her job duties were substantially changed to less desirable and less prestigious duties and she was suspended without pay for 37 days. *Id.* 69-71. The Court held that the significance of any alleged act of retaliation must be considered with regard to the surrounding context and particular circumstances set forth. *Id.* at 70.

With these jurisprudential guidelines in mind, we review the reprimands at issue. The April 4, 2007 reprimand resulted from Wei's failure to attend a mandatory meeting. The written reprimand referenced Wei's absence from the meeting, and further stated, "[t]his action is being taken to impress upon you the seriousness of this violation and give you the opportunity to correct your behavior in the future," and that "[i]f you fail to correct this type of behavior or commit a similar violation, you will be subject to further disciplinary action up to and including dismissal from employment." (Doc. 300-1 at 399). The July 2, 2007 reprimand resulted from Wei's inappropriate behavior related to communications between Wei and his supervisor. The reprimand referenced the communication at issue and stated, "[p]lease be advised that any future incidents of this nature will result in further disciplinary action up to and including discharge." (Doc. 300-1 at 401).

In our view, these two written reprimands do not rise to the level of being materially adverse because we simply cannot find that they would have dissuaded a reasonable worker from making or supporting a charge of discrimination. To be clear, these reprimands did not result in any change to Wei's duties, assignments, surrounding coworkers, compensation or any other terms or conditions of employment. Rather, they were a form of targeted constructive criticism, demonstrating to Wei the seriousness of missing a mandatory meeting and inappropriately communicating with his super-

visor. They essentially advised Wei to cease certain conduct. Further, it is evident that Wei was not dissuaded from making or supporting a charge of discrimination by virtue of these two written reprimands. To the contrary, Wei made almost weekly complaints to the DEEO, which were in addition to his many more formal complaints to the EEOC, PHRC and the courts. (Docs. 321 at 40, 42 and 51).

Accordingly, because we find that no reasonable jury would determine that the April 4 and July 2, 2007 written reprimands were materially adverse and would dissuade a reasonable worker from making or supporting a charge of discrimination, we shall grant summary judgment in favor of the Defendants on Wei's Title VII retaliation claim.

B. Title VII Retaliation and Discrimination Claims and 42 U.S.C. § 1981 Claims Based on Denying Wei Pay for his Leave

To summarize,[2] Wei was granted unpaid FMLA leave of eight to ten days in July or August of 2007 and claims that he should have been able to substitute paid annual leave for this unpaid leave. The Defendants submit that the legitimate, nondiscriminatory reason for denying Wei pay for

[2] A fulsome recitation of the lengthy factual background surrounding these claims is set forth by Magistrate Judge Schwab at pages 29-30 of her December 29, 2016 report. (Doc. 321).

the leave he was granted (in the form of substituting annual leave for the granted FMLA leave) was operational in nature — specifically that Defendant Urdaneta denied Wei's request to use annual leave because Wei was not completing his work duties. Defendants' further submit that Wei never notified Defendant Urdaneta that his requests to use annual leave were in any way related to the FMLA leave that he had been granted by human resources. The lack of evidence on this point is critical. In our view, no reasonable jury could find that failure to compensate Wei for his unpaid FMLA leave absences were indicative of discrimination when there is simply no evidence that Dr. Urdaneta was aware that Wei had been approved for FMLA leave by human resources or that she was aware that the FMLA required that paid annual leave be substituted for unpaid FMLA leave. While it might be a failing of the management structure of the PADOH that Wei's supervisor was not aware of the fact that human resources had granted FMLA leave to Wei, this insufficiency does not rise to the level of invidious, actionable discrimination or retaliation under Title VII or 42 U.S.C. § 1981. As such, we shall reject the Magistrate Judge's recommendation that summary judgment be denied on this claim, and shall enter judgment in favor of the Defendants.

An appropriate Order shall issue.

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

No. 1:11-cv-688

MING WEI,

Plaintiff,

v.

COMMONWEALTH OF PENNSYLVANIA, et al.,

ORDER

March 28, 2019

JOHN E. JONES, III, District Judge.

In conformity with the Memorandum issued on today's date, it is hereby ORDERED that:

1. This Court's Order dated March 27, 2017 (Doc. 344) wherein we adopted Magistrate Judge Schwab's Report and Recommendation (Doc. 321) in its entirety, thereby granting in part and denying in part the Defendants' Motion for Summary Judgment is VACATED to the extent we are reconsidering our ruling with respect to the Defendants' Motion for Summary Judgment. Our Order remains intact to the extent we denied Plaintiffs' motions for a default judgment and for sanctions.

2. The Report and Recommendation (Doc. 321) is ADOPTED IN PART and REJECTED IN PART to the following extent:

a. The Defendants' Motion for Summary Judgment (Doc. 298) is GRANTED in its entirety for the reasons stated in the accompanying Memorandum.

3. The parties motions *in limine* (Docs. 376, 381, 383) are DISMISSED AS MOOT.

4. The Plaintiffs' Seventh Motion for Sanctions (Doc. 411) is SUMMARILY DENIED.

5. The Clerk of Court is directed to CLOSE the file on this case.

s/ John E. Jones III

John E. Jones III

United States District Judge

APPENDIX D

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

No. 1:11-cv-688

MING WEI,

Plaintiff,

v.

COMMONWEALTH OF PENNSYLVANIA, et al.,

Defendants,

ORDER

March 27, 2017

AND NOW, upon consideration of the Report and Recommendation of Chief United States Magistrate Judge Susan E. Schwab (Doc. 272), recommending that the Defendants' Motion for Summary Judgment be granted in part and denied in part, and that Plaintiff's Motions for Default Judgment and for Sanctions be denied, and noting that both parties filed objections to portions of the report[1]1 which have been fully briefed, and the

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[1] 1 Where objections to a magistrate judge's report and recommendation are filed, the court must perform a de novo review of the contested portions of the report. Supinksi v. United Parcel Serv., Civ. A. No. 06-0793, 2009 WL 113796, at *3 (M.D. Pa. Jan. 16, 2009) (citing Sample v. Diecks, 885 F.2d 1099, 1106 n. 3 (3d Cir. 1989); 28 U.S.C. § 636(b)(1)(c)). "In

Court finding Judge Schwab's analysis to be thorough, well-reasoned, and fully supported by the record, and the Court further finding both parties' objections to be without merit and squarely addressed by the Magistrate Judge within her report[2] 2 IT IS HEREBY ORDERED THAT:

1. The Report and Recommendation of Magistrate Judge Schwab (Doc. 321) is ADOPTED in its entirety.

2. Defendants' Motion for Summary Judgment (Doc. 298) is GRANTED in part and DENIED in part as follows:

a. Summary judgment is granted in favor of the Defendants on all of Plaintiff's claims with the exception of the following claims:

b. Plaintiff's Title VII discrimination claim against the PADOH based on denying Plaintiff his pay for his leave;

c. Plaintiff's Title VII retaliation claim against the PADOH based on denying Wei pay for his leave;

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this regard, Local Rule of Court 72.3 requires 'written objections which . . . specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for those objections.'" Id. (citing Shields v. Astrue, Civ. A. No. 07-417, 2008 WL 4186951, at *6 (M.D. Pa. Sept. 8, 2008).

[2] None of the arguments presented by the parties in their partial objections cause us to part company with the recommendations contained within Magistrate Judge's comprehensive and thoughtful report.

d. Plaintiff's Title VII retaliation claim against the PADOH based on the April 4, 2007 reprimand and the July 2, 2007 reprimand; and

e. Plaintiff's 42 U.S.C. § 1981 retaliation claim against Defendants Urdaneta and Ostroff based on denying Plaintiff pay for his leave.

3. Plaintiff's Motion for a Default Judgment (Doc. 290) is DENIED.

4. Plaintiff's Motions for Sanctions (Docs. 313 and 316) are DENIED.

5. This matter is REMANDED to Magistrate Judge Schwab for further pretrial management, including the disposition of any other pretrial motions, and determining whether the parties will consent to proceed to the Magistrate Judge's jurisdiction for trial.

s/ John E. Jones III
John E. Jones III
United States District Judge

APPENDIX E

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

No. 1:11-cv-688

MING WEI,

Plaintiff,

v.

COMMONWEALTH OF PENNSYLVANIA, et al.,

Defendants,

September 23, 2015

ORDER

AND NOW, upon consideration of the comprehensive Report and Recommendation of United States Magistrate Susan E. Schwab (Doc. 248), recommending that the Defendants' Motion for Summary Judgment (Doc.197) be granted in part and denied in part; that the Plaintiff's Motion for Summary Judgment (Doc. 201) be denied; that the John Doe defendants be dismissed; and that this matter be remanded to Magistrate Judge Schwab for further pre-trial management,[1] and

[1] Magistrate Judge Schwab also recommends that Defendants be permitted to file a second dispositive motion to address the claims that remain after the issuance of this

noting that Plaintiff filed partial objections[2] (Doc. 261) to the report on September 10, 2015, and the Court finding Judge Schwab's analysis to be thorough, well-reasoned, and fully supported by the record, and the Court further finding Plaintiff's objections to be without merit [3] and squarely

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Order. As noted by the Magistrate Judge, given the sheer number of claims in this matter, and the unclear nature of the pro se Plaintiff's pleadings, the Defendants have overlooked or inadequately addressed certain claims in their instant summary judgment motion. We agree with the Magistrate Judge that, in the interest of judicial economy and efficiency, it is appropriate to permit the Defendants to file a second motion for summary judgment on the remaining claims, as set forth in the Magistrate Judge's report, page 77, footnote 19.

[2] Where objections to a magistrate judge's report and recommendation are filed, the court must perform a de novo review of the contested portions of the report. *Supinksi v. United Parcel Serv., Civ. A.* No. 06-0793, 2009 WL 113796, at *3 (M.D. Pa. Jan. 16, 2009) (citing *Sample v.Diecks,* 885 F.2d 1099, 1106 n. 3 (3d Cir. 1989); 28 U.S.C. § 636(b)(1)(c)). The court may accept, reject, or modify, in whole or in part, the magistrate judge's findings or recommendations. Id. Although the standard of review is de novo, 28 U.S.C. § 636(b)(1) permits whatever reliance the district court, in the exercise of sound discretion, chooses to place on a magistrate judge's proposed findings and recommendations. *United States v. Raddatz* , 447 U.S. 667, 674-75 (1980); see also *Mathews v. Weber*, 423 U.S. 261, 275 (1976); *Goney v. Clark*, 749 F.2d 5, 7 (3d Cir. 1984).

[3] 3 The Court has reviewed the Magistrate Judge's extremely thorough 79-page Report and Recommendation on the

addressed by the Magistrate Judge within her report, IT IS HEREBY ORDERED THAT:

1. The Report and Recommendation of Magistrate Judge Schwab (Doc.248) is ADOPTED in its entirety.

2. The Defendants' Motion for Summary Judgment (Doc. 197) is GRANTED with respect to Plaintiff's discrimination and retaliation claims based on his termination; his hostile work environment claims; his Title VII and § 1981 claims based upon the work assignments and denial of additional time off; the Title VII claims against the Commission; the remaining 42 U.S.C. § 1983 claims; the 42 U.S.C. § 1985 claims; and the remaining Rehabilitation Act Claims. The Motion is DENIED in all other respects.

3. Plaintiff's Motion for Summary Judgment (Doc. 201) is DENIED.

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pending cross-motions for summary judgment. Likewise, we have considered Plaintiff's 55-page partial objections to the Magistrate Judge's report. We have found no errors in the Magistrate Judge's reasoning or her ultimate recommendations, and we therefore find it appropriate to exercise our discretion to rely on the report. Further, we note that Plaintiff's objections, in the main, express his dissension with th Magistrate Judge's interpretations of the facts, but the Plaintiff does not present us with any legally availing reasons to depart from the Magistrate Judge's conclusions.

4. The John Doe Defendants are DISMISSED from this action and the Clerk shall terminate the John Doe Defendants from the docket.

5. Defendants' are granted leave to file a second motion for summary judgment.

6. This matter is REMANDED to Magistrate Judge Schwab for all further pre-trial management.

s/ John E. Jones III
John E. Jones III
United States District Judge

APPENDIX F

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

No. 1:11-cv-688

MING WEI,

Plaintiff,

v.

COMMONWEALTH OF PENNSYLVANIA, et al.,

Defendants,

June 6, 2012.

MEMORANDUM AND ORDER

JOHN E. JONES, III, District Judge.

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

Before the Court is the Report and Recommendation ("R&R") of Magistrate Judge J. Andrew Smyser (Doc. 62) filed on March 14, 2012. Within the R&R, the Magistrate Judge analyzes the Defendants' Motion to Dismiss the Third Amended Complaint (Doc. 34) and recommends that the Motion be largely denied, but that the Motion be granted with respect to the following claims: Plaintiff's purported 42 U.S.C. § 1983 emotional distress claim, Plaintiff's Pennsylvania Human Relations Act ("PHRA") claims, and Plaintiff's §

1983 claims of discrimination based on the Defendants' discipline of him during his employment and termination. Magistrate Judge Smyser recommends that the matter be remanded to him for further pre-trial management.

Plaintiff Ming Wei ("Plaintiff" or "Wei") and the Defendants filed limited objections to the R&R. (Docs. 67-69). Accordingly, this matter is ripe for our review.

I. STANDARD OF REVIEW[1]

When objections are filed to the report of a magistrate judge, the district court makes a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objections are made. 28 U.S.C. § 636(b)(1); *United States v. Raddatz*, 447 U.S. 667, 674-75 (1980). The court may accept, reject, or modify, in whole or in part, the magistrate judge's findings or recommendations. *Id.* Although the standard of review is *de novo,* 28 U.S.C. § 636(b)(1) permits whatever reliance the district court, in the exercise of sound discretion, chooses to place on a magistrate judge's proposed findings and recommendations. *Raddatz*, 447 U.S. at 674-75; *see also Mathews v. Weber*, 423 U.S. 261, 275 (1976); *Goney v. Clark*, 749 F.2d 5, 7 (3d Cir. 1984).

[1] Magistrate Judge Smyser set forth the standard of review for a motion to dismiss at pages 8-11 of the R&R. Thus, in the interest of economy, we shall not repeat the same herein.

II. BACKGROUND

Plaintiff first commenced this employment discrimination action on April 13, 2011 against the following Defendants: 1) the Commonwealth of Pennsylvania; 2) the Pennsylvania Department of Health ("PADOH"); 3) the Pennsylvania State Civil Service Commission; 4) Veronica Urdaneta; 5) Stephen Ostrolff; and 6) Tiffany Burnhauser. The current operative pleading in this matter is the third amended complaint.

Magistrate Judge Smyser sets forth the facts giving rise to this action in great detail at pages 2 through 8 of the R&R, thus we shall only summarize the salient facts herein. Plaintiff, who is of Chinese origin, worked at the PADOH from 2001 until his termination in 2007. In the context of his employment, Plaintiff performed various types of data analysis pertaining to HIV/AIDS cases in the Commonwealth. Plaintiff alleges that, during his employment, there was a double standard and stereotypical view of employees of Chinese origin that they should work harder than other employees who were not of Chinese origin. Plaintiff claims that when he complained about being overloaded with work, he was threatened he would lose his job, was disciplined, and that the number of staff members in his unit was decreased.

Plaintiff alleges that as a result of the excessive work and groundless harassment by the Defendants, he suffered from emotional distress and

became physically ill. Plaintiff was advised by his medical providers to only work intermittently, however when Plaintiff requested annual leave to care for his health, his request was denied despite the fact that he had accumulated 100 hours of vacation time.

On July 23, 2007, Plaintiff filed a complaint with the Pennsylvania Human Relations Commission and the Equal Opportunity Commission. He was suspended on August 24, 2007 and subsequently fired from his employment on September 4, 2007. Plaintiff claims that during a hearing with the State Civil Service Commission pertaining to his termination, he was further discriminated against by not being appointed an interpreter. Plaintiff also claims that his health rendered him unable to sit for a hearing longer than two hours in length, but that despite asserting this as a basis for a continuance, he was denied that request.

Finally, Plaintiff claims that in May of 2009 he went to the Civil Service office to review his case file but was told to come back another day. Plaintiff claims that when he returned to the office another day, the police were called and he was stopped and arrested. Similarly, on February 7, 2011, Plaintiff alleges that when he went to the PADOH for a pubic document and job information, the PADOH called the police and falsely accused him of making a threat. Plaintiff was again stopped, searched, and arrested.

Plaintiff's third amended complaint contains eighteen counts. Counts One through Four are Title VII claims against the Commonwealth and

the PADOH for retaliation, national origin and racial harassment, and national origin discrimination. Count Five is a Title VII claim against the Commonwealth, the PADOH and the State Civil Service Commission for racial discrimination. Counts Six through Ten are 42 U.S.C. § 1983 and § 1985 claims against individual Defendants Urdaneta, Burnhauser, Ostroff, and the Doe Defendants. Counts Eleven through Eighteen are PHRA claims against the individual Defendants.

III. DISCUSSION

In the main, Magistrate Judge Smyser recommends that the Defendants' Motion to Dismiss be denied, with three exceptions. The claims Magistrate Judge Smyser recommends be dismissed are as follows: 1) Count IX, labeled as a 42 U.S.C. § 1983 claim for intentional emotional distress, because such claim is not cognizable under the statute; 2) Plaintiff's 42 U.S.C. § 1983 claim based on Defendants' discipline of Plaintiff during his employment and the termination of Plaintiff's employment, because these claims are barred by the statute of limitations; and 3) Plaintiff's PHRA claims, since Plaintiff has indicated his intent not to proceed with these claims in this Court.

As noted above, the parties have interposed limited objections to the R&R. Plaintiff objects to the Magistrate Judge's recommendation that some of his 42 U.S.C. § 1983 claims be dismissed as

barred by the statute of limitations. Defendants object to the Magistrate Judge's recommendation that Plaintiff's deprivation of property claim be permitted to proceed. We shall discuss each objection in turn.

A. Plaintiff's Objections

Magistrate Judge Smyser concluded that the Plaintiff's 42 U.S.C. § 1983 claims related to alleged wrongful conduct of the Defendants that occurred prior to April 13, 2009 should be dismissed because they fall outside of the applicable statute of limitations.[2][2] In rendering this conclusion, Magistrate Judge Smyser rejected Plaintiff's contention that claims based on pre-April 13, 2009 conduct were permitted by the continuing violation doctrine. In his objections, Plaintiff contends that the continuing violation doctrine applies to save these claims from dismissal.

Under the continuing violation doctrine, "when a defendant's conduct is part of a continuing practice, an action is timely so long as the last act evidencing the continuing practice falls within the limitations period; in such an instance, the court will grant relief for the earlier related acts that would other-

[2] The action was filed on April 13, 2011. A two-year statute of limitations is applied to 42 U.S.C. § 1983 claims in Pennsylvania federal courts. *O'Connor v. City of Newark*, 440 F. 3d 125, 126 (3d Cir. 2006).

wise be time barred. *Cowell v. Palmer Twp.*, 263 F. 3d 286, 292 (3d Cir. 2001) (quoting *Brenner v. Local 514, United Bhd. of Carpenters and Joiners of Am.*, 927 F. 2d 1283 (3d Cir. 1991)). To achieve the protection of the continuing violation doctrine, a plaintiff must show that the defendant's conduct is part of a continuing practice and is more than the occurrence of isolated or sporadic acts. *Rush v. Scott Speciality Gases, Inc.*, 113 F. 3d 476, 481 (3d Cir. 1997).

Plaintiff contends that the discipline that occurred during his employment and his termination in 2007 was related to the 2011 incident at the PADOH (when Plaintiff was stopped, searched and arrested), and thus the continuing violation doctrine saves the claims based on earlier conduct from being time-barred. We disagree. The Plaintiff has not alleged a clear factual connection between his employment discipline and termination in 2007 to an incident at the PADOH which occurred nearly *four years later* in 2011 to support the operation of the continuing violation doctrine. Thus, we shall adopt the Magistrate Judge's recommendation on this point, noting as we do that we are not dismissing the Plaintiff's hostile work environment or conspiracy claims brought pursuant to 42 U.S.C. § 1983.

B. Defendants' Objection

Next we turn to the Defendants' contention that Plaintiff's due process/deprivation of property

claim must be dismissed. In the context of this case, Plaintiff alleges that the Defendants failed to return all of his property following his termination. The touchstone for this claim is whether or not the Plaintiff had an adequate post-deprivation remedial process available to him for the return of his property. *See Hudson v. Palmer*, 468 U.S. 517, 533 (1984).

Defendants contend that state law provides adequate process to the Plaintiff through an action in state court for conversion or replevin. We agree. It is well-established that § 1983 claims for deprivation of property without due process are not cognizable when a state's post-deprivation remedies are adequate to protect a plaintiff's procedural due process rights. *Taylor v. Naylor*, 2006 U.S. Dist. LEXIS 27322, *9 (W.D. Pa. 2006). In Pennsylvania, district courts have recognized that Pennsylvania provides an adequate post-deprivation remedy for unauthorized deprivations of property in the form of actions for replevin and conversion. *See id.*; *see also Marsh v. Ladd,* 2004 WL 2441088, *6-7 (E.D. Pa. 2004). Accordingly, we agree with the Defendants that Plaintiff's 42 U.S.C. § 1983 claim for deprivation of property without due process must be dismissed because Pennsylvania provides for an adequate post-deprivation remedy. Thus, we shall reject the Magistrate Judge's recommendation that the Motion to Dismiss be denied with respect to this claim.

C. Plaintiff's Request to Further Amend Complaint

b. The Defendants' Motion to Dismiss (Doc. 34) is DENIED in all other respects.

2. This matter is REMANDED to Magistrate Judge Smyser for further pre-trial management.

s/ John E. Jones III

John E. Jones III

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MING WEI,	:	CIVIL NO: 1:11-CV-00688
	:	
Plaintiff	:	
	:	(Judge Jones)
v.	:	
	:	(Chief Magistrate Judge Schwab)
COMMONWEALTH OF PENNSYLVANIA, *et al.*,	:	
	:	
Defendants	:	
	:	

REPORT AND RECOMMENDATION

In this employment-discrimination case, the plaintiff, Ming Wei, who is of Chinese origin, claims that the defendants discriminated against him because of his national origin, his race, and his disability. He also claims that they retaliated against him because he complained about his working conditions and that they subjected him to a hostile-work environment. The Court dismissed many of Wei's claims, and it granted summary judgment to the defendants as to many others. The only remaining claims are: 1) the Title VII discrimination claim against the PADOH based on denying Wei pay for his leave; (2) the Title VII retaliation claim against the PADOH based on denying Wei pay for his leave; (3) the Title VII retaliation claim against the PADOH based on the April 4, 2007, reprimand and the July 2, 2007, reprimand; and (4) the 42 U.S.C. §1981 retaliation claim against defendants Urdaneta and Ostroff based on denying Wei pay for his leave.

On Mach 27, 2017, Judge Jones granted in part and denied in part the defendants' second motion for summary judgment, and he remanded the case to the undersigned "for further pretrial management, including the disposition of any other pretrial motions, and determining whether the parties will consent to proceed to the Magistrate Judge's jurisdiction for trial." *Doc. 334* at 3. The parties subsequently elected not to consent to proceed before a magistrate judge. *See Doc. 342.* And by an Order dated November 28, 2017, we denied two motions for sanctions filed by Wei. *See Doc. 348.*

Wei's motion for reconsideration of Judge Jones's Order of March 27, 2017, is pending. *See Doc. 337.* Because that motion seeks reconsideration of an Order of Judge Jones, we will not address that motion unless otherwise directed. Also pending is Wei's appeal to Judge Jones of the Order of November 28, 2017. *See Doc. 349.* Again, since the appeal is directed to Judge Jones, we will not address it unless directed to do so.

Given that the parties do not consent to proceed before a magistrate judge and there is no further pretrial management for the undersigned to conduct, we recommend that after disposition of Wei's motion for reconsideration and appeal of the Order of November 28, 2017, the case be listed for trial on the remaining claims.

The Parties are further placed on notice that pursuant to Local Rule 72.3:

Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Submitted this 5th day of December, 2017.

S/Susan E. Schwab
Susan E. Schwab
Chief United States Magistrate Judge

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