

Fed. R. Civ. P. 15(a)(2). While leave to amend should be granted freely, a court may deny a motion to amend where there is "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of the amendment." *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962); see also *Budhun v. Reading Hosp. & Med. Ctr.*, 765 F.3d 245, 259 (3d Cir. 2014). A claim is futile "if the amended complaint would not survive a motion to dismiss for failure to state a claim." *Budhun*, 765 F.3d at 259.

Here, Mr. Rivera initiated this action in March 2010. Since that date the Court has addressed a variety of discovery disputes. Additionally, in 2015, the Court delayed resolving portions of Defendants' Motion for Summary Judgment to allow Mr. Rivera to conduct additional limited discovery concerning claims against Defendant Walsh. (ECF No. 171.) The parties were given an October 2015 deadline for the close of discovery, and a November 2015 deadline to file dispositive motions. (*Id.*) After additional discovery disputes arose and were resolved by the Court, in March 2017, the Court granted in part, and denied in part, Mr. Rivera's motion to compel Defendant Walsh to supplement various discovery responses. (ECF Nos. 221 and 222.) On March 17, 2017, a scheduling order was issued calling for the filing of all pre-trial motions by Monday, June 12, 2017. (ECF No. 222.) That date stands unchanged.

Mr. Rivera's motion to amend his Complaint against Defendant Walsh includes a proposed amended complaint. See ECF No. 225-1. Aside from asserting an Eighth

Amendment claim of deliberate indifference against Defendant Walsh based on his failure to place him in a single cell following his release from the RHU, Mr. Rivera now claims Defendant Walsh's actions also violated the "Disability (sic) Act" and the "Federal Disability Statute 42 U.S.C. § 12101 et seq." (*Id.*)

The Court notes that Mr. Rivera raised an claim under Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §12101 *et seq.*, in his 2010 Complaint which has since been dismissed. At that time he sued CHCA Leskowski, Deputy Secretary Shirley R. Moore Smeal, Deputy Director Marc Goldberg, and Andrea Priori Meintel, the DOC's Director of the Bureau of Treatment Services, for failing to process Mr. Rivera's ADA request. (ECF No. 1 at ¶¶ 49 - 51, and ¶ 62.) He did not include Deputy Walsh in his ADA allegations which were dismissed in April 2013. See ECF No. 73, pp. 21 - 22. Mr. Rivera defines his proposed ADA claim as follows: "Defendant Deputy Superintendent Walsh removed Plaintiff's Z Code status on March 2009 without valid reasoning." (ECF No. 225-1, ¶ 8.) He claims to have exhausted his administrative remedies as to this claim.

The undisputed record in this case establishes that Superintendent Klopotoski made the final decision to remove Mr. Rivera's Z Code in December 2008. Mr. Rivera confirms that he was notified of this event on December 23, 2008. (ECF No. 136-4, p. 35.) It is also undisputed that Mr. Rivera's Grievance No. 268049, filed April 7, 2009, was the first grievance he filed while housed at SCI-Dallas. (ECF No. 136-4, p. 38.) This grievance exclusively addresses "the PRC's March 20, 2009 decision failing to reinstate [Mr. Rivera's] Z-code single-cell status." (ECF No. 144, Pl.'s Br. in Opp'n to Defs'. Mot. for Summ. J., p.

12.) There is no language contained within this grievance to suggest an ADA claim against Deputy Walsh. See ECF No. 170, pp. 21 - 26. Accordingly, at this late stage in the litigation, to allow Mr. Rivera to amend his Complaint as to claims against Deputy Walsh would be prejudicial and futile.

An appropriate order follows.



A. RICHARD CAPUTO
United States District Judge

DATED: MAY 2, 2017