NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-2915

JEREMIAH MOORE,
Appellant

v.

MS. DURAND; K. OWENS; K. SORBER; D. VARNER

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 2:21-cv-02695)
District Judge: Honorable Juan R. Sanchez

Submitted Pursuant to Third Circuit LAR 34.1(a)
July 17, 2023

Before: KRAUSE, PHIPPS, and SCIRICA, Circuit Judges

(Opinion filed: August 1, 2023)

OPINION*

PER CURIAM

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

Appellant Jeremiah Moore, who was incarcerated at SCI Phoenix during the relevant time-period[1] and is proceeding pro se, appeals from the District Court's orders dismissing Moore's complaint and amended complaint. We will vacate the judgment of the District Court in part, affirm in part, and remand for further proceedings.

Moore, who is asthmatic, filed an in forma pauperis complaint in June of 2021 requesting damages for numerous alleged constitutional violations in relation to Defendants' failures to reassign Moore to a cell with a non-smoking cellmate. At the initial screening, the District Court dismissed most of Moore's claims either with prejudice for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(iii) or for lack of subject matter jurisdiction. However, the District Court granted Moore leave to file an amended complaint with respect to Moore's claim against Defendant Durand based on exposure to environmental tobacco smoke (ETS) and any claim based upon deliberate indifference to Moore's serious medical needs. Moore filed an amended complaint in July of 2022. In relation to Moore's federal civil rights claims, the District Court dismissed the amended complaint with prejudice for failure to state a claim and noted that further amendment would be futile. To the extent Moore's amended complaint reasserted any state law negligence claims, the District Court dismissed them without prejudice to

[1] Moore was housed as a pre-trial detainee and has since been released.

Moore's ability to bring those claims in an appropriate state forum. This appeal followed.

We have jurisdiction pursuant to 28 U.S.C. § 1291 and exercise plenary review over the District Court's sua sponte dismissal under § 1915(e)(2)(B)(ii). See Allah v. Seiverling, 229 F.3d 220, 223 (3d Cir. 2000). The legal standard for dismissing a complaint for failure to state a claim under § 1915(e)(2)(B)(ii) is the same as that for dismissing a complaint pursuant to a motion filed under Rule 12(b)(6) of the Federal Rules of Civil Procedure. See Allah, 229 F.3d at 223. To avoid dismissal, a complaint, accepted as true, must "state a claim that is plausible on its face" by including facts which "permit the court to infer more than the mere possibility of misconduct." Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009).

There are two varieties of ETS Claims.[2] The first is prospective. To allege that exposure to ETS unreasonably endangers his future health, an inmate must show (1)

[2] ETS exposure claims are typically brought under the Eighth Amendment. Because Moore was a pre-trial detainee, his claims for inadequate medical care are brought under the Fourteenth Amendment's substantive due process clause rather than the Eighth Amendment. See Natale v. Camden Cty. Corr. Facility, 318 F.3d 575, 581 (3d Cir. 2003). "[T]he Fourteenth Amendment affords pretrial detainees protections at least as great as the Eighth Amendment protections available to a convicted prisoner." Id. So, Moore's claims are evaluated under the same standard used to evaluate similar claims under the Eighth Amendment.

exposure to "unreasonably high" levels of ETS contrary to contemporary standards of decency; and (2) deliberate indifference by the authorities to the exposure. See Helling v. McKinney, 509 U.S. 25, 35-36 (1993); Atkinson v. Taylor, 316 F.3d 257, 262-63, 66 (3d Cir. 2003). The second concerns a current or pre-existing jury. To allege that ETS exposure has aggravated a pre-existing illness, a plaintiff must show (1) a sufficiently serious medical need related to the ETS exposure, Atkinson v. Taylor, 316 F.3d 257, 262 (3d Cir. 2003) (citing Estelle v. Gamble, 429 U.S. 97, 104 (1976)), and (2) deliberate indifference by prison authorities. Id. at 266.

Claims meet

Regarding any claim of future harm raised by Moore, we agree with the District Court that Moore's pleadings fail to satisfy the first Helling prong. "[P]lainly relevant" is the fact that Moore is no longer in custody. Helling, 509 U.S. at 35-36; e.g., Oliver v. Deen., 77 F.3d 156, 159-60 (7th Cir. 1996) (noting that the plaintiff could not make a future injury ETF claim when was no longer in the defendants' custody). And other than to vaguely state that the events giving rise to his allegations occurred on twelve different dates over the course of three months, Moore has neglected to allege any specific facts sufficient to plausibly demonstrate that his levels of ETS exposure were unreasonably high. Compare Helling, 509 U.S. at 35 (holding that inmate, who bunked with cellmate who smoked five packs a day, was exposed to unreasonably high levels of ETS), and Atkinson, 316 F.3d at 264-65 (holding that inmate, who shared cell with two constant

Claims was made for present sufferings

Damage was Done

Reason for filing constitute to violations

smokers for seven months, was exposed to unreasonably high levels of ETS), with Richardson v. Spurlock, 260 F.3d 495, 498 (5th Cir. 2001) (finding that sitting near smokers sometimes is not unreasonable exposure). Moore's unspecific allegations were insufficient to allege a plausible prospective injury ETS exposure claim. DCT No. 13 at 5. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level[.]").

However, Moore's original complaint alleged that the ETS exposure aggravated his chronic asthma, which caused him to suffer difficulty breathing, woke him up at night, required medical officials to examine whether an additional inhaler was necessary, and interfered with his medication for an unrelated mental health concern. DCT No. 2. Moore also claimed that the prison medical department advised him to request a cell change from his unit manager. DCT No. 2 at 13-14. Moore's original complaint averred that he sent a number of requests to Defendant Durand to switch his cell assignment because he had asthma and was having adverse reactions to ETS from his cellmate smoker. DCT No. 2. Assuming, as we must, that these factual allegations are true, we conclude that the District Court erred in dismissing Moore's present-injury ETS exposure claim against Defendant Durand. Plausible Claim

A present injury ETS exposure claim can be based on a prison official's housing an inmate, who has a medical need for a smoke-free environment, in a cell with a

prisoner who smokes. See Atkinson, 316 F.3d at 268 ("[T]he Eighth Amendment's objective component is violated by forcing a prisoner with a serious medical need for a smoke free environment to share his cell with an inmate who smokes." (quoting Hunt v. Reynolds, 974 F.2d 734, 735-36 (6th Cir. 1992)); see also Atkinson, 316 F.3d at 268 at 268 ("When a susceptible prisoner is confined to a cell, a small and confined space, with a "constant" smoker for an extended period of time, such symptoms may transform what would otherwise be a passing annoyance into a serious ongoing medical need."); Alvarado v. Litscher, 267 F.3d 648, 653 (7th Cir. 2001) (finding a potential Eighth Amendment claim where inmate alleges ETS exposure exacerbated his chronic asthma). Thus, the factual allegations contained in Moore's original complaint are sufficient to plausibly assert such a claim. And the District Court appears to have erred in concluding that Moore's original complaint failed to sufficiently allege Defendant Durand's deliberate indifference. See Atkinson, 267 F.3d at 268 ("Atkinson has produced evidence that after telling prison officials about his sensitivity to ETS no change was made in housing conditions. This evidence demonstrates deliberate indifference on the part of prison officials."). The District Court did not err, however, in its dismissal for lack of personal knowledge of Moore's present-injury ETS exposure allegations against Defendant's Owens, Serber, and Varner. See Rode v. Dellarciprete, 845 F.2d 1195, 1207-1208 (3d Cir. 1988).

Accordingly, we will vacate the District Court's order to the extent that it dismissed Moore's present-injury ETS exposure claim against Defendant Durand and remand for further proceedings. We will otherwise affirm.[3]

[3] Moore's appellate brief does not specifically challenge or otherwise address the legal bases asserted by the District Court in dismissing any of his other claims, including the District Court's findings regarding subject matter jurisdiction. We therefore deem forfeited any challenge to those rulings. See In re Wettach, 811 F.3d 99, 115 (3d Cir. 2016) (deeming forfeited arguments that were not developed in the appellants' opening brief). Even had Moore preserved such challenges, we agree with the District Court's decision to dismiss those claims.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-2915

JEREMIAH MOORE,
Appellant

v.

MS. DURAND; K. OWENS; K. SORBER; D. VARNER

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 2:21-cv-02695)
District Judge: Honorable Juan R. Sanchez

Submitted Pursuant to Third Circuit LAR 34.1(a)
July 17, 2023

Before: KRAUSE, PHIPPS, and SCIRICA, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on July 17, 2023. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered the order of the District Court entered September 23, 2022, be and the same is hereby affirmed in part and vacated in part. This matter is remanded for further proceedings. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-2915

JEREMIAH MOORE,
Appellant

v.

MS. DURAND; K. OWENS; K. SORBER; D. VARNER

(E.D. Pa. No. 2-21-cv-02695)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG, and SCIRICA*, Circuit Judges

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

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* As to panel rehearing only

Appendix A

circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/Anthony J. Scirica
Circuit Judge

Date: December 4, 2023
SLC/cc: Jeremiah Moore

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

JEREMIAH MOORE, *et al.*,	:	
Plaintiff,	:	
	:	
v.	:	**CIVIL ACTION NO. 21-CV-2695**
	:	
DEPARTMENT OF CORRECTIONS, *et al.*,	:	
Defendants.	:	

MEMORANDUM

SÁNCHEZ, C.J. **JUNE 22, 2022**

Jeremiah Moore, who was formerly incarcerated at SCI Phoenix, filed this civil rights Complaint naming as Defendants the Pennsylvania Department of Corrections ("DOC"), SCI Phoenix, four officials at SCI Phoenix, the DOC's Chief Secretary's Office of Inmate Grievance and Appeals and D. Varner.[1] Moore also seeks to proceed *in forma pauperis*. For the following reasons, the Court will grant Moore leave to proceed *in forma pauperis* and dismiss his Complaint pursuant to 28 U.S.C. § 1915(e)(2)(B).

I. FACTUAL ALLEGATIONS

Moore asserts that on February 21, 2021, while he in custody at SCI Phoenix, he sent a request to Defendant Ms. Durand, a Unit Manager on E block, asking to be housed in a different cell with a non-smoker. Moore informed Durand that he had asthma and exposure to environmental tobacco smoke ("ETS") was placing his health at risk. (Compl., ECF No. 2, at 3.) Durand responded that she could not move him at that time. (*Id.* at 3, 11.) Moore sent another

[1] Moore filed a change of address with the Clerk of Court on September 13, 2021 indicating he was no longer incarcerated at SCI Phoenix, but had been moved to a community correctional center. (ECF No. 5.) On December 15, 2021, he filed another change of address indicating he was released to his home. (ECF No. 7.)

request on February 7, 2021, again complaining that his asthma was bothered by ETS. (*Id.* at 3 (alleging that ETS was "causing me to suffer to breath"), *see also id.* at 12 (stating in request form that ETS "triggers my asthma with the attacks"). Moore sent a third request to Durand on February 15, 2021, in which he also requested not to be housed with a homosexual inmate "because its [sic] against my religion." (*Id.* at 3, 13.) In that request he told Durand he had "multiple asthma attacks" that woke him up at night because he wheezes when he lays down. (*Id.* at 13.)

On February 20, 2021 Moore filed a grievance about Durand's lack of action on his request. (*Id.* at 3, 14.) The grievance listed his three request forms to Durand, and stated that Moore had also written to the prison medical department, which was working to get him an asthma inhaler. (*Id.* at 14.) His grievance asserted he was being forced to live under unhealthy conditions because his cellmate smoked, and mental health medication Moore took caused him to sleep heavily and made it hard for him to wake up when he felt an asthma attack. (*Id.*) The grievance was rejected on February 23, 2021 by Defendant K. Owens on the ground that it was not submitted within 15 working days of the events upon which the claims were based. (*Id.* at 3, 15.) Moore's appeal of the denial of the grievance was rejected by Defendant K. Sorber. (*Id.* at 4, 14.) Moore then filed a final appeal to the DOC Chief Secretary's Office of Inmate Grievances and Appeals on March 12, 2021. (*Id.* at 4, 18.) The final appeal was rejected by Defendant Varner. (*Id.* at 19.)

Moore asserts that Durant, Owens, Sorber, and Varner each violated his "10th Amendment of the U.S. Constitution by negligence to render relief" by confining him in unhealthy prison conditions. (*Id.* at 6-7.) He also asserts each violated his due process rights and inflicted cruel and unusual punishment in violation of his Eighth Amendment rights, and he also

cites the Universal Declaration of Human Rights. (*Id.*) Finally, Moore alleges a violation of his equal protection rights under the Fourteenth Amendment "in the negligence to a serious medical condition" because his cell assignment was not changed. (*Id.* at 8.) Moore seeks a declaration that his rights were violated, an injunction ordering Defendants to "cease their negligence" and move him to a cell with a non-smoking, non-homosexual cellmate, and pay him money damages. (*Id.* at 8-9.)

II. STANDARD OF REVIEW

Moore is granted leave to proceed *in forma pauperis*. Accordingly, 28 U.S.C. § 1915(e)(2)(B)(ii) requires the Court to dismiss the Complaint if it fails to state a claim. Whether a complaint fails to state a claim under § 1915(e)(2)(B)(ii) is governed by the same standard applicable to motions to dismiss under Federal Rule of Civil Procedure 12(b)(6), *see Tourscher v. McCullough*, 184 F.3d 236, 240 (3d Cir. 1999), which requires the Court to determine whether the complaint contains "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotations omitted). "At this early stage of the litigation,' '[the Court will] accept the facts alleged in [the *pro se*] complaint as true,' 'draw[] all reasonable inferences in [the plaintiff's] favor,' and 'ask only whether [that] complaint, liberally construed, . . . contains facts sufficient to state a plausible [] claim.'" *Shorter v. United States*, 12 F.4th 366, 374 (3d Cir. 2021) (quoting *Perez v. Fenoglio*, 792 F.3d 768, 774, 782 (7th Cir. 2015)). Conclusory allegations do not suffice. *Iqbal*, 556 U.S. at 678. Furthermore, the Court must dismiss any claims over which it lacks subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3). As Moore is proceeding *pro se*, the Court construes his allegations liberally. *Vogt v. Wetzel*, 8 F.4th 182, 185 (3d Cir. 2021) (citing *Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 244-45 (3d Cir. 2013)).

III. DISCUSSION

Moore seeks money damages and other relief due to alleged violations of his civil rights. The vehicle by which federal constitutional claims may be brought in federal court is 42 U.S.C. § 1983. "To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988).

A. Declaratory and Injunctive Relief

In addition to money damages, Moore seeks a declaration that his rights have been violated and an injunction directing prison officials to house him in with a non-smoking, non-homosexual cell mate. Both of these forms of relief are improper. Declaratory relief is unavailable to adjudicate past conduct, so Moore's request for a declaration that his rights were violated in the past is improper. *See Corliss v. O'Brien*, 200 F. App'x 80, 84 (3d Cir. 2006) (*per curiam*) ("Declaratory judgment is inappropriate solely to adjudicate past conduct" and is also not "meant simply to proclaim that one party is liable to another."); *see also Andela v. Admin. Office of U.S. Courts*, 569 F. App'x 80, 83 (3d Cir. 2014) (*per curiam*) ("Declaratory judgments are meant to define the legal rights and obligations of the parties in the anticipation of some future conduct."). A declaratory judgment is also not "meant simply to proclaim that one party is liable to another." *Corliss*, 200 F. App'x at 84 (*per curiam*); *see also Taggart v. Saltz*, No. 20-3574, 2021 WL 1191628, at *2 (3d Cir. Mar. 30, 2021) (*per curiam*) ("A declaratory judgment is available to define the legal rights of the parties, not to adjudicate past conduct where there is no threat of continuing harm.").

The request for prospective injunctive relief is moot since Moore is no longer incarcerated at SCI Phoenix or otherwise in the custody of the Pennsylvania Department of

Corrections. Mootness is a jurisdictional "doctrine that 'ensures that the litigant's interest in the outcome continues to exist throughout the life of the lawsuit,'" and "is 'concerned with the court's ability to grant effective relief.'" *Hamilton v. Bromley*, 862 F.3d 329, 335 (3d Cir. 2017) (quoting *Freedom from Religion Found. Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 476 (3d Cir. 2016), and *Cty. of Morris v. Nationalist Movement*, 273 F.3d 527, 533 (3d Cir. 2001)). "[T]he central question of all mootness problems is whether changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief." *Jersey Cent. Power & Light Co. v. New Jersey,* 772 F.2d 35, 39 (3d Cir.1985) (citation omitted). Moore's release from custody at SCI Phoenix is such a change in circumstance because his release means that he can no longer be subjected to the conditions of confinement of which he complains, namely exposure to ETS and being housed with a homosexual cellmate, and the Court cannot fashion any form of appropriate injunctive relief. *Accord Williams v. Sec'y Pennsylvania Dep't of Corr.*, 447 F. App'x 399, 403 (3d Cir. 2011) (finding prospective injunctive relief seeking the elimination of distinctions between sex offenders and other offenders with respect to community correction center placement was moot because prisoner had been released and the condition that he obtain placement in a CCC was waived); *Sutton v. Rasheed*, 323 F.3d 236, 248 (3d Cir. 2003) (stating that "[a]n inmate's transfer from the facility complained of generally moots the equitable and declaratory claims"); *Marshall v. Pa. Dep't of Corr.*, 499 F. App'x 131, 134 (3d Cir. 2012) (concluding that because Marshall "asked for an injunction that restrains SCI-Mahanoy officials from violating his civil rights, but he has now been transferred out from under their control[,] . . . the District Court was unable to fashion any form of meaningful relief against these defendants, and thus the motion for injunctive relief was

moot"). Accordingly, Moore's requests for declaratory relief is dismissed as not plausible and his request for injunctive relief is dismissed as moot.

B. Claims for Money Damages

1. Claims Against the Department of Corrections and its Entities

Moore seeks money damages against the DOC, the DOC's Chief Secretary's Office of Inmate Grievance and Appeals, and SCI Phoenix. These claims are not plausible. States and their agencies, like the DOC, are not considered "persons" for purposes of § 1983. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65-66 (1989). Furthermore, the Eleventh Amendment bars suits against a state and its agencies in federal court that seek monetary damages. *See Pennhurst State Sch. And Hosp. v. Halderman*, 465 U.S. 89, 99-100 (1984); *A.W. v. Jersey City Public Schs.*, 341 F.3d 234, 238 (3d Cir. 2003). The Commonwealth of Pennsylvania has not waived that immunity. *See* 42 Pa. Cons. Stat. § 8521(b). Since the DOC's Chief Secretary's Office of Inmate Grievance and Appeals and SCI Phoenix are both entities within the DOC, they are also entitled to Eleventh Amendment immunity and are not "persons" for purposes of § 1983. *Lavia v. Pennsylvania, Dep't of Corr.*, 224 F.3d 190, 195 (3d Cir. 2000) (explaining that, "[b]ecause the Commonwealth of Pennsylvania's Department of Corrections is a part of the executive department of the Commonwealth, it shares in the Commonwealth's Eleventh Amendment immunity" and is also not considered a person for purposes of § 1983); *see also Pettaway v. SCI Albion*, 487 F. App'x 766, 768 (3d Cir. 2012) (*per curiam*) ("[A]s a state agency and the prison it administers, the Department of Corrections and SCI-Albion are not 'persons' and thus cannot be sued under 42 U.S.C. § 1983.").

The Eleventh Amendment serves as "a jurisdictional bar which deprives federal courts of subject matter jurisdiction." *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 694 n.2 (3d Cir.

1996). As this dismissal based on Eleventh Amendment immunity is for lack of subject-matter jurisdiction, the dismissal is without prejudice even though Moore cannot reassert another claim for monetary relief against the DOC, the DOC's Chief Secretary's Office of Inmate Grievance and Appeals, or SCI Phoenix in this court. *See Figueroa v. Buccaneer Hotel Inc.*, 188 F.3d 172, 182 (3d Cir. 1999) (agreeing that "a dismissal for lack of subject-matter jurisdiction is not an adjudication on the merits and thus should be ordered 'without prejudice' " (citations omitted)).

2. Exposure to ETS

Although he repeatedly uses the term "negligence" in his Complaint, the Court understands Moore to be asserting constitutional claims against the named Defendants for failing to provide him a smoke-free environment. Exposure to ETS experienced by a convicted prisoner is analyzed under the Eighth Amendment. *Murray v. Wetzel*, No. 17-1637, 2021 WL 5500511, at *2 (M.D. Pa. Nov. 23, 2021) ("It is well established that a prisoner can bring a claim under the Eighth Amendment for exposure "to levels of ETS that pose an unreasonable risk of serious damage" to the inmate's health."); *Mearin v. Swartz*, 951 F. Supp. 2d 776, 780 (W.D. Pa. 2013). In order to pass statutory screening on an Eighth Amendment claim based on exposure to ETS, a prisoner must allege plausibly that he has been "exposed to unreasonably high levels of ETS contrary to contemporary standards of decency; and . . . that the authorities were deliberately indifferent to the exposure to ETS. *Mearin*, 951 F. Supp. 2d at 780-81 (citing *Brown v. U.S. Justice Dep't,* 271 F. App'x 142, 144 (3d Cir. 2008) (citing *Helling v. McKinney,* 509 U.S. 25, 35 (1993))). The prisoner must allege plausibly that the official was "both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* (citing *Wilson v. Burks,* 423 F. App'x 169, 173 (3d Cir. 2011), *quoting Farmer v. Brennan,* 511 U.S. 825, 837 (1994)).

Moore's allegations fail to meet this standard, and the claim must be dismissed. While he asserts that he asked Defendant Durand to change his cell assignment because exposure to ETS placed his health at risk, and his asthma was bothered by ETS, he fails to allege that the level of ETS to which he was exposed was unreasonable, contrary to contemporary standards, or excessive. *Compare, e.g., Helling,* 509 U.S. at 35 (holding that bunking with a cellmate who smoked five packs of cigarettes per day exposed an inmate to an unreasonable risk of future harm from ETS exposure), and *Atkinson v. Taylor,* 316 F.3d 257, 259 (3d Cir. 2003) (holding that a prisoner who claimed that he had shared a cell with constant smokers for many months stated a claim for a violation of a clearly established right), with *Richardson v. Spurlock,* 260 F.3d 495, 498 (5th Cir. 2001) (holding that sitting near some smokers sometimes is not an unreasonable exposure to ETS) and *Pryor-El v. Kelly,* 892 F. Supp. 261, 267 (D.D.C. 1995) (dismissing an ETS claim in which the plaintiff alleged "only that various unnamed inmates and prison officials smoke 'in the TV room, games room, and the letter writing room'"). *See also Carroll v. DeTella,* 255 F.3d 470, 472 (7th Cir. 2001) ("The Eighth Amendment does not require prisons to provide prisoners with more salubrious air . . . than are enjoyed by substantial numbers of free Americans.").

Moreover, Moore's assertions that his asthma was "bothered" by ETS, that ETS was "causing [him] to suffer to breath," that it "triggers my asthma with the attacks," and he had "multiple asthma attacks" that woke him up at night (*see* Compl. at 3, 12, 13), is markedly less detailed than those situations where courts have found that symptoms of ETS exposure were sufficient to pass the plausibility threshold. *See, e.g.*, *Murry*, 2021 WL 5500511, at *3 (noting diagnosis of "allergic rhinitis . . . from smoke exposure triggering mucus production"; "constant heavy mucus/sputum build up in [his] chest area and nostrils," "difficulty breathing during

exertion," "mucus build-up in his nose, throat, chest and lungs," post-nasal drip and cough, and "mild hypertrophy" and "congestion" in his nose; and that he repeatedly treated for these conditions (including having a chest X-ray and bloodwork performed); *Atkinson*, 316 F.3d at 268 (allegations of "nausea, inability to eat, headaches, chest pains, difficulty breathing, numbness in his limbs, teary eyes, itching, burning skin, dizziness, sore throat, coughing and production of sputum" sufficient); *Alvarado v. Litscher*, 267 F.3d 648, 651 (7th Cir. 2001) (allegations of aggravation of asthma sufficient where prisoner alleged his asthma medication had to be increased); *Weaver v. Clarke*, 45 F.3d 1253, 1254, 1256 (8th Cir. 1995) (allegations of "severe headaches, dizziness, nausea, vomiting, and breathing difficulties" sufficient); *Brown v. DiGuglielmo*, 418 F. App'x 99, 102 (3d Cir. 2011) (*per curiam*) (allegations of "sinus congestion, headaches, tightness of the lungs, and difficulty breathing" sufficient); *Mearin*, 951 F. Supp. 2d at 781 (allegations of "coughs, headaches, chest pains, shortness of breath, vomiting, and fatigue" sufficient); *but see Torres v. Beard*, No. 08-200, 2009 WL 1684682, at *1, *7 (W.D. Pa. June 16, 2009) (allegation of exacerbation of asthma found sufficient). Finally, Moore's ability to assert a plausible claim of unreasonable exposure must be viewed in light of his allegation that the exposure began in February 2021, but he was released from SCI Phoenix in September 2021. *See Oliver v. Deen*, 77 F.3d 156, 160-61 (7th Cir. 1996) (summary judgment granted dismissing Eighth Amendment medical indifference claim where prisoner's medical records evaluated his asthma as only a mild case and he received medication and an inhaler, and record showed he shared a cell with a smoker for only 133 days). Nonetheless, because the Court cannot say at this time that Moore can never allege a plausible Eighth Amendment claim against Durand based on unreasonable exposure to ETS, the dismissal of this claim will be

without prejudice and Moore will be provided the opportunity to file an amended complaint to flesh out his allegations in order to cure the defects in his ETS claim.

3. Claims Based on Grievance Process

Intertwined with his allegations of exposure to ETS and his attempts to have Durand change his cell assignment, Moore asserts that his grievance about the failure to change his cell was denied at all levels by the other named individual Defendants. He also alleges in conclusory fashion that his due process rights were violated. To the extent that Moore asserts a separate constitutional claim based on the handling by the Defendants of his grievance over his lack of reassignment, that claim is not plausible and will be dismissed with prejudice.

Claims based on the handling of prison grievances fail because "[p]rison inmates do not have a constitutionally protected right to a grievance process." *Jackson v. Gordon*, 145 F. App'x 774, 777 (3d Cir. 2005) (*per curiam*); *see also Caldwell v. Beard*, 324 F. App'x 186, 189 (3d Cir. 2009) (*per curiam*). Additionally, the handling of a prisoner's grievance is generally insufficient to show personal involvement to in the underlying violation. *See also Woods v. First Corr. Med. Inc.*, 446 F. App'x 400, 403 (3d Cir. 2011) (*per curiam*) ("[B]ecause a prisoner has no free-standing constitutional right to an effective grievance process, [a prisoner] cannot maintain a constitutional claim . . . based upon his perception that [the defendant] ignored and/or failed to properly investigate his grievances." (citing *Flick v. Alba*, 932 F.2d 728, 729 (8th Cir. 1991))). Moreover, to the extent Moore seeks to hold prison officials who were involved in his grievance process liable on his underlying ETS exposure claim, that too fails to allege a plausible claim. *See Folk v. Prime Care Med.*, 741 F. App'x 47, 51 (3d Cir. 2018) (*per curiam*) ("Although some of these defendants were apparently involved in responding to some of Folk's prison grievances, there are no allegations linking them to the underlying incidents and thus no basis for liability

based on those later grievance reviews."); *Curtis v. Wetzel*, 763 F. App'x 259, 263 (3d Cir. 2019) (*per curiam*) ("The District Court properly determined that Defendants [Superintendent] Wenerowicz, Lewis, and Shaylor – who participated only in the denial of Curtis' grievances – lacked the requisite personal involvement [in the conduct at issue]."). Accordingly, the facts alleged by Moore about grievances do not give rise to a plausible basis for a constitutional claim. The dismissal of the grievance claims will be with prejudice since any attempt at amendment would be futile. *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 108, 110 (3d Cir. 2002).

4. Medical Indifference Claims

Although Moore mentions that exposure to ETS placed his health at risk and mentions he contacted the prison medical department to get an asthma inhaler, it is not entirely clear if seeks to also raise a separate claim that any of the named Defendants, none of whom are medical providers, were deliberately indifferent to his serious medical needs. To state a constitutional claim based on the failure to provide medical treatment, a prisoner must allege facts indicating that prison officials were deliberately indifferent to his serious medical needs. *See Farmer*, 511 U.S. at 835. A prison official is not deliberately indifferent "unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837. "A medical need is serious, . . . if it is one that has been diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention." *Monmouth Cty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987) (internal quotations omitted). Deliberate indifference is properly alleged "where the prison official (1) knows of a prisoner's need for medical treatment but intentionally refuses to provide it; (2) delays necessary medical treatment

based on a non-medical reason; or (3) prevents a prisoner from receiving needed or recommended medical treatment." *Rouse v. Plantier*, 182 F.3d 192, 197 (3d Cir. 1999). A serious medical need exists where "failure to treat can be expected to lead to substantial and unnecessary suffering." *Colburn v. Upper Darby Twp.*, 946 F.2d 1017, 1023 (3d Cir. 1991). Allegations of medical malpractice and mere disagreement regarding proper medical treatment are insufficient to establish a constitutional violation. *See Spruill v. Gillis*, 372 F.3d 218, 235 (3d Cir. 2004). Furthermore, "[a] defendant in a civil rights action must have personal involvement in the alleged wrongs" to be liable. *See Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988); *Dooley v. Wetzel*, 957 F.3d 366, 374 (3d Cir. 2020) ("Personal involvement requires particular 'allegations of personal direction or of actual knowledge and acquiescence.'" (quoting *Rode*, 845 F.2d at 1207)).

Moore does not assert that any of the named Defendants refused, delayed, or prevented him from receiving needed or recommended medical treatment. Any such claim is, therefore, not plausible. Moreover, "[i]f a prisoner is under the care of medical experts . . . , a non-medical prison official will generally be justified in believing that the prisoner is in capable hands." *See Spruill v. Gillis*, 372 F.3d 218, 236 (3d Cir. 2004); *see also Carter v. Smith*, 483 F. App'x 705, 708 (3d Cir. 2012) (*per curiam*) ("Prison officials cannot be held to be deliberately indifferent merely because they did not respond to the medical complaints of a prisoner who was already being treated by the prison medical staff."). However, because the Court cannot say that Moore can never assert a plausible deliberate indifference claim, the dismissal will be without prejudice and Moore will be afforded the opportunity to amend this claim as well.

5. First Amendment Religion Claim

It is also unclear whether Moore is asserting a separate claim that his First Amendment freedom of religion rights were violated. His third request to Defendant Durand for a cell reassignment on February 15, 2021 also requested not to be housed with a homosexual inmate "because its [sic] against my religion." (Compl. at 3, 13.) He also mentioned this request in several grievance forms. To the extent Moore attempts to raise a religious freedom claim, it is not plausible.

Although inmates retain certain protections afforded by the First Amendment, "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *O'Lone v. Shabazz*, 482 U.S. 342, 348 (1987) (quotations omitted). While federal courts must take cognizance of valid constitutional claims of prison inmates, the Supreme Court has repeatedly cautioned that the task of prison administration has been committed to the responsibility of the legislative and executive branches of government, and that federal courts should be reluctant to second guess these authorities. *See, e.g., Turner v. Safley*, 482 U.S. 78, 84 (1987); *O'Lone*, 482 U.S. at 353. Importantly, "those courts confronted with the question of whether inmates have a constitutional right to choose a cellmate have held that no such right exists." *Murray v. Bledsoe*, 650 F.3d 246, 247 (3d Cir. 2011) (citing *Harris v. Greer*, 750 F.2d 617, 618 (7th Cir. 1984), and *Cole v. Benson*, 760 F.2d 226, 227 (8th Cir. 1985) (*per curiam*)); *see also Drayton v. Cohen*, No. 10-3171, 2012 WL 666839, at *6 (D.S.C. Feb. 29, 2012) ("For obvious reasons, courts have widely rejected any notion that a prisoner has any constitutional right to choose his cellmate"), *aff'd*, 474 F. App'x 991 (4th Cir. 2012). Courts have also rejected claims based on cell, or cellmate, assignments even where the assignment allegedly had an adverse effect on the inmate's ability to

practice his religion. For example, in *Ochs v. Thalacker*, 90 F.3d 293 (8th Cir. 1996), the United States Court of Appeals for the Eighth Circuit held that state prison "officials properly rejected Ochs's request for racially segregated living quarters *even if* that substantially burdened his sincerely held religious beliefs," since the defendants' decisions as to cell assignments implicated institutional security, and "allowing such exceptions would create serious administrative and security problems." *Id.* at 296-97 (emphasis added). Accordingly, any religion claim for money damages based on Moore's being housed with certain cellmates is dismissed with prejudice.

6. Claims Based on the Universal Declaration of Human Rights

Moore invokes the Universal Declaration of Human Rights as a basis for his claims. As the United States Court of Appeals for the Third Circuit has recognized, "the Universal Declaration of Human Rights is a non-binding declaration that provides no private rights of action." *See United States v. Chatman*, 351 F. App'x 740, 741 (3d Cir. 2009) (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004)) (explaining that the Universal Declaration of Human Rights is merely a resolution of the United Nations and "does not of its own force impose obligations as a matter of international law"). District courts throughout this Circuit have routinely dismissed claims brought under the Universal Declaration of Human Rights with prejudice for failure to state a claim or as legally frivolous. *See, e.g.*, *Best v. S.C.I. Huntingdon*, No. 19-01599, 2019 WL 5866707, at *5 (M.D. Pa. Oct. 9, 2019), *report and recommendation adopted*, 2019 WL 5868259 (M.D. Pa. Nov. 8, 2019) (recommending dismissal of claims under the Universal Declaration of Human Rights for failure to state a claim upon which relief can be granted pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1) in a prisoner civil rights action); *Hamilton v. Dolce*, No. 18-2615, 2019 WL 4509375, at *3 (D.N.J. Sept. 19, 2019)

(dismissing with prejudice *pro se* prisoner's claims for violations of the Universal Declaration of Human Rights); *Pavalone v. Pres. Mgmt. Inc.*, No. 18-191, 2019 WL 1117931, at *3 (M.D. Pa. Jan. 8, 2019), *report and recommendation adopted*, 2019 WL 1117919 (M.D. Pa. Mar. 11, 2019) (recommending dismissal of non-prisoners' claims for the "alleged violation[s] of their rights under the Universal Declaration of Human Rights . . . as legally frivolous, pursuant to 28 U.S.C. § 1915(e)(2)(B)(i)). Accordingly, to the extent Moore raises claims against the Defendants for violating the Universal Declaration of Human Rights, they are dismissed with prejudice as any amendment would be futile.

7. Negligence Claims

While negligence is not a constitutional standard, *see Daniels v. Williams,* 474 U.S. 327, 328 (1986) (holding that official's mere negligence is not actionable under § 1983 because "the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property"), read liberally Moore may be seeking to assert state law claims in his Complaint based on the negligence of the Defendants. Because the Court has dismissed his federal claims, the Court will not exercise supplemental jurisdiction under 28 U.S.C. § 1367(c) over any state law claims. Accordingly, the only independent basis for jurisdiction over any such claims is 28 U.S.C. § 1332(a), which grants a district court jurisdiction over a case in which "the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States."

Section 1332(a) requires "'complete diversity between all plaintiffs and all defendants,' even though only minimal diversity is constitutionally required. This means that, unless there is some other basis for jurisdiction, 'no plaintiff [may] be a citizen of the same state as any defendant.'" *Lincoln Ben. Life Co. v. AEI Life, LLC*, 800 F.3d 99, 104 (3d Cir. 2015) (quoting

Lincoln Prop. Co. v. Roche, 546 U.S. 81, 89 (2005) and *Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412, 419 (3d Cir. 2010) (internal footnotes omitted)). An individual is a citizen of the state where he is domiciled, meaning the state where he is physically present and intends to remain. *See Washington v. Hovensa LLC*, 652 F.3d 340, 344 (3d Cir. 2011). "[T]he domicile of a prisoner before his imprisonment presumptively remains his domicile during his imprisonment." *Pierro v. Kugel*, 386 F. App'x 308, 309 (3d Cir. 2010). It is the plaintiff's burden to establish diversity of citizenship. *See Gibbs v. Buck*, 307 U.S. 66, 72 (1939); *Quaker State Dyeing & Finishing Co., Inc. v. ITT Terryphone Corp.*, 461 F.2d 1140, 1143 (3d Cir. 1972) (stating that, in diversity cases, the plaintiff must demonstrate complete diversity between the parties and that the amount in controversy requirement has been met); *Jackson v. Rosen*, C.A. No. 20-2842, 2020 WL 3498131, at *8 (E.D. Pa. June 26, 2020).

Moore does not allege the citizenship of the parties. Rather, he provides only Pennsylvania addresses for himself and the Defendants, which suggests that he and some, if not all, of the Defendants may be Pennsylvania citizens. Accordingly, Moore has not sufficiently alleged that the parties are diverse for purposes of establishing the Court's jurisdiction over any state law negligence claims he intends to pursue.

IV. CONCLUSION

For the foregoing reasons, the Court will dismiss Moore's Complaint in part with prejudice and in part without prejudice. His claims for declaratory relief, as well as all claims based on the handling of prison grievances, a violation of his First Amendment freedom of religion, and a violation of the Universal Declaration of Human Rights are dismissed with prejudice. Moore's claim against Defendant Durand based upon exposure to ETS and any claim asserting deliberate indifference to a serious medical need are dismissed without prejudice. His

moot claim for injunctive relief, his claims against the DOC, the DOC's Chief Secretary's Office of Inmate Grievance and Appeals, SCI Phoenix, and all state law negligence claims are dismissed without prejudice for lack of subject matter jurisdiction. An appropriate order follows giving Moore instructions on filing an amended complaint if he seeks to reassert his ETS claim.

BY THE COURT:

/s/ Juan R. Sánchez
JUAN R. SÁNCHEZ, C.J.

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

JEREMIAH MOORE, *et al.*,	:	
Plaintiff,	:	
	:	
v.	:	**CIVIL ACTION NO. 21-CV-2695**
	:	
MS. DURAND, *et al.*,	:	
Defendants.	:	

MEMORANDUM

SÁNCHEZ, C.J. **SEPTEMBER 23, 2022**

Jeremiah Moore, a former prisoner[1] proceeding *pro se*, initiated this civil rights action in 2021 with respect to alleged violations of his constitutional rights during his incarceration at SCI Phoenix. By prior Memorandum, *see Moore v. Dep't of Corr.*, No. 21-2695, 2022 WL 2240086, at *3 (E.D. Pa. June 22, 2022), the Court granted Moore leave to proceed *in forma pauperis* and dismissed his Complaint pursuant to 28 U.S.C. § 1915(e)(2)(B). The majority of Moore's claims were either dismissed with prejudice or dismissed for lack of subject matter jurisdiction. However, the Court granted Moore leave to file an amended complaint with respect to two claims. Moore filed an Amended Complaint on July 22, 2022. (Am. Compl., ECF No. 12.) For the following reasons, the Court will dismiss Moore's Amended Complaint for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).

[1] Moore filed a change of address with the Clerk of Court on September 13, 2021 indicating he had been released from prison. (ECF No. 5.) Based on a review of the public record related to Moore's underlying criminal offenses, it appears that Moore was a pretrial detainee at the time of the events alleged in the Amended Complaint. *See Commonwealth v. Moore*, CP-46-CR-0006395-2019 (C.P. Montgomery).

I. FACTUAL ALLEGATIONS AND PROCEDURAL HISTORY

In his original Complaint, Moore alleged that exposure to environmental tobacco smoke ("ETS") at SCI Phoenix in February of 2021 was placing his health at risk because he had asthma and was unable to secure a new housing placement in a cell with a non-smoker. (Compl., ECF No. 2, at 3, 11-13.) After his multiple requests to be rehoused were not acted upon, Moore alleged that he grieved prison officials' inaction asserting that he was being forced to live under unhealthy conditions because his cellmate smoked. (*Id.* at 3, 14.) Moore's initial grievance and his two subsequent appeals were rejected. (*Id.* at 3, 14-15, 18-19.) Based on these allegations, Moore asserted claims that Defendants violated his "10th Amendment of the U.S. Constitution by negligence to render relief" by confining him in unhealthy prison conditions, subjected him to cruel and unusual punishment in violation of the Eighth Amendment, violated his due process rights, and denied him equal protection under the Fourteenth Amendment. (*Id.* at 6-8.)

Upon screening Moore's original Complaint, the Court dismissed several claims without permitting amendment. Specifically, the Court dismissed Moore's claims for money damages against the Department of Corrections ("DOC"), and other Commonwealth entities that he named because the Commonwealth and its entities are not "persons" as that term is used in 42 U.S.C. § 1983 and because the Eleventh Amendment bars claims for money damages against those entities. Moore was advised that he could not "reassert another claim for monetary relief against the DOC, the DOC's Chief Secretary's Office of Inmate Grievance and Appeals, or SCI Phoenix in this court." *Moore* , 2022 WL 2240086, at *3. Additionally, the Court dismissed Moore's "constitutional claim based on the handling . . . of his grievance over his lack of reassignment" with prejudice finding that such a claim was not plausible, and amendment would be futile. *Id.* at *4. Moore's "claims for declaratory relief, . . . a violation of his First

Amendment freedom of religion, and a violation of the Universal Declaration of Human Rights [were also] dismissed with prejudice." *Id.* at *7.

Two claims were dismissed without prejudice. Moore's Eighth Amendment deliberate indifference claim based on exposure to ETS was dismissed because Moore failed to "allege that the level of ETS to which he was exposed was unreasonable, contrary to contemporary standards, or excessive" and because Moore's allegations related to his symptoms from ETS exposure were "markedly less detailed than those situations where courts have found that symptoms of ETS exposure were sufficient to pass the plausibility threshold." *Id.* at *3-*4. Moore's Eighth Amendment deliberate indifference claim based on an alleged failure to provide medical treatment was dismissed because Moore failed to "assert that any of the named Defendants refused, delayed, or prevented him from receiving needed or recommended medical treatment." *Id.* at *5. Moore was permitted to file an amended complaint with respect to these two claims.

On July 22, 2022, Moore filed his Amended Complaint naming the same individual Defendants that he named in his original Complaint: (1) Ms. Durand, a Unit Manager at SCI Phoenix; (2) K. Owens, the Facility Grievance Coordinator at SCI Phoenix; (3) K. Sorber, Facility Manager at SCI Phoenix; and (4) D. Varner, an Inmate Grievance and Appeals Officer at the DOC's Chief Secretary's Office. (Am. Compl. at 2-3.) The allegations of the Amended Complaint are brief. Moore asserts that "a tort was commit[t]ed against" him while he was incarcerated at SCI Phoenix from February tó April of 2021 because he "was forced to live in pollution . . . [and] forced to breathe harmful toxins caused by second hand smoke" despite having asthma – a chronic illness[.]" (*Id.* at 5.) Moore reiterates his assertion that he "suffered to breathe [for] 6 months[,]" and alleges that Durand, Owens, Sorber, and Varner, "all showed

negligence to [his] health" in their handling of his requests for a housing transfer, and his related grievances and appeals.[2] (*Id.*) Moore asserts that Defendants violated his rights under the First, Fifth, Eighth, Ninth, and Fourteenth Amendments. (*Id.* at 3.)

Moore claims that these violations resulted in his "pain, suffering, and distress" and that he required relief because he was suffering to breathe, but it was not within the authority of the medical department to rehouse him. (*Id.* at 5, 8.) Moore seeks $250,000 in compensation for his "pains, distress, and sufferings" and $100,000 in punitive damages for negligence. (*Id.* at 5.)

II. STANDARD OF REVIEW

The Court previously granted Moore leave to proceed *in forma pauperis*. Accordingly, 28 U.S.C. § 1915(e)(2)(B)(ii) requires the Court to dismiss the Amended Complaint if it fails to state a claim. Whether a complaint fails to state a claim under § 1915(e)(2)(B)(ii) is governed by the same standard applicable to motions to dismiss under Federal Rule of Civil Procedure 12(b)(6), *see Tourscher v. McCullough*, 184 F.3d 236, 240 (3d Cir. 1999), which requires the Court to determine whether the complaint contains "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotations omitted). "At this early stage of the litigation,' '[the Court will] accept the facts alleged in [the *pro se* amended] complaint as true,' 'draw[] all reasonable inferences in [the plaintiff's] favor,' and 'ask only whether [that] complaint, liberally construed, . . . contains facts

[2] The Court previously dismissed with prejudice any attempt by Moore to assert "a separate constitutional claim based on the handling by the Defendants of his grievance over his lack of reassignment" related to his exposure to ETS. *Moore*, 2022 WL 2240086, at *4 ("Accordingly, the facts alleged by Moore about grievances do not give rise to a plausible basis for a constitutional claim. The dismissal of the grievance claims will be with prejudice since any attempt at amendment would be futile.") To the extent Moore's Amended Complaint seeks to reassert such a claim, it is again dismissed for the reasons previously stated. *Id.*

sufficient to state a plausible [] claim.'" *Shorter v. United States*, 12 F.4th 366, 374 (3d Cir. 2021) (quoting *Perez v. Fenoglio*, 792 F.3d 768, 774, 782 (7th Cir. 2015)). Conclusory allegations do not suffice. *Iqbal*, 556 U.S. at 678.

As Moore is proceeding *pro se*, the Court construes his allegations liberally. *Vogt v. Wetzel*, 8 F.4th 182, 185 (3d Cir. 2021) (citing *Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 244-45 (3d Cir. 2013)). "This means we remain flexible, especially 'when dealing with imprisoned *pro se* litigants[.]'" *Vogt*, 8 F.4th at 185 (quoting *Mala*, 704 F.3d at 244. The Court will "apply the relevant legal principle even when the complaint has failed to name it." *Id.* "'[P]ro se litigants still must allege sufficient facts in their complaints to support a claim.'" *Vogt*, 8 F.4th at 185 (quoting *Mala*, 704 F.3d at 245). However, "liberal construction of a *pro se* amended complaint does not mean accumulating allegations from superseded pleadings." *Argentina v. Gillette*, 778 F. App' x 173, 175 n.3 (3d Cir. 2019).

III. DISCUSSION

Moore seeks money damages due to alleged violations of his civil rights. The vehicle by which federal constitutional claims may be brought in federal court is 42 U.S.C. § 1983.[3] "To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the

[3] Much like his original Complaint, Moore continues to allege that Defendants acted negligently with respect to his exposure to ETS while incarcerated at SCI Phoenix. (*See, e.g.*, Am. Compl. 5) ("Ms. Durand, K. Owens, K. Sorber, D. Varner all showed negl[i]gence to my health . . ."); (*id.*) (requesting punitive damages "for negl[i]gence"); (*cf. id.*) (asserting that "[t]here was a tort commit[t]ed against" Moore). However, Moore specifically seeks to bring his claims under § 1983, and repeatedly asserts that Defendants violated his constitutional rights. (*See id.* at 3) (affirmatively checking the box to bring a claim under § 1983 and citing alleged violations of various Constitutional Amendments); (*see also id.* at 5) (alleging that Defendants conduct was "in violation of [his] Constitutional rights."). Accordingly, the Court analyzes Moore's claims in Amended Complaint under § 1983.

Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988).

A. Eighth Amendment Deliberate Indifference Claim for Exposure to ETS

The Court understands Moore to again assert an Eighth Amendment deliberate indifference claim against Defendants in their individual capacities based on Moore's exposure to ETS at SCI Phoenix.[4] As the Court previously explained, when a convicted prisoner is exposure to ETS, the legal analysis proceeds under the Eighth Amendment.[5] *Moore*, 2022 WL 2240086, at *3 (citing *Murray v. Wetzel*, No. 17-1637, 2021 WL 5500511, at *2 (M.D. Pa. Nov.

[4] Moore's Amended Complaint was filed utilizing the Court's standard form for a prisoner filing a civil rights complaint. In completing this form, Moore checked the box for each Defendant indicating that he seeks to bring his claims for money damaged against them in their official capacities. Moore does not appear to understand the implication of checking the official capacity box. Claims against state employees such as Defendants Durand, Owens, Sorber, and Varner, named in their official capacity are indistinguishable from claims against the Commonwealth. *See Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) ("Official-capacity suits . . . 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'") (quoting *Monell v. N.Y.C. Dept. of Soc. Servs.*, 436 U.S. 658, 690, n. 55 (1978)). "[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Id.*

Because Moore's Amended Complaint does not attempt to allege an official capacity claim, *see Monell*, 436 U.S. at 694, the Court will liberally construe the Amended Complaint to assert claims against Defendants in their individual capacities instead. *See Downey v. Pa. Dep't of Corr.*, 968 F.3d 299, 310 (3d Cir. 2020) ("To determine whether a plaintiff sued state officials in their official capacity, we first look to the complaints and the course of proceedings." (quotations omitted)); *Coward v. City of Philadelphia*, No. 21-1619, 2021 WL 4169422, at *3 (E.D. Pa. Sept. 13, 2021) (permitting claim against defendant in his individual capacity to proceed event though "[plaintiff] did not check the box indicating a desire to sue [that defendant] in his individual capacity" where the allegations clearly sought relief based on the defendant's conduct). Furthermore, this construction of Moore's Amended Complaint is consistent with the Court's prior holding that Moore could not reassert his claims for money damages against the DOC in federal court, even upon amendment of the original Complaint. *See Moore*, 2022 WL 2240086, at *3.

[5] Although it appears on amendment that Moore's ETS claim is brought pursuant to the Due Process Clause of the Fourteenth Amendment, "Eighth Amendment standards are nonetheless applicable as the minimal standard that must be met." *See Aruanno v. Green*, 527 F. App'x 145, 146 n.1 (3d Cir. 2013).

23, 2021) ("It is well established that a prisoner can bring a claim under the Eighth Amendment for exposure "to levels of ETS that pose an unreasonable risk of serious damage" to the inmate's health."); *Mearin v. Swartz*, 951 F. Supp. 2d 776, 780 (W.D. Pa. 2013)). In order to pass statutory screening on an Eighth Amendment claim based on exposure to ETS, a prisoner must allege plausibly that he has been "exposed to unreasonably high levels of ETS contrary to contemporary standards of decency; and . . . that the authorities were deliberately indifferent to the exposure to ETS. *Mearin*, 951 F. Supp. 2d at 780-81 (citing *Brown v. U.S. Justice Dep't,* 271 F. App'x 142, 144 (3d Cir. 2008) (citing *Helling v. McKinney,* 509 U.S. 25, 35 (1993))). The prisoner must allege plausibly that the official was "both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* (citing *Wilson v. Burks,* 423 F. App'x 169, 173 (3d Cir. 2011), *quoting Farmer v. Brennan,* 511 U.S. 825, 837 (1994)).

The Court previously found that Moore's allegations failed to meet this standard, and dismissed his claim because he did not "allege that the level of ETS to which he was exposed was unreasonable, contrary to contemporary standards, or excessive." *Moore*, 2022 WL 2240086, at *3. The Court further concluded that Moore's assertions about his exposure – that it "bothered" his asthma, caused him breath problems, and triggered asthma attacks that woke him up at night – were "markedly less detailed than those situations where courts have found that symptoms of ETS exposure were sufficient to pass the plausibility threshold." *Id.* at *4. However, given Moore's contention that he asked Defendant Durand to change his cell assignment because exposure to ETS placed his health at risk, and his asthma was bothered by ETS, the Court granted Moore leave to amend so that he could "flesh out his allegations . . . [and] cure the defects in his ETS claim." *Id.*

Despite having the opportunity to amend and cure these defects, Moore's Amended Complaint similarly fails to plead sufficient facts to state a plausible Eighth Amendment claim based on exposure to ETS. The allegations of Moore's Amended Complaint are extremely brief, and do not flesh out any additional details that demonstrate that his exposure to ETS was unreasonable, contrary to contemporary standards, or excessive. Rather, Moore essentially reiterates the allegations of his original Complaint, asserting that he "was forced to live in pollution . . . [and] forced to breathe harmful toxins caused by second hand smoke" despite having asthma – a chronic illness[.]" (Am. Compl. at 5.) Despite the Court's extensive citation to cases where prisoners alleging ETS exposure claims alleged sufficient details to pass the plausibility threshold, *see Moore*, 2022 WL 2240086, at *4 (collecting cases), Moore's Amended Complaint does not provide the Court with any additional details on the precise nature or severity of his symptoms, nor does he provide any further explanation of the extent of his alleged exposure. Instead, Moore primarily repeats his assertions that he "suffered to breathe" for six months, that second-hand smoke caused him to have asthma attacks, and his "right to adequate living was being violated[.]" (*Id.* at 5, 7.) These allegations remain insufficient to allege a plausible Eighth Amendment exposure to ETS claim. As Moore has already been given an opportunity to cure the defects in his Eighth Amendment ETS exposure claim and has been unable to do so, the Court concludes that further amendment would be futile. *See Jones v. Unknown D.O.C. Bus Driver & Transp. Crew*, 944 F.3d 478, 483 (3d Cir. 2019) (amendment by *pro se* litigant would be futile when litigant "already had two chances to tell his story").

B. Eighth Amendment Deliberate Indifference to Medical Needs Claim

As the Court previously stated, for a constitutional claim based on the failure to provide medical treatment to be plausible a prisoner must allege facts indicating that prison officials were

deliberately indifferent to his serious medical needs. *Moore*, 2022 WL 2240086, at *5 (citing *Farmer*, 511 U.S. at 835). A prison official is not deliberately indifferent "unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837.[6] "A medical need is serious, . . . if it is one that has been diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention." *Monmouth Cty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987) (internal quotations omitted). Deliberate indifference is properly alleged "where the prison official (1) knows of a prisoner's need for medical treatment but intentionally refuses to provide it; (2) delays necessary medical treatment based on a non-medical reason; or (3) prevents a prisoner from receiving needed or recommended medical treatment." *Rouse v. Plantier*, 182 F.3d 192, 197 (3d Cir. 1999). A serious medical need exists where "failure to treat can be expected to lead to substantial and unnecessary suffering." *Colburn v. Upper Darby Twp.*, 946 F.2d 1017, 1023 (3d Cir. 1991). Allegations of medical malpractice and mere disagreement regarding proper medical treatment are insufficient to establish a constitutional violation. *See Spruill v. Gillis*, 372 F.3d 218, 235 (3d Cir. 2004).

The deliberate indifference claim in Moore's original Complaint was dismissed because it was not entirely clear if he sought to raise a separate claim that any of the named Defendants were deliberately indifferent to his serious medical needs. *Moore*, 2022 WL 2240086, at *5.

[6] The standard under the Eighth Amendment and Fourteenth Amendment for claims related to a prisoner's medical needs is essentially the same for purposes of the analysis. *See Moore v. Luffey*, 767 F. App'x 335, 340 n.2 (3d Cir. 2019); *Parkell v. Morgan*, 682 F. App'x 155, 159-60 (3d Cir. 2017) (*per curiam*).

However, the dismissal was without prejudice and Moore was permitted to amend the claim if he could plausibly allege that a named Defendant "refused, delayed, or prevented him from receiving needed or recommended medical treatment." *Id.* The Court also noted, the Defendants named in the original Complaint were not medical providers. *Id.*

Moore's Amended Complaint does not fare any better. Moore once again fails to allege any facts that a named Defendant refused, delayed, or prevented him from receiving needed or recommended medical treatment, nor does he allege that he needed medical care of any kind. He also fails to assert that any Defendants is even a medical provider. Accordingly, Moore has again failed to allege a plausible claim for deliberate indifference to medical needs under the Eighth Amendment.[7] Since Moore was previously granted leave to amend in order to cure the defects in his claim and has been unable to do so, the Court concludes that further amendment would be futile. *See Jones*, 944 F.3d at 483.

[7] To the extent Moore's Amended Complaint could be liberally construed to assert state law negligence claims against Defendants, the Court will decline to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c) over such claims, having dismissed all of Moore's federal claims with prejudice. The only independent basis for jurisdiction over any such claims is 28 U.S.C. § 1332(a), which grants a district court jurisdiction over a case in which "the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States." Like his original Complaint, Moore's Amended Complaint does not allege the citizenship of the parties, but simply Pennsylvania addresses for himself and the Defendants. This again suggests that Defendants may be Pennsylvania citizens, complete diversity is lacking, and the Court does not have subject matter jurisdiction over these claims. Therefore, any such negligence claims will be dismissed without prejudice to Moore's right to bring those claims in an appropriate state court.

IV. CONCLUSION

For the foregoing reasons, the Court will dismiss Moore's Amended Complaint with prejudice for failure to state a claim, and his state law negligence claims are dismissed without prejudice for lack of subject matter jurisdiction. An appropriate order follows.

BY THE COURT:

/s/ Juan R. Sánchez
JUAN R. SÁNCHEZ, C.J.

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

JEREMIAH MOORE, *et al.*,	:	
Plaintiff,	:	
	:	
v.	:	**CIVIL ACTION NO. 21-CV-2695**
	:	
DEPARTMENT OF CORRECTIONS, *et al.*,	:	
Defendants.	:	

ORDER

AND NOW, this 22nd day of June, 2022, upon consideration of Plaintiff Jeremiah Moore's Motion to Proceed *In Forma Pauperis* (ECF No. 9) and his *pro se* Complaint (ECF No. 2), it is **ORDERED** that:

1. Leave to proceed *in forma pauperis* is **GRANTED** pursuant to 28 U.S.C. § 1915.

2. The Complaint is **DEEMED** filed.

3. The Complaint is **DISMISSED IN PART WITH PREJUDICE AND IN PART WITHOUT PREJUDICE** for the reasons stated in the Court's Memorandum as follows:

Grievance System Tort of (Negligence) Appeal

a. All claims for declaratory relief, as well as all claims based on the handling of prison grievances, a violation of his First Amendment freedom of religion, and a violation of the Universal Declaration of Human Rights are **DISMISSED WITH PREJUDICE** for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii)

State Claim ON Amended

b. Moore's claim against Defendant Durand based upon exposure to environmental tobacco smoke, and any claim based upon deliberate indifference to his serious medical needs are **DISMISSED WITHOUT PREJUDICE** for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).

Tort of negligence claim

APPENDIX D

c. Moore's moot claim for injunctive relief, his claims against the Department of Corrections, the DOC's Chief Secretary's Office of Inmate Grievance and Appeals, and SCI Phoenix, and all state law negligence claims are **DISMISSED WITHOUT PREJUDICE** for lack of subject matter jurisdiction.

4. The Clerk of Court is **DIRECTED** to terminate the Department of Corrections, the DOC's Chief Secretary's Office of Inmate Grievance and Appeals, SCI Phoenix, K. Owens, K. Sorber, and D. Varner as Defendants.

5. Moore may file an amended complaint within thirty (30) days of the date of this Order. Any amended complaint must identify all defendants in the caption of the amended complaint in addition to identifying them in the body of the amended complaint and shall state the basis for Moore's claims against each defendant. The amended complaint shall be a complete document that does not rely on the initial Complaint or other papers filed in this case to state a claim. When drafting his amended complaint, Moore should be mindful of the Court's reasons for dismissing the claims in his initial Complaint as explained in the Court's Memorandum. Moore may not reassert (1) any claim that has already been dismissed with prejudice, (2) any claim determined to be moot, or (3) any claim for money damages against the Department of Corrections, the DOC's Chief Secretary's Office of Inmate Grievance and Appeals, or SCI Phoenix. Upon the filing of an amended complaint, the Clerk shall not make service until so **ORDERED** by the Court.

6. The Clerk of Court is **DIRECTED** to send Moore a blank copy of the Court's form complaint for a prisoner filing a civil rights action bearing the above civil action number. Moore may use this form to file his amended complaint if he chooses to do so.[1]

7. If Moore does not wish to amend his Complaint and instead intends to stand on his Complaint as originally pled, he may file a notice with the Court within thirty (30) days of the date of this Order stating that intent, at which time the Court will issue a final order dismissing the case. Any such notice should be titled "Notice to Stand on Complaint," and shall include the civil action number for this case. *See Weber v. McGrogan*, 939 F.3d 232 (3d Cir. 2019) ("If the plaintiff does not desire to amend, he may file an appropriate notice with the district court asserting his intent to stand on the complaint, at which time an order to dismiss the action would be appropriate." (quoting *Borelli v. City of Reading*, 532 F.2d 950, 951 n.1 (3d Cir. 1976))); *In re Westinghouse Sec. Litig.*, 90 F.3d 696, 703–04 (3d Cir. 1996) (holding "that the district court did not abuse its discretion when it dismissed with prejudice the otherwise viable claims . . . following plaintiffs' decision not to replead those claims" when the district court "expressly warned plaintiffs that failure to replead the remaining claims . . . would result in the dismissal of those claims").

8. If Moore fails to file any response to this Order, the Court will conclude that Moore intends to stand on his Complaint and will issue a final order dismissing this case.[2] *See Weber*, 939 F.3d at 239-40 (explaining that a plaintiff's intent to stand on his complaint may be

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[1] This form is available on the Court's website at http://www.paed.uscourts.gov/documents/forms/frmc1983f.pdf.

[2] The six-factor test announced in *Poulis v. State Farm Fire & Casualty Co.*, 747 F.2d 863 (3d Cir. 1984), is inapplicable to dismissal orders based on a plaintiff's intention to stand on his complaint. *See Weber*, 939 F.3d at 241 & n.11 (treating the "stand on the complaint" doctrine as distinct from dismissals under Federal Rule of Civil Procedure 41(b) for failure to comply with a

inferred from inaction after issuance of an order directing him to take action to cure a defective complaint).

BY THE COURT:

/s/ Juan R. Sánchez
JUAN R. SÁNCHEZ, C.J.

court order, which require assessment of the *Poulis* factors); *see also Elansari v. Altria*, 799 F. App'x 107, 108 n.1 (3d Cir. 2020) (*per curiam*). Indeed, an analysis under *Poulis* is not required when a plaintiff willfully abandons the case or makes adjudication impossible, as would be the case when a plaintiff opts not to amend his complaint, leaving the case without an operative pleading. *See Dickens v. Danberg*, 700 F. App'x 116, 118 (3d Cir. 2017) (*per curiam*) ("Where a plaintiff's conduct clearly indicates that he willfully intends to abandon the case, or where the plaintiff's behavior is so contumacious as to make adjudication of the case impossible, a balancing of the *Poulis* factors is not necessary."); *Baker v. Accounts Receivables Mgmt., Inc.*, 292 F.R.D. 171, 175 (D.N.J. 2013) ("[T]he Court need not engage in an analysis of the six *Poulis* factors in cases where a party willfully abandons her case or otherwise makes adjudication of the matter impossible." (citing cases)).