

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

KENNETH J. PHELAN,

Plaintiff,

-v-

9:11-CV-314
(DNH/DRH)

QUINN, Correctional Officer, Great Meadow
Correctional Facility; SWAN, Correctional
Officer, Great Meadow Correctional Facility;
McDONALD, Correctional Officer, Great
Meadow Correctional Facility; WARRINGTON,
Correctional Officer, Great Meadow
Correctional Facility; WASHER, Sergeant,
Great Meadow Correctional Facility; MINAL,
Psychologist, Great Meadow Correctional
Facility; TORRES, Counselor, Great Meadow
Correctional Facility; OWENS, Sergeant,
Great Meadow Correctional Facility; GEBO,
Correctional Officer, Great Meadow Correctional
Facility; FULLER, Correctional Officer, Great
Meadow Correctional Facility; KISER,
Correctional Officer, Great Meadow Correctional
Facility; MURPHY, Correctional Officer, Great
Meadow Correctional Facility; and NURSE TED,
Nurse, Great Meadow Correctional Facility,

Defendants.

APPEARANCES:

OF COUNSEL:

KENNETH J. PHELAN
Plaintiff Pro Se
09-A-1183
Five Points Correctional Facility
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Ass't Attorney General

DAVID N. HURD
United States District Judge

DECISION and ORDER

Plaintiff brought this action pursuant to the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. On May 21, 2012, the Honorable David R. Homer, United States Magistrate Judge, advised, by Report-Recommendation, that defendants' motion to dismiss be granted in part and denied and part, and that plaintiff be granted leave to file a second amended complaint. No objections to the Report-Recommendation were filed.

Based upon a careful review of the entire file and the recommendations of the Magistrate Judge, the Report-Recommendation is accepted in whole. See 28 U.S.C. 636(b)(1).

Therefore it is


ORDERED that:

1. Defendants' motion to dismiss is GRANTED in part and DENIED in part;
2. Plaintiff's claims for damages against the individual defendants in both their individual and official capacities under the Americans with Disabilities Act are DISMISSED;
3. Plaintiff's claims for injunctive relief against the individual defendants in their official capacities REMAIN;
4. Plaintiff's remaining claims as to defendants Quinn, Minal, Torres, and Washer are DISMISSED without prejudice to allow amendment as directed below;

5. Plaintiff's claim against Nurse Ted is DISMISSED; and

6. Plaintiff is granted until July 20, 2012, to file a second amended complaint to assert causes of action for (a) the use of excessive force in violation of his Eighth Amendment right to be free from cruel and unusual punishment, (b) retaliation for filing complaints and grievances in violation of his First Amendment right to seek the redress of grievances, and (c) failing to protect Phelan from harm posed by other inmates in violation of his Eighth Amendment right to be free from cruel and unusual punishment.

IT IS SO ORDERED.



United States District Judge

Dated: June 19, 2012
Utica, New York.