CLD-021 **NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-2012

LUISA M. LIBERTO; JEFFREY M. LIBERTO,
Appellants

v.

GEISINGER HOSPITAL; JANET SHERMAN, Regional Director, Patient Access Central Region; JAN LETTEER, Human Resources Generalist; CARI DEPACK, Senior Access Rep.; THERESA PHILLIPS, Patient Access Rep.; WENDY LOW, Manager, Patient Access Services; DR. DAVID T. FEINBERG; DIANE PARDOE, Volunteer Coordinator; SHELLY LEE TYSON, Director of Volunteer Services; JOSH WOLFE, Human Services Generalist; STACEY FISHER, Senior Director, Guest Services; LISA KOBELIS, PAC; VALERIE MOHUTSKY, Manager, Workman's Compensation

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On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action No. 4-17-cv-02320)
District Judge: Honorable Jennifer P. Wilson

Submitted for Possible
Summary Action Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6

October 29, 2020
Before: RESTREPO, MATEY, and SCIRICA, Circuit Judges

APP A

(Opinion filed November 24, 2020)

OPINION*

PER CURIAM

Appellants Luisa and Jeffrey Liberto, proceeding in forma pauperis and pro se, appeal from the dismissal of their complaint for failure to prosecute. Because the appeal presents no substantial question, we will summarily affirm the judgment of the District Court with one modification. See 3d Cir. L.A.R. 27.4; 3d Cir. I.O.P. 10.6.

On December 15, 2017, Luisa Liberto and her son, Jeffrey Liberto, initiated an employment discrimination action in the District Court. The Libertos amended their complaint. The defendants filed a motion to dismiss the amended complaint or for a more definite statement under Federal Rules of Civil Procedure 12(b)(6) and (e). On August 20, 2018, the District Court granted the defendants' motion and dismissed the amended complaint without prejudice to the Libertos' filing a second amended complaint. Rather than file a new complaint, the Libertos appealed. We dismissed the appeal for failure to prosecute on February 27, 2020. See C.A. No. 18-2990.

On February 28, 2020, a Magistrate Judge ordered the Libertos to file a second amended complaint on or before March 27, 2020. The order warned them that failure to do so could result in the dismissal of the action pursuant to Federal Rule of Civil Procedure 41. The Libertos did not file a new complaint. On March 30, 2020, the

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

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Magistrate Judge recommended dismissing the action for failure to prosecute. The Libertos did not file objections to the Report and Recommendation ("R&R"). The District Court adopted the R&R and dismissed the Libertos' amended complaint with prejudice. The Libertos appealed. In this Court, they have filed a motion for appointment of counsel.

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. We review the District Court's dismissal of the amended complaint pursuant to Federal Rule of Civil Procedure 41(b) for an abuse of discretion. Briscoe v. Klaus, 538 F.3d 252, 257 (3d Cir. 2008). Our review is

> guided by the manner in which the trial court balanced the following factors . . . and whether the record supports its findings: (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party . . . was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.

Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863, 868 (3d Cir. 1984) (emphasis omitted). "Each factor need not be satisfied for the trial court to dismiss a claim." Ware v. Rodale Press, Inc., 322 F.3d 218, 221 (3d Cir. 2003). Although "dismissal with prejudice is only appropriate in limited circumstances and doubts should be resolved in favor of reaching a decision on the merits," Emerson v. Thiel Coll., 296 F.3d 184, 190 (3d Cir. 2002) (per curiam), such decisions are given "great deference," Mindek v. Rigatti, 964 F.2d 1369, 1373 (3d Cir. 1992), and a district court may sua sponte dismiss for failure to prosecute, see Donnelly v. Johns-Manville Sales Corp., 677 F.2d 339, 341

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(3d Cir. 1982).

We agree with the District Court's conclusion that the Poulis factors weighed in favor of dismissal. As the Magistrate Judge's thorough R&R discussed, the Libertos were given several opportunities to amend their complaint and put on notice that their failure to do so could result in dismissal. The appellants have demonstrated a pattern of seemingly intentional dilatoriness in both the District Court and this Court. Moreover, the District Court's attempted lesser sanction (i.e., dismissing the complaint without prejudice to file an amendment) was ineffective. Indeed, given the Libertos' failure to replead, "it is difficult to conceive of what other course the court could have followed." In re Westinghouse Sec. Litig., 90 F.3d 696, 704 (3d Cir. 1996) (quotation marks omitted). Thus, the District Court did not err in dismissing the Libertos' complaint.

We note, however, that the Libertos' filings in the District Court and on appeal indicate that Jeffrey is incompetent to represent himself in federal court. See, e.g., 3d Cir. ECF No. 7 at 1. Since he was not represented by counsel, the dismissal as to him should be without prejudice. See Osei-Afriyie v. Med. Coll. of Pa., 937 F.2d 876, 883 (3d Cir. 1991).

Accordingly, we will affirm the District Court's dismissal for failure to prosecute with the modification that, as to Jeffrey Liberto, the dismissal is without prejudice. The motion for appointment of counsel is denied as to both appellants.

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CLD-021

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-2012

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Appellants

v.

GEISINGER HOSPITAL; JANET SHERMAN, Regional Director, Patient Access Central Region; JAN LETTEER, Human Resources Generalist; CARI DEPACK, Senior Access Rep.; THERESA PHILLIPS, Patient Access Rep.; WENDY LOW, Manager, Patient Access Services; DR. DAVID T. FEINBERG; DIANE PARDOE, Volunteer Coordinator; SHELLY LEE TYSON, Director of Volunteer Services; JOSH WOLFE, Human Services Generalist; STACEY FISHER, Senior Director, Guest Services; LISA KOBELIS, PAC; VALERIE MOHUTSKY, Manager, Workman's Compensation

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On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action No. 4-17-cv-02320)
District Judge: Honorable Jennifer P. Wilson

Submitted for Possible
Summary Action Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6
October 29, 2020
Before: RESTREPO, MATEY, and SCIRICA, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Middle District of Pennsylvania and was submitted for possible summary

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action pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6 on October 29, 2020. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered April 16, 2020, be and the same hereby is affirmed as modified. All of the above in accordance with the opinion of this Court.

ATTEST:

s/Patricia S. Dodszuweit
Clerk

DATED: November 24, 2020

Certified as a true copy and issued in lieu of a formal mandate on December 16, 2020

Teste: Patricia S. Dodszuweit

Clerk, U.S. Court of Appeals for the Third Circuit

APP B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

LUISA LIBERTO, et al.,	:	**Civil No. 4:17-CV-2320**
	:	
Plaintiffs	:	**(Judge Wilson)**
	:	
v.	:	**(Magistrate Judge Carlson)**
	:	
GEISINGER HOSPITAL, et al.,	:	
	:	
Defendants	:	

REPORT AND RECOMMENDATION

I. Statement of Fact and of the Case

In this case, we are confronted with a *pro se* lawsuit which has now been marked by years of delay and a persistent, regrettable failure on the part of the plaintiffs to follow the court's instructions.

By way of background the plaintiffs, Luisa and Jeffrey Liberto, initially commenced this lawsuit on December 15, 2017, by filing a *pro se* complaint against Geisinger and twelve Geisinger employees. An examination of the plaintiffs' initial complaint suggested that the plaintiffs were attempting to bring some sort of employment discrimination lawsuit since the plaintiffs stated that they were bringing an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. Further, the plaintiffs captioned this initial pleading as a "Complaint for Employment Discrimination." (Doc. 1.) What then followed was a collection of workplace

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complaints by Luisa Liberto relating to a wide array of matters such as access to office keys, requests to change work cubicles, laptop computer access, and workplace ventilation and acoustics. (Id.) In addition, the plaintiffs alleged that Liberto's son, Jeffrey Liberto, who allegedly suffers from some developmental disability, was subjected to some form of discrimination during his volunteer work at the hospital. (Id.)

While this much was clear, the manner in which the plaintiffs' grievances were initially expressed often defied easy understanding. Thus, it was often difficult to discern how specific actions alleged by the plaintiffs were related to discrimination in violation of federal law. It was also frequently difficult to discern precisely what type of discrimination was being alleged by the plaintiffs since the complaint simply asserted in a conclusory fashion discrimination based upon race, color, and disability.

Presented with this form of complaint, the defendants filed a motion seeking a more definite statement of the plaintiffs' claims pursuant to Rule 12(e) of the Federal Rules of Civil Procedure. (Doc. 22.) Finding that the plaintiffs' pleadings were "so vague or ambiguous that the [defendants] cannot reasonably prepare a response," Fed. R. Civ. P. 12(e), we granted this motion for a more definite statement, (Doc. 27), and instructed the plaintiffs to file an amended complaint on or before June 29, 2018. (Doc. 27.) We also informed the plaintiffs that their amended complaint must recite factual allegations that are sufficient to raise the plaintiffs' claimed right to relief

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beyond the level of mere speculation, contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), set forth in averments that are "concise, and direct." Fed. R. Civ. P. 8(e)(1). We further instructed the plaintiffs that this complaint must be a new pleading which stands by itself as an adequate complaint without reference to any other pleading already filed. Young v. Keohane, 809 F. Supp. 1185, 1198 (M.D. Pa. 1992). We also told the plaintiffs that the amended complaint should set forth plaintiffs' claims in short, concise and plain statements, and in sequentially numbered paragraphs. Further we instructed the plaintiffs that any amended complaint should name proper defendants, specify the offending actions taken by a particular defendant, be signed, and indicate the nature of the relief sought. Finally, we advised the plaintiffs that the claims set forth in the complaint should arise out of the same transaction, occurrence, or series of transactions or occurrences, and they should contain a question of law or fact common to all defendants.

The plaintiffs then filed an amended complaint in this action. (Doc. 28.) This amended complaint, which consisted of 47 pages of text and an additional 32 pages of exhibits, provided a more fulsome factual narrative in support of the plaintiffs' claims, even if it did not comply with our formatting instructions to set forth each factual averment in separately numbered paragraphs. Further, the amended complaint did not identify the legal or statutory basis for the plaintiffs' claims but did allege that

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"[p]laintiffs were targetted, persecuted, harassed, black-balled, bullied, relentlessly tortured, and discriminated [sic] based on their race, color, disabilities and in retaliation for speaking out," (Doc. 28, at 45), thus suggesting that the plaintiffs were bringing claims under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, for discrimination on the basis of race and color, as well as disability discrimination claims in employment under the Americans with Disabilities Act, 42 U.S.C. § 12101. There was one further ambiguity to this amended complaint. The original complaint specifically named Geisinger and twelve individuals as defendants. (Doc. 1.) The amended complaint bore the caption "Geisinger Hospital et al.," but did not specifically indicate who the remaining other defendants may be beyond Geisinger.

Presented with this amended complaint, the defendants, once again, moved to dismiss this complaint, or in the alternative for a more definite statement of this claim. (Docs. 32 and 33.) The plaintiffs responded to this motion by indicating that they were unable to further articulate their claims. (Doc. 34.)

Given the patent inadequacies in this amended complaint, in July of 2018, we recommended that this motion to dismiss be granted, and: (1) that the individual defendants previously named in this action be dismissed; (2) that the claims brought by Jeffrey Liberto pursuant to Title VII and the ADA be dismissed; and (3) that the plaintiffs' complaint be dismissed without prejudice to the plaintiffs filing an amended complaint endeavoring to correct the defects cited in our report, provided

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that the plaintiffs act within 20 days of any dismissal order. (Doc. 35). On August 20, 2018, the district court adopted this Report and Recommendation but allowed the plaintiffs 20 days to file an amended complaint endeavoring to address the legal deficiencies in their pleadings. (Doc. 36).

The plaintiffs did not follow the path prescribed by this court. Instead, they elected to file a notice of appeal in September of 2018. (Doc. 37). They then took no action to perfect or pursue this appeal for more than 17 months. Ultimately, in February of 2020, this appeal was dismissed for failure to prosecute, and the case was remanded to the district court and assigned to the undersigned. (Docs. 40 and 41).

On February 28, 2020, we then entered an order which advised the plaintiffs in clear and precise terms as follows:

1. On or before **March 27, 2020**, the plaintiffs shall file an amended complaint in this case, and serve this complaint upon the defendants.

2. The plaintiffs' amended complaint must recite factual allegations which are sufficient to raise the plaintiffs' claimed right to relief beyond the level of mere speculation, contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), set forth in averments that are "concise, and direct." Fed. R. Civ. P. 8(e)(1).

3. This complaint must be a new pleading which stands by itself as an adequate complaint without reference to any other pleading already filed. Young v. Keohane, 809 F. Supp. 1185, 1198 (M.D. Pa. 1992). The complaint should set forth plaintiffs' claims in short, concise and plain statements, and in sequentially numbered

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paragraphs. It should name proper defendants, specify the offending actions taken by a particular defendant, be signed, and indicate the nature of the relief sought. Further, the claims set forth in the complaint should arise out of the same transaction, occurrence, or series of transactions or occurrences, and they should contain a question of law or fact common to all defendants.

4. *The Court further places the plaintiffs on notice that failure to comply with this direction may result in the dismissal of this action pursuant to Rule 41 of the Federal Rules of Civil Procedure. . . .*

(Doc. 42) (emphasis added).

Despite this explicit admonition, the plaintiffs have failed, once again, to follow the court's instructions and timely submit the amended complaint that they were initially directed to file by September of 2018. The plaintiffs' persistent failure to obey court instructions or actively litigate this case over the past 18 months now wholly stymies efforts to advance or resolve this case.

On these facts, for the reasons set forth below, it is recommended that this case be dismissed.

II. Discussion

A. Dismissal of this Case Is Warranted Under Rule 41.

Federal Rule of Civil Procedure 41 authorizes a court to dismiss a civil action for failure to prosecute, stating that: "If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it." Fed. R. Civ. P. 41(b). Decisions regarding dismissal of actions for

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dispositive,' Ware, 322 F.3d at 222, [and it is] clear that 'not all of the Poulis factors need be satisfied in order to dismiss a complaint.' Mindek, 964 F.2d at 1373." Briscoe v. Klaus, 538 F.3d at 263. Moreover, recognizing the broad discretion conferred upon the district court in making judgments weighing these six factors, the Court of Appeals has frequently sustained such dismissal orders where there has been a pattern of dilatory conduct by a *pro se* litigant who is not amenable to any lesser sanction. See, e.g., Emerson v. Thiel College, supra; Tillio v. Mendelsohn, 256 F. App'x 509 (3d Cir. 2007); Reshard v. Lankenau Hospital, 256 F. App'x 506 (3d Cir. 2007); Azubuko v. Bell National Organization, 243 F. App'x 728 (3d Cir. 2007).

This rule applies with particular force in a case such as this, where the plaintiffs have been afforded the opportunity to amend their complaint but have forfeited that opportunity through months of inaction. While our prior decisions called for dismissal of this action, the Court provided the plaintiffs an opportunity to further litigate this matter by endeavoring to promptly file a proper amended complaint. Having concluded that this *pro se* complaint was flawed in multiple and profound ways, we followed this course recognizing that in civil rights cases, *pro se* plaintiffs often should be afforded an opportunity to amend a complaint before the complaint is dismissed in its entirety, see Fletcher-Hardee Corp. v. Pote Concrete Contractors, 482 F.3d 247, 253 (3d Cir. 2007), unless it is clear that granting further leave to amend would be futile, or result in undue delay. Alston v. Parker, 363 F.3d 229,

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failure to prosecute rest in the sound discretion of the Court and will not be disturbed absent an abuse of that discretion. Emerson v. Thiel College, 296 F.3d 184, 190 (3d Cir. 2002) (citations omitted). That discretion, however, while broad is governed by certain factors, commonly referred to as Poulis factors. As the United States Court of Appeals for the Third Circuit has noted:

> To determine whether the District Court abused its discretion [in dismissing a case for failure to prosecute], we evaluate its balancing of the following factors: (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense. Poulis v. State Farm Fire and Cas. Co., 747 F.2d 863, 868 (3d Cir.1984).

Emerson, 296 F.3d at 190.

In exercising this discretion "there is no 'magic formula' that we apply to determine whether a District Court has abused its discretion in dismissing for failure to prosecute." Lopez v. Cousins, 435 F. App'x 113, 116 (3d Cir. 2011)(quoting Briscoe v. Klem, 538 F.3d 252 (3d Cir. 2008)) Therefore, "[i]n balancing the Poulis factors, [courts] do not [employ] a . . . 'mechanical calculation' to determine whether a District Court abused its discretion in dismissing a plaintiff's case. Mindek v. Rigatti, 964 F.2d 1369, 1373 (3d Cir.1992)." Briscoe v. Klaus, 538 F.3d at 263. Consistent with this view, it is well-settled that " 'no single Poulis factor is

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235 (3d Cir. 2004).

Thus, in this case, the plaintiffs were given this opportunity to further amend their complaint but have now forfeited this opportunity through their inaction. In this situation, where a deficient complaint is dismissed without prejudice but the *pro se* plaintiffs refuse or decline to timely amend the complaint, it is well within the court's discretion to dismiss the complaint with prejudice given the plaintiffs' refusal to comply with court directives. Indeed, the precise course was endorsed by the Court of Appeals in Pruden v. SCI Camp Hill, 252 F. App'x 436, 438 (3d Cir. 2007). In Pruden, the appellate court addressed how district judges should exercise discretion when a *pro se* plaintiff ignores instructions to amend a complaint. In terms that are equally applicable here the court observed that:

> The District Court dismissed the complaint without prejudice and allowed [the *pro se* plaintiff] twenty days in which to file an amended complaint. [The *pro se* plaintiff] failed to do so. Because [the *pro se* plaintiff] decided not to amend his complaint in accordance with the Federal Rules of Civil Procedure, we conclude that the District Court did not abuse its discretion when it dismissed [the *pro se* plaintiff's] complaint with prejudice. See In re Westinghouse Securities Litigation, 90 F.3d 696, 704 (3d Cir. 1996). The District Court expressly warned [the *pro se* plaintiff] that the failure to amend his complaint would result in dismissal of the action with prejudice. "[I]t is difficult to conceive of what other course the court could have followed." Id. (quoting Spain v. Gallegos, 26 F.3d 439, 455 (3d Cir. 1994)).

Pruden v. SCI Camp Hill, 252 F. App'x 436, 438 (3d Cir. 2007).

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Therefore, consistent with the prior practice of this court, it is recommended that the complaint now be dismissed with prejudice without further leave to amend. See, e.g., Moore v. Primeramo, No. 4:17-CV-990, 2017 WL 5474548, at *2 (M.D. Pa. Oct. 24, 2017), report and recommendation adopted, No. 4:17-CV-990, 2017 WL 5473461 (M.D. Pa. Nov. 14, 2017); Williams v. Harry, No. 1:16-CV-01759, 2017 WL 3454410, at *1 (M.D. Pa. Aug. 11, 2017)(Kane, J.); Washington v. U.S.P. Canaan Kitchen/FBOP, No. 1:15-CV-849, 2015 WL 4663188, at *1 (M.D. Pa. Aug. 6, 2015) (Kane, J.); Wicks v. Barkley, 3:12-CV-02203, 2013 WL 5937066 (M.D. Pa. Nov. 4, 2013) (Mariani, J.); Davis v. Superintendent, SCI Huntingdon, 3:12-CV-01935, 2013 WL 6837796 (M.D. Pa. Dec. 23, 2013) (Mariani, J.).

Indeed, in this case, a dispassionate assessment of the Poulis factors weighs heavily in favor of dismissing this action. At the outset, a consideration of the first Poulis factor, the extent of the party's personal responsibility, shows that the delays in this case are entirely attributable to the plaintiffs, who have failed to abide by court orders, failed to prosecute the appeal of those prior orders, and have otherwise neglected to litigate this case.

Similarly, the second Poulis factor–the prejudice to the adversary caused by the failure to abide by court orders–also calls for dismissal of this action. Indeed, this factor–the prejudice suffered by the party seeking sanctions–is entitled to great weight and careful consideration. As the Court of Appeals has observed:

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> "Evidence of prejudice to an adversary would bear substantial weight in support of a dismissal or default judgment." Adams v. Trustees of N.J. Brewery Employees' Pension Trust Fund, 29 F.3d 863, 873-74 (3d Cir.1994) (internal quotation marks and citation omitted). Generally, prejudice includes "the irretrievable loss of evidence, the inevitable dimming of witnesses' memories, or the excessive and possibly irremediable burdens or costs imposed on the opposing party." Id. at 874 (internal quotation marks and citations omitted). . . . However, prejudice is not limited to "irremediable" or "irreparable" harm. Id.; see also Ware v. Rodale Press, Inc., 322 F.3d 218, 222 (3d Cir.2003); Curtis T. Bedwell & Sons, Inc. v. Int'l Fidelity Ins. Co., 843 F.2d 683, 693-94 (3d Cir.1988). It also includes "the burden imposed by impeding a party's ability to prepare effectively a full and complete trial strategy." Ware, 322 F.3d at 222.

Briscoe v. Klaus, 538 F.3d at 259-60.

In this case, the plaintiffs' failure to litigate these claims or comply with court orders now wholly frustrates and delays the resolution of this action, a lawsuit which has been pending since 2017. In such instances, the defendants are plainly prejudiced by the plaintiffs' continuing inaction and dismissal of the case clearly rests in the discretion of the trial judge. Tillio v. Mendelsohn, 256 F. App'x 509 (3d Cir. 2007) (failure to timely serve pleadings compels dismissal); Reshard v. Lankenau Hospital, 256 F. App'x 506 (3d Cir. 2007) (failure to comply with discovery compels dismissal); Azubuko v. Bell National Organization, 243 F. App'x 728 (3d Cir. 2007) (failure to file amended complaint prejudices defense and compels dismissal).

When one considers the third Poulis factor-the history of dilatoriness on the plaintiffs' part-it becomes clear that dismissal of this action is now appropriate. In

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this regard, it is clear that "'[e]xtensive or repeated delay or delinquency constitutes a history of dilatoriness, such as consistent non-response . . . , or consistent tardiness in complying with court orders.' Adams, 29 F.3d at 874." Briscoe v. Klaus, 538 F.3d at 260-61 (some citations omitted). Here, the plaintiffs have failed for more than 18 months to timely file pleadings, have failed to litigate their appeal, resulting in the dismissal of that appeal, and have not complied with orders of this court. Thus, the plaintiffs' conduct amply displays "[e]xtensive or repeated delay or delinquency [and conduct which] constitutes a history of dilatoriness, such as consistent non-response . . . , or consistent tardiness in complying with court orders." Adams, 29 F.3d at 874.

The fourth Poulis factor–whether the conduct of the party or the attorney was willful or in bad faith–also cuts against the plaintiffs in this case. In this setting, we must assess whether this conduct reflects mere inadvertence or willful conduct, in that it involved "strategic," "intentional or self-serving behavior," and not mere negligence. Adams v. Trs. of N.J. Brewery Emps.' Pension Trust Fund, 29 F.3d 863, 875 (3d Cir.1994). At this juncture, when the plaintiffs have failed to comply with instructions of the Court directing the plaintiffs to take specific actions in this case, and have had an interlocutory appeal dismissed for failure to prosecute, the Court is compelled to conclude that the plaintiffs' actions are not accidental or inadvertent but instead reflect an intentional disregard for this case and the Court's instructions.

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While Poulis also enjoins us to consider a fifth factor, the effectiveness of sanctions other than dismissal, cases construing Poulis agree that in a situation such as this case, where we are confronted by *pro se* litigants who will not comply with the rules or court orders, lesser sanctions may not be an effective alternative. See, e.g., Briscoe v. Klaus, 538 F.3d 252, 262-63 (3d Cir. 2008); Emerson, 296 F.3d at 191. This case presents such a situation where the plaintiffs' status as a *pro se* litigant severely limits the ability of the court to utilize other lesser sanctions to ensure that this litigation progresses in an orderly fashion. In any event, by entering our prior orders, and counseling the plaintiffs on their obligations in this case, we have endeavored to use lesser sanctions, but to no avail. The plaintiffs still decline to obey court orders and otherwise ignore their responsibilities as litigants. Since lesser sanctions have been tried, and have failed, only the sanction of dismissal remains available to the Court.

Finally, under Poulis we are cautioned to consider one other factor, the meritoriousness of the plaintiffs' claims. In our view, however, consideration of this factor cannot save these claims, since the plaintiffs are now wholly non-compliant with their obligations as litigants. The plaintiffs cannot refuse to address the merits of their claims, and then assert the untested merits of these claims as grounds for denying a motion to sanction them. Furthermore, it is well-settled that " 'no single Poulis factor is dispositive,' Ware, 322 F.3d at 222, [and it is] clear that 'not all of the

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Poulis factors need be satisfied in order to dismiss a complaint.' Mindek, 964 F.2d at 1373." Briscoe v. Klaus, 538 F.3d at 263. Therefore, the untested merits of the non-compliant plaintiffs' claims, standing alone, cannot prevent imposition of sanctions. Thus, in accord with the prior settled practice of this court, it is recommended that the complaint now be dismissed with prejudice as frivolous without further leave to amend. See, e.g., Moore, 2017 WL 5474548, at *2, report and recommendation adopted, 2017 WL 5473461; Williams, 2017 WL 3454410, at *1; Washington, 2015 WL 4663188, at *1; Wicks, 2013 WL 5937066; Davis, 2013 WL 6837796.

III. Recommendation

Accordingly, for the foregoing reasons, IT IS RECOMMENDED that the plaintiffs' complaint be dismissed for failure to prosecute.

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

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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 30th day of March 2020.

S/Martin C. Carlson
Martin C. Carlson
United State Magistrate Judge

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7/30/18

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

LUISA LIBERTO, et al.,	:	**Civil No. 4:17-CV-2320**
	:	
Plaintiffs	:	**(Judge Kane)**
	:	
v.	:	**(Magistrate Judge Carlson)**
	:	
GEISINGER HOSPITAL, et al.,	:	
	:	
Defendants	:	

REPORT AND RECOMMENDATION

I. Statement of Fact and of the Case

In this case we are now called upon to consider a second motion to dismiss, or for more definite statement, filed by the defendant, Geisinger Medical Center. (Doc. 32.) This motion raises a number of concerns regarding the adequacy of the amended complaint filed by the plaintiffs in this case. As discussed below, we believe that this motion should be granted, in part, but the plaintiffs should be afforded a final opportunity to amend their complaint to state any claims upon which relief may be granted.

By way of background the plaintiffs, Luisa and Jeffrey Liberto, initially commenced this lawsuit on December 15, 2017, by filing a *pro se* complaint against Geisinger and twelve Geisinger employees. An examination of the plaintiffs' initial complaint suggested that the plaintiffs were attempting to bring some sort of

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employment discrimination lawsuit since the plaintiffs stated that they were bringing an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e. Further, the plaintiffs captioned this initial pleading as a "Complaint for Employment Discrimination." (Doc. 1.) What then followed was a collection of workplace complaints by Luisa Liberto relating to a wide array of matters such as access to office keys, requests to change work cubicles, laptop computer access, and workplace ventilation and acoustics. (Id.) In addition, the plaintiffs alleged that Liberto's son, Jeffrey Liberto, who allegedly suffers from some developmental disability, was subjected to some form of discrimination during his volunteer work at the hospital. (Id.)

While this much was clear, the manner in which the plaintiffs' grievances were initially expressed often defied easy understanding. Thus, it was often difficult to discern how specific actions alleged by the plaintiffs were related to discrimination in violation of federal law. It was also frequently difficult to discern precisely what type of discrimination was being alleged by the plaintiffs since the complaint simply asserted in a conclusory fashion discrimination based upon race, color and disability.

Presented with this form of complaint, the defendants filed a motion seeking a more definite statement of the plaintiffs' claims pursuant to Rule 12(e) of the Federal Rules of Civil Procedure. (Doc. 22.) Finding that the plaintiffs' pleadings were "so

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vague or ambiguous that the [defendants] cannot reasonably prepare a response," Fed. R. Civ. P. 12(e), we granted this motion for a more definite statement, (Doc. 27), and instructed the plaintiffs to file an amended complaint on or before June 29, 2018. (Doc. 27.) We also informed the plaintiffs that their amended complaint must recite factual allegations which are sufficient to raise the plaintiffs' claimed right to relief beyond the level of mere speculation, contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), set forth in averments that are "concise, and direct." Fed. R. Civ. P. 8(e)(1). We further instructed the plaintiffs that this complaint must be a new pleading which stands by itself as an adequate complaint without reference to any other pleading already filed. Young v. Keohane, 809 F. Supp. 1185, 1198 (M.D. Pa. 1992). We also told the plaintiffs that the amended complaint should set forth plaintiffs' claims in short, concise and plain statements, and in sequentially numbered paragraphs. Further we instructed the plaintiffs that any amended complaint should name proper defendants, specify the offending actions taken by a particular defendant, be signed, and indicate the nature of the relief sought. Finally, we advised the plaintiffs that the claims set forth in the complaint should arise out of the same transaction, occurrence, or series of transactions or occurrences, and they should contain a question of law or fact common to all defendants.

The plaintiffs then filed an amended complaint in this action. (Doc. 28.) This

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amended complaint, which consisted of 47 pages of text and an additional 32 pages of exhibits, provided a more fulsome factual narrative in support of the plaintiffs' claims, even if it did not comply with our formatting instructions to set forth each factual averment in separately numbered paragraphs. Further, the amended complaint did not identify the legal or statutory basis for the plaintiffs' claims but did allege that "[p]laintiffs were targetted, persecuted, harassed, black-balled, bullied, relentlessly tortured, and discriminated [sic] based on their race, color, disabilities and in retaliation for speaking out," (Doc. 28, p 45),thus suggesting that the plaintiffs were bringing claims under Title VII of the Civil Rights Act, 42 U.S.C. §2000e, for discrimination on the basis of race and color, as well as disability discrimination claims in employment under the Americans with Disabilities Act, 42 U.S.C. 12101.[1] There is one further ambiguity to this amended complaint. The original complaint specifically named Geisinger and twelve individuals as defendants. (Doc. 1.) The amended complaint bears the caption "Geisinger Hospital et al.," but does not specifically indicate who the remaining other defendants may be beyond Geisinger.

Presented with this amended complaint, the defendants have, once again, moved to dismiss this complaint, or in the alternative for a more definite statement

[1] The plaintiffs have alleged that they are unable to reference the pertinent statutory law. For the plaintiffs' benefit, copies of the pertinent text of these statutes is attached as Appendix A to this Report and Recommendation

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of this claim. (Docs. 32 and 33.) The plaintiffs, in turn, have responded to this motion, albeit by indicating that they are unable to further articulate their claims, by suggesting that an attorney should be appointed to represent them. (Doc. 34.)

For the reasons set forth below, it is recommended that this motion to dismiss be granted, in part. In particular, we recommend: (1) that the individual defendants previously named in this action be DISMISSED; (2) that the claims brought by Jeffrey Liberto pursuant to Title VII and the ADA be DISMISSED; and (3) that the plaintiff's complaint be dismissed without prejudice to the plaintiffs filing an amended complaint endeavoring to correct the defects cited in this report, provided that the plaintiffs act within 20 days of any dismissal order.:

II. Discussion

A. Motion to Dismiss—Standard of Review

A motion to dismiss tests the legal sufficiency of a complaint. It is proper for the court to dismiss a complaint in accordance with Rule 12(b)(6) of the Federal Rules of Civil Procedure only if the complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). When reviewing a motion to dismiss, the court "must accept all factual allegations in the complaint as true, construe the complaint in the light favorable to the plaintiff, and ultimately determine whether plaintiff may be entitled to relief under any reasonable reading of the complaint." Mayer v. Belichick, 605 F.3d 223, 229 (3d Cir. 2010). In reviewing a motion to

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dismiss, a court must "consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the [plaintiff's] claims are based upon these documents." Id. at 230.

In deciding whether a complaint fails to state a claim upon which relief can be granted, the court is required to accept as true all factual allegations in the complaint as well as all reasonable inferences that can be drawn from the complaint. Jordan v. Fox Rothschild, O'Brien & Frankel, Inc., 20 F.3d 1250, 1261 (3d Cir. 1994). These allegations and inferences are to be construed in the light most favorable to the plaintiff. Id. However, the court "need not credit a complaint's bald assertions or legal conclusions when deciding a motion to dismiss." Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997). Further, it is not proper to "assume that [the plaintiff] can prove facts that [he] has not alleged . . . ." Associated Gen. Contractors of Cal. v. California State Council of Carpenters, 459 U.S. 519, 526 (1983).

Following the rule announced in Ashcroft v. Iqbal, "a pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Rather, a complaint must recite factual allegations sufficient to raise the plaintiff's claimed right to relief beyond the level of mere speculation. Id. To determine the sufficiency of a complaint under the pleading regime established by the Supreme Court, the court must engage in a three step analysis:

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> First, the court must take note of the elements a plaintiff must plead to state a claim. Second, the court should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. Finally, where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.

Santiago v. Warminster Twp., 629 F.3d 121, 130 (3d Cir. 2010) (quoting Iqbal, 556 U.S. at 675, 679). "In other words, a complaint must do more than allege the plaintiff's entitlement to relief" and instead must "'show' such an entitlement with its facts." Fowler v. UPMC Shadyside, 578 F.3d 203, 211 (3d Cir. 2009).

As the court of appeals has observed:

> The Supreme Court in Twombly set forth the "plausibility" standard for overcoming a motion to dismiss and refined this approach in Iqbal. The plausibility standard requires the complaint to allege "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570, 127 S.Ct. 1955. A complaint satisfies the plausibility standard when the factual pleadings "allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129 S.Ct. at 1949 (citing Twombly, 550 U.S. at 556, 127 S.Ct. 1955). This standard requires showing "more than a sheer possibility that a defendant has acted unlawfully." Id. A complaint which pleads facts 'merely consistent with' a defendant's liability, [ ] "stops short of the line between possibility and plausibility of 'entitlement of relief.' "

Burtch v. Milberg Factors, Inc., 662 F.3d 212, 220-21 (3d Cir. 2011).

Applying these legal benchmarks, for the reasons set forth below we conclude that a number of the claims made by the plaintiffs are subject to dismissal at this time.

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B. The Individual Defendants Should Be Dismissed from this Action

As we have noted there remain a number of ambiguities in the plaintiffs' amended complaint. First, while it is uncertain what legal grounds the plaintiffs are asserting in support of their claims, their allegation that "[p]laintiffs were targetted, persecuted, harassed, black-balled, bullied, relentlessly tortured, and discriminated [sic] based on their race, color, disabilities and in retaliation for speaking out," (Doc. 28, p 45), suggests that the plaintiffs are bringing claims under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e for discrimination on the basis of race and color, as well as disability discrimination claims in employment under the Americans with Disabilities Act, (ADA) 42 U.S.C. 12101. In addition, the original complaint specifically named Geisinger and twelve individuals as defendants. (Doc. 1.) The amended complaint bears the caption "Geisinger Hospital et al.," but does not specifically indicate who besides Geisinger these remaining other defendants may be.

To the extent that the plaintiffs are bringing claims under Title VII and the ADA, and purport to bring those claims against individual Geisinger employees, these individuals are now entitled to dismissal from this case since individuals who work for the corporate employer of a plaintiff bringing a claim under Title VII or the ADA typically may not be held personally liable under these statutes. See Emerson v. Thiel Coll., 296 F.3d 184, 190 (3d Cir. 2002). Thus, "[w]ith respect to violations

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of Title VII, the Third Circuit has long held that individuals cannot be personally liable." DeSantis v. New Jersey Transit, 103 F. Supp. 3d 583, 589 (D.N.J. 2015). Similarly, it has been held that:

> Third Circuit's Title VII holdings most naturally extend to the ADA and ADEA, and that individual liability is equally barred under all three statutes. Several courts in this district have reached the same conclusion. DeJoy, 941 F.Supp. at 475 (finding that neither the ADEA nor the ADA provides for individual liability); Kohn v. AT & T Corp., 58 F.Supp.2d 393, 421 (D.N.J.1999); Crawford v. W. Jersey Health Sys. (Voorhees Div.), 847 F.Supp. 1232, 1237 (D.N.J.1994) (no individual liability under the ADEA); P.N. v. Greco, 282 F.Supp.2d 221, 243 (D.N.J.2003). Courts of Appeals other than the Third Circuit have likewise held that individuals are not personally liable under the ADA and the ADEA. AIC Sec. Investigations, 55 F.3d at 1279 (no individual liability under the ADA); Roman–Oliveras v. Puerto Rico Elec. Power Auth., 655 F.3d 43, 51 (1st Cir.2011) (same); Albra v. Advan, Inc., 490 F.3d 826, 830 (11th Cir.2007) (same); Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 588 (9th Cir.1993) (no individual liability under the ADEA); Smith v. Lomax, 45 F.3d 402, 403–04 & n. 4 (11th Cir.1995) (same); Birkbeck, 30 F.3d at 510–11 (same); Martin v. Chem. Bank, 129 F.3d 114 (2d Cir.1997) (same).
>
> DeSantis v. New Jersey Transit, 103 F. Supp. 3d 583, 590 (D.N.J. 2015).

In light of this rising tide of legal authority rejecting individual liability under these statutes, absent some further well-pleaded claims by the plaintiffs, this amended complaint, which we construe as bringing ADA and Title VII claims, should be dismissed with respect to all of the individual defendants previously named by the plaintiffs.

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C. **Jeffrey Liberto's Claims Are Also Subject to Dismissal**

Furthermore, construing this amended complaint as bringing employment discrimination claims under the ADA and Title VII we note that Jeffrey Liberto's claims against Geisinger may encounter a legal obstacle since the amended complaint describes Jeffrey Liberto as a hospital volunteer, and not an employee. Title VII provides that: "It shall be an unlawful employment practice for an employer--(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). In the same vein, the ADA prohibits "discriminat[ion] against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). Both of these statutes, however, speak in terms of employment discrimination and protect the rights of employees, a term that is somewhat enigmatically defined as "an individual employed by an employer." 42 U.S.C. § 2000e(f). 42 U.S.C. § 12111 (4).

It is said that "this definition 'is completely circular and explains nothing,' " Bryson v. Middlefield Volunteer Fire Dep't, Inc., 656 F.3d 348, 352 (6th Cir. 2011). However, courts have applied agency law principles to determine whether an

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individual who is designated as a volunteer by an organization should be deemed an employee for purposes of Title VII and the ADA. Adopting this approach, some courts have held that volunteers who receive remuneration or some other significant direct and tangible benefits may be deemed to be employees, Bryson v. Middlefield Volunteer Fire Dep't, Inc., 656 F.3d 348, 352 (6th Cir. 2011), but in the absence of any pleading or proof showing that the volunteer received such substantial benefits, courts have often concluded that persons who simply volunteer at some establishment are not employees protected by Title VII or the ADA. Juino v. Livingston Par. Fire Dist. No. 5, 717 F.3d 431, 440 (5th Cir. 2013); Mirka v. Langley, City of, 16 F. App'x 665, 666 (9th Cir. 2001). Thus, "[n]umerous courts have held that volunteers are not employees for purposes of employment discrimination. See, e.g., Graves v. Women's Professional Rodeo Ass'n, 907 F.2d 71 (8th Cir.1990) (holding that benefits accrued as a member in a rodeo association does not raise the members to the status of employees); Hall v. Delaware Council on Crime & Justice, 780 F.Supp. 241, 244 (D.Del.1992) (holding that "reimbursement for some work-related expenses and free admittance to an annual luncheon [does not] constitute compensation significant enough to raise a volunteer to the status of an employee"); Berks Community Television, 657 F.Supp. at 795–96 (holding that an individual that volunteered at a television studio, and received no compensation or fringe benefits, was not an employee under Title VII)." Tawes v. Frankford

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Volunteer Fire Co., No. CIV.A.03-842-KAJ, 2005 WL 83784, at *4 (D. Del. Jan. 13, 2005).

In the instant case, beyond the description of Jeffrey Liberto as a "volunteer" the plaintiffs have set forth no well-pleaded facts which suggest that Mr. Liberto received remuneration or other substantial direct benefits which would effectively convert his volunteer duties into some form of employment status. In the absence of such pleading and proof, Jeffrey Liberto may not maintain a claim against Geisinger under Title VII or the ADA.

D. The Plaintiffs' Request for a Sum Certain of Unliquidated Damages Should Be Stricken

In addition, we note that the Court should also strike the claims for specific sums of unliquidated damages, $35,000,000, from this *pro se* complaint. In this regard, Rule 12 (f) of the Federal Rules of Civil Procedure imposes a duty on the Court to review pleadings and provides that the Court may upon its own initiative at any time order strike from any pleading any immaterial matter. Fed. R. Civ. P. 12(f). Decisions regarding whether claims may be stricken from a complaint are properly presented to a United States Magistrate Judge for determination in the first instance. Singh v. Superintending School Committee of the City of Portland, 593 F. Supp. 1315 (D. Me. 1984). In this case, the plaintiffs' various claims for specified amounts of unliquidated damages violate Local Rule 8.1 which provides, in part, that:

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> The demand for judgment required in any pleading in any civil action pursuant to Fed.R.Civ.P.8(a)(3) may set forth generally that the party claiming damages is entitled to monetary relief *but shall not claim any specific sum where unliquidated damages are involved.* The short plain statement of jurisdiction, required by Fed.R.Civ.P.8(a)(1), shall set forth any amounts needed to invoke the jurisdiction of the court but no other.

Local Rule 8.1 (emphasis added).

Since this prayer for relief violates Local Rule 8.1 by specifying particular amounts of unliquidated damages, these specific dollar claims should be stricken from the complaint without prejudice to the plaintiff arguing in any subsequent trial or hearing on the merits for any appropriate amount of damages supported by the evidence. Braddy v. Sciarillo, No. 3:16-CV-198, 2016 WL 2940450, at *7–8 (M.D. Pa. Apr. 7, 2016), report and recommendation adopted, No. 3:16-CV-198, 2016 WL 2904958 (M.D. Pa. May 18, 2016).

E. The Plaintiffs Should be Afforded an Opportunity to File an Amended Complaint Which Addresses the Concerns Raised By the Defendant and the Deficiencies Found By the Court

While this merits analysis calls for dismissal of some of the claims made by the plaintiffs in their amended complaint, we recommend that the plaintiffs be given a final opportunity to further litigate this matter by endeavoring to promptly file an amended complaint setting forth well-pleaded claims and addressing the deficiencies cited by this court. We recommend this course for two reasons: First, we are mindful of the fact that in civil rights cases *pro se* plaintiffs often should be

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afforded an opportunity to amend a complaint before the complaint is dismissed in its entirety, see Fletcher-Hardee Corp. v. Pote Concrete Contractors, 482 F.3d 247, 253 (3d Cir. 2007), unless granting further leave to amend is not necessary because amendment would be futile or result in undue delay, Alston v. Parker, 363 F.3d 229, 235 (3d Cir. 2004).

In addition we recognize that the defendants have filed a motion for a more definite statement made under Rule12(e) of the Federal Rules of Civil Procedure. Rule 12(e) provides in part that:

> A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

Fed. R. Civ. P. 12(e).

Here the defendants have requested that the Court order the plaintiffs to make a more definite statement of their claims against these defendants, and we find that this case aptly:

> highlight[s] the particular usefulness of the Rule 12(e) motion for a more definite statement. Under Rule 12(e), a defendant may move for a more definite statement "[i]f a pleading ... is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading." Fed.R.Civ.P. 12(e). The Rule 12(e) "motion shall point out the defects complained of and the details desired." Id. When a complaint fashioned under a notice pleading standard does not disclose

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> the facts underlying a plaintiff's claim for relief, the defendant cannot reasonably be expected to frame a proper, fact-specific . . . defense. . . . The Rule 12(e) motion for a more definite statement is perhaps the best procedural tool available to the defendant to obtain the factual basis underlying a plaintiff's claim for relief.

Thomas v. Independence Tp., 463 F.3d 285, 301 (3d Cir. 2006).

In our view, this case calls out for a more definite statement of the plaintiffs' claims since in some respects the plaintiffs' pleadings remain "so vague or ambiguous that the [defendants] cannot reasonably prepare a response." Fed. R. Civ. P. 12(e). Accordingly, the plaintiffs should be given leave to file an amended complaint, but be instructed that:

> [I]n amending this complaint or providing a more definite statement of his claims, the plaintiff should recite factual allegations which are sufficient to raise the plaintiff's claimed right to relief beyond the level of mere speculation, contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), set forth in averments that are "concise, and direct," Fed. R. Civ. P. 8(e)(1), and stated in separately numbered paragraphs describing the date and time of the events alleged, and identifying wherever possible the participants in the acts about which the plaintiff complains. This amended complaint should be a new pleading which stands by itself as an adequate complaint without reference to any other pleading already filed. Young v. Keohane, 809 F. Supp. 1185, 1198 (M.D. Pa. 1992). It should set forth plaintiff's claims in short, concise and plain statements, and in sequentially numbered paragraphs. It should name proper defendants, specify the offending actions taken by particular defendants, be signed, and indicate the nature of the relief sought. Further, the claims set forth in the amended complaint should arise out of the same transaction, occurrence, or series of transactions or occurrences, and they should contain a question of law or fact common to all defendants. Finally, the amended complaint should clearly state the legal basis for any discrimination claim, citing the appropriate statutes upon which [the plaintiffs] rel[y] in bringing a claim.

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Mazuka v. Amazon.com, No. 3:16-CV-566, 2016 WL 9776081, at *4 (M.D. Pa. June 9, 2016), report and recommendation adopted, No. 3:16-CV-566, 2016 WL 9776082 (M.D. Pa. July 6, 2016).

Finally we note that the plaintiffs' response to this motion has included what we construe as a request for the appointment of counsel. While we appreciate the plaintiffs' interest in securing counsel, we must decline this request at present. On this score, we recognize that there is neither a constitutional nor a statutory right to counsel for civil litigants. Parham v. Johnson, 126 F.3d 454, 456-57 (3d Cir. 1997); Tabron v. Grace, 6 F.3d 147, 153 (3d Cir. 1993). Instead, 28 U.S.C. § 1915(e)(1) simply provides that "[t]he court may request an attorney to represent any person unable to employ counsel." Under §1915(e)(1), a district court's appointment of counsel is discretionary and must be made on a case-by-case basis. Tabron, 6 F.3d at 157-58. In Parham, the United States Court of Appeals outlined the standards to be considered by courts when reviewing an application to appoint counsel pursuant to 28 U.S.C. § 1915(e)(1). In passing on such requests we must first:

> "[D]etermine[] that the plaintiff's claim has some merit, then [we] should consider the following factors: (1) the plaintiff's ability to present his or her own case; (2) the complexity of the legal issues; (3) the degree to which factual investigation will be necessary and the ability of the plaintiff to pursue such investigation; (4) the amount a case is likely to turn on credibility determinations; (5) whether the case will require the testimony of expert witnesses; [and] (6) whether the plaintiff can attain and afford counsel on his own behalf."

Parham v. Johnson, 126 F.3d at 457. There is yet another practical consideration which must be taken into account when considering motions for appointment of

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counsel. As the United States Court of Appeals for the Third Circuit has aptly observed:

> Finally, in addressing this issue, we must take note of the significant practical restraints on the district courts' ability to appoint counsel: the ever-growing number of prisoner civil rights actions filed each year in the federal courts; the lack of funding to pay appointed counsel; and the limited supply of competent lawyers who are willing to undertake such representation without compensation. We have no doubt that there are many cases in which district courts seek to appoint counsel but there is simply none willing to accept appointment. It is difficult to fault a district court that denies a request for appointment under such circumstances.

Tabron v. Grace, 6 F.3d 147, 157 (3d Cir. 1993). Mindful of this consideration it has been "emphasize[d] that volunteer lawyer time is extremely valuable. Hence, district courts should not request counsel under § 1915(d) indiscriminately. As the Court of Appeals for the Second Circuit has warned: 'Volunteer lawyer time is a precious commodity.... Because this resource is available in only limited quantity, every assignment of a volunteer lawyer to an undeserving client deprives society of a volunteer lawyer available for a deserving cause. We cannot afford that waste.' Cooper v. A. Sargenti Co., 877 F.2d 170, 172 (2d Cir.1989)." Tabron v. Grace, 6 F.3d 147, 157 (3d Cir. 1993).

In this case our analysis of these factors leads us to conclude that counsel should not be appointed in this case at the present time. At the outset, we believe that we should defer any such decision until after we have had a further opportunity to assess the first benchmark standard we must address, the question of

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whether the plaintiffs' claims against the remaining defendants have arguable legal merit. In our view, it would be inappropriate to appoint counsel until we have the opportunity to complete this legal merits analysis in this matter.

Moreover, while we understand that the plaintiffs doubtless face some obstacles in bringing this action, the actual investigation that the plaintiffs have to do is minimal, since the pleadings show that the plaintiffs are fully aware of the bases for these claims against the Defendants. Taking all of these factors into account we DENY this request to appoint counsel at this time without prejudice to re-examining this issue as this litigation progresses.

III. Recommendation

Accordingly, for the foregoing reasons, IT IS RECOMMENDED that the Defendants' Motion to dismiss be GRANTED, in part, as follows:

1. The individuals defendants previously named in this action should be DISMISSED.

2. The claims brought by Jeffrey Liberto pursuant to Title VII and the ADA should be DISMISSED

IT IS FURTHER RECOMMENDED that the plaintiffs' amended complaint be dismissed without prejudice to the plaintiffs filing a second amended complaint endeavoring to correct the defects cited in this report, provided that the plaintiffs act

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within 20 days of any dismissal order.

The plaintiff is 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 30th day of July, 2018.

S/Martin C. Carlson
Martin C. Carlson
United States Magistrate Judge

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APPENDIX A

(a) Employer practices
It shall be an unlawful employment practice for an employer--
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2

(a) General rule
No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112

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4/16/20

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

LUISA LIBERTO, *et al.*,	:	Civil No. 4:17-CV-02320
Plaintiffs,	:	
v.	:	
GEISINGER HOSPITAL, *et al.*,	:	
Defendants.	:	Judge Jennifer P. Wilson

ORDER

Before the court is the report and recommendation of United States Magistrate Judge Martin C. Carlson recommending that Plaintiffs' amended complaint be dismissed for failure to prosecute under Federal Rule of Civil Procedure 41(b) and the *Poulis* factors as set forth in *Emerson v. Thiel College*, 296 F.3d 184, 190 (3d Cir. 2002) (citing *Poulis v. State Farm Fire & Cas. Co.*, 747 F.2d 863, 868 (3d Cir. 1984)). (Doc. 43.) No party has filed objections to the report and recommendation, resulting in the forfeiture of de novo review by this court. *Nara v. Frank*, 488 F.3d 187, 194 (3d Cir. 2007) (citing *Henderson v. Carlson*, 812 F.2d 874, 878–79 (3d Cir. 1987)).

Following an independent review of the report and record, and affording "reasoned consideration" to the uncontested portions of the report, *EEOC v. City of Long Branch*, 866 F.3d 93, 100 (3d Cir. 2017) (quoting *Henderson*, 812 F.2d at 879), to "satisfy [the court] that there is no clear error on the face of the record,"

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Fed. R. Civ. P. 72(b), advisory committee notes, the court finds that Judge Carlson's analysis is well-reasoned and fully supported by the record and applicable law. Accordingly, **IT IS ORDERED THAT**:

1) The report and recommendation is **ADOPTED** in its entirety. (Doc. 43.)

2) Plaintiffs' amended complaint, Doc. 28, is **DIMISSED WITH PREJUDICE.**

3) The Clerk of Court is directed to close this case.

s/Jennifer P. Wilson
JENNIFER P. WILSON
United States District Court Judge
Middle District of Pennsylvania

Dated: April 16, 2020

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dkt 2/27/20

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

LUISA M. LIBERTO, and JEFFREY M. LIBERTO,	:	Civil No. 4:17-CV-02320
Plaintiffs,	:	
v.	:	
GEISINGER HOSPITAL, *et al.*,	:	
Defendants.	:	Judge Jennifer P. Wilson

ORDER

AND NOW, on this 27th day of February, 2020, following the United States Court of Appeals for the Third Circuit's order dismissing Plaintiffs' appeal for failure to timely prosecute and issuance of a certified order in lieu of a formal mandate, Doc. 40, **IT IS ORDERED** that this matter is remanded to Magistrate Judge Martin C. Carlson for further proceedings.

s/Jennifer P. Wilson
JENNIFER P. WILSON
United States District Court Judge
Middle District of Pennsylvania

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