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

JORGE HARRIS a/k/a GEORGE HARRIS, JR., Plaintiff,	)	**Civil Action No. 16-38 Erie**
v.	)	
SUPT. NANCY GIROUX, *et al*., Defendants	)	**Magistrate Judge Susan Paradise Baxter**

MEMORANDUM OPINION[1]

United States Magistrate Judge Susan Paradise Baxter

I. INTRODUCTION

A. Relevant Procedural History

On February 11, 2016, Plaintiff Jorge Harris, an inmate at the State Correctional Institution at Albion, Pennsylvania ("SCI Albion"), filed a *pro se* civil rights complaint pursuant to 42 U.S.C. § 1983, Title II of the Americans with Disabilities Act ("ADA"), and the Rehabilitation Act ("Rehab Act"). Plaintiff subsequently filed an amended complaint on January 6, 2017, which supersedes the original complaint and is the operative pleading in this case. [ECF No. 23]. Named as Defendants are the following individuals employed by the Pennsylvania Department of Corrections ("DOC"), most of whom are staff members at SCI Albion: Superintendent Nancy Giroux ("Giroux"); Deputy Melinda L. Adams ("Adams"); Deputy Michael R. Clark ("Clark"); Deputy Barry R. Smith ("Smith"); Counselor Nichole Norton ("Norton"); CO1 Benjamin Beringer ("Beringer"); Hearing Examiner Ryan Szylewski

[1] The parties have consented to having a United States Magistrate Judge exercise jurisdiction over this matter. [ECF Nos. 4, 18).

("Szylewski"); Grievance Coordinator Ronnie Martucci ("Martucci"); Unit Manager Bryan E. Flinchbaugh ("Flinchbaugh"); Intelligence Captain Earl J. Jones ("Jones"); Acting Major of Unit Management Melanie Kosinski ("Kosinski"); and DOC Secretary Wetzel ("Wetzel").[2]

Plaintiff's amended complaint contains three causes of action. Count I is a First Amendment retaliation claim asserting that Defendants retaliated against him for filing grievances and inmate requests by unjustifiably confining him in the restricted housing unit ("RHU") for almost four months, refusing his numerous requests for reasonable accommodations for his disabilities, and subjecting him to constant verbal and emotional abuse. (ECF No. 23, Amended Complaint, at ¶¶ 104-111). Count II is a claim under both the Rehab Act and the ADA asserting that Defendants discriminated against him and refused to provide reasonable accommodations on account of his disabilities. (Id. at ¶¶ 112-118). Count III is an Eighth Amendment claim arising from his confinement in the RHU for 108 days. (Id. at ¶¶ 119-127).

On January 20, 2017, Defendants filed a motion to dismiss Plaintiff's amended complaint [ECF No. 25] on the following grounds: (i) Plaintiff has failed to show the personal involvement of Defendants Giroux, Clark, Adams, Smith, Norton, Szelewski, Martucci, Flinchbaugh, Jones, Kosinski, and Wetzel, in any of the alleged wrongdoing; (ii) Plaintiff has failed to state a claim against Defendant Beringer related to the filing of false misconduct reports; (iii) Plaintiff has otherwise failed to state causes of action upon which relief may be granted; and (iv) Plaintiff's claims against Defendants in their official capacities are barred by Eleventh Amendment immunity. [ECF No. 26]. Plaintiff has since filed a brief in opposition to Defendants' motion. [ECF No. 28]. This matter is now ripe for consideration.

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[2] Krieg Williams, Parole Agent Supervisor at SCI-Albion, was named as a Defendant in the original complaint; however, he was neither named as a Defendant, nor was he the subject of any allegations or claims, in the amended complaint [ECF No. 23]. Thus, he has been terminated from this case.

B. Relevant Factual History

Plaintiff is completely blind in his right eye and suffers from bilateral hearing loss, having no hearing in his left ear and 75% hearing loss in his right ear. (ECF No.23, Amended Complaint, at ¶ 2). Plaintiff's partial blindness occurred during his prior incarceration at SCI-Albion, which resulted in Plaintiff filing suit against SCI-Albion officials and employees that ultimately led to a negotiated monetary settlement. (Id. at ¶¶ 3, 33). Approximately two years after his prior release from SCI-Albion in June 2013, Plaintiff was convicted of violating his parole and was sent back to SCI-Albion on May 11, 2015. (Id. at ¶¶ 34-38). Upon his return to SCI-Albion, Plaintiff was placed in the RHU, where he remained for a period of 108 days. (Id. at ¶¶ 5-7, 44). Plaintiff alleges that he was originally told he was placed in the RHU pending medical clearance, but was informed ten days later that he was being kept in the RHU because of a lack of bed space in general population. (Id. at ¶¶ 45-46).

On May 29, 2015, Plaintiff submitted a request to Defendant Smith that he be given a Z-code, which denotes single cell status in general population. (Id. at ¶ 49). Defendant Norton was allegedly responsible for processing the necessary paperwork to obtain the Z-code. (Id. at ¶ 51). Plaintiff alleges that, although the process for obtaining a Z-code usually takes only two to three weeks, Defendant Norton delayed the process for nearly three months. (Id.).

While he was in the RHU, Plaintiff alleges that he was "denied access to assistive devices, personal hygiene opportunities (showers, shaves, etc.), exercise opportunities, and phone calls to family members or attorneys." (Id. at ¶ 8). In particular, Plaintiff alleges that he was not given access to a hearing aid for his right ear until November 2016. (Id. at ¶ 61). Plaintiff also alleges that he was subjected to verbal and emotional abuse in the form of racial epithets and food tampering. (Id. at ¶ 9).

C. Standard of Review

A motion to dismiss filed pursuant to Rule 12(b)(6) must be viewed in the light most favorable to the plaintiff and the complaint's well-pleaded allegations must be accepted as true. Erickson v. Pardus, 551 U.S. 89, 93–94 (2007). A complaint must be dismissed pursuant to Rule 12(b)(6) if it does not allege "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) (rejecting the traditional 12(b)(6) standard set forth in Conley v. Gibson, 355 U.S. 41 (1957)). See also Ashcroft v. Iqbal, 556 U.S. 662 (2009) (specifically applying Twombly analysis beyond the context of the Sherman Act).

A court need not accept inferences drawn by a plaintiff if they are unsupported by the facts set forth in the complaint. See California Pub. Emps'. Ret. Sys. v. The Chubb Corp., 394 F.3d 126, 146 (3d Cir. 2004), citing Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997). Nor must the court accept legal conclusions set forth as factual allegations. Twombly, 550 U.S. at 555, citing Papasan v. Allain, 478 U.S. 265, 286 (1986); see also McTernan v. City of York, Pennsylvania, 577 F.3d 521, 531 (3d Cir. 2009) ("The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions"). A plaintiff's factual allegations "must be enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 556, citing 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216, pp. 235–36 (3d ed. 2004). Although the United States Supreme Court ("Supreme Court") does "not require heightened pleading of specifics, [the Court does require] enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570.

In other words, at the motion to dismiss stage, a plaintiff is "required to make a 'showing' rather than a blanket assertion of an entitlement to relief." Smith v. Sullivan, No. 07-528, 2008

WL 482469, at *1 (D. Del. Feb. 19, 2008), quoting Phillips v. County of Allegheny, 515 F.3d 224, 231 (3d Cir. 2008). "This 'does not impose a probability requirement at the pleading stage,' but instead 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of' the necessary element." Phillips, 515 F.3d at 234, quoting Twombly, 550 U.S. at 556 n.3).

The Third Circuit has expounded on the Twombly/Iqbal line of cases. To determine the sufficiency of a complaint under Twombly and Iqbal, the court must follow three steps:

> First, the court must 'tak[e] 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.'

Burtch v. Milberg Factors, Inc., 662 F.3d 212, 221 (3d Cir. 2011), quoting Santiago v. Warminster Twp., 629 F.3d 121, 130 (3d Cir. 2010).

"The purpose of a motion to dismiss is to test the sufficiency of a complaint, not to resolve disputed facts or decide the merits of the case." Tracinda Corp. v. DaimlerChrysler AG, 197 F. Supp. 2d 42, 53 (D. Del. 2002), citing Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). Indeed, the Supreme Court has held that a complaint is properly dismissed under Rule 12(b)(6) when it does not allege "enough facts to state a claim to relief that is plausible on its face," Twombly, 550 U.S. at 570, or when the factual content does not allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. The question is not whether the plaintiff will prevail in the end. Rather, the question "is whether the plaintiff is entitled to offer evidence in support of his or her claims." Swope v.

City of Pittsburgh, 90 F. Supp. 3d 400, 405 (W.D. Pa. 2014), citing Oatway v. Am. Int'l Grp., Inc., 325 F.3d 184, 187 (3d Cir. 2003).

D. Discussion

1. Official Capacity Claims

Defendants assert that, to the extent Plaintiff is suing them in their official capacities for monetary damages, they are immune from suit under the Eleventh Amendment. The Court agrees.

It is well settled that suits for damages by individuals against state governments, state agencies, or state officers acting in their official capacities are barred by the Eleventh Amendment. See Kentucky v. Graham, 473 U.S. 159, 165-67 (1985) (holding that claims for damages against a state officer acting in his official capacity are barred by the Eleventh Amendment); Chittister v. Dep't of Community and Economic Development, 226 F.3d 223 (3d Cir. 2000) (holding that individuals are barred from seeking monetary damages from state governments or state agencies). See also Bey v. Pennsylvania Department of Corrections, 98 F.Supp.2d 650, 657 (E.D. Pa. 2000) wherein the court summarized well-established law, observing that:

> [t]he Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Thus, under the Eleventh Amendment, absent express consent by the state in question or a clear and unequivocal waiver by Congress, states are immune from suit in federal court. See Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996).

Id.; see also Koslow v. Commonwealth of Pennsylvania, 302 F.3d 161 (3d Cir. 2002).

No exceptions to Eleventh Amendment immunity are applicable here. The Commonwealth of Pennsylvania has not consented to be sued. Wilson v. Vaughn, No. 93-C.V.-6020, 1996 WL 426538, *1 n.2 (E.D.Pa. July 30, 1996) (citing, 42 Pa. Con. Stat. Ann.

§8521(b)). Congress has not expressly abrogated Pennsylvania's Eleventh Amendment immunity from civil rights suits for damages. Smith v. Luciani, No. 97-3613, 1998 WL 151803, *4 (E.D.Pa. March 31, 1998), aff'd, 178 F.3d 1280 (3d Cir. 1999)(Table). Thus, Plaintiff's claims against Defendants in their official capacities for monetary damages will be dismissed.

2. Personal Involvement

It is well-settled that liability under § 1983 requires a defendant's "personal involvement" in the deprivation of a constitutional right. See Gould v. Wetzel, 2013 WL 5697866, at *2 (3d Cir. Oct. 21, 2013), citing Argueta v. U.S. Immigration and Customs Enforcement, 643 F.3d 60, 73 (3d Cir. 2011). This means that the defendant must have played an "affirmative part" in the complained-of misconduct. Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009) ("In a § 1983 suit … [a]bsent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct."); Oliver v. Beard, 358 Fed. Appx 297, 300 (3d Cir.2009); Chinchello v. Fenton, 805 F.2d 126, 133 (3d Cir. 1986). Supervisory liability may attach if the supervisor personally "participated in violating the plaintiff's rights, directed others to violate them, or, as the person in charge, had knowledge of and acquiesced" in a subordinate's unconstitutional conduct. A.M. ex rel. J.M.K. v. Luzerne Cnty. Juvenile Det. Ctr., 372 F.3d 572, 586 (3d Cir. 2004), citing Baker v. Monroe Twp., 50 F.3d 1186, 1190-91 (3d Cir. 1995).[3]

Here, Defendants assert that Plaintiff's claims against Defendants Giroux, Clark, Adams, Smith, Norton, Szelewski, Martucci, Flinchbaugh, Jones, Kosinski, and Wetzel must be dismissed because he has failed to establish their personal involvement in the alleged constitutional violations.

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[3] The Court notes that supervisory liability may also attach if the supervisor, "with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused [the] constitutional harm." A.M. ex rel. J.M.K, 372 F.3d at 586, quoting Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 725 (3d Cir. 1989). However, there are no allegations regarding a relevant policy, practice or custom in this case.

a. Defendants Jones and Wetzel

First, Defendants argue that Plaintiff failed to state any allegations whatsoever against Defendants Jones and Wetzel and, thus, cannot support a claim against them. The Court agrees and these Defendants should be dismissed from this case, accordingly.

b. Defendants Flinchbaugh, Clark, Smith, and Adams

Defendants next argue that the only alleged involvement of Defendants Flinchbaugh, Clark, Smith, and Adams occurred in their roles as members of the Program Review Committee ("PRC"). (ECF No. 26, Defendants' Brief, at p. 6). This is not entirely accurate. The Court agrees that the only allegation against Defendant Flinchbaugh is that he was a member of the PRC that decided on May 12, 2015, to continue Plaintiff in his status in the RHU "pending medical clearance." (ECF No. 23, Amended Complaint, at ¶ 45). At that time, Plaintiff had only been in the RHU for one day. Similarly, Defendant Clark is alleged to have been a member of the same PRC as Defendant Flinchbaugh, as well as the second PRC before whom Plaintiff appeared on May 26, 2015, when it was decided that Plaintiff would simply be continued on RHU status without further explanation (Id. at ¶ 48). At that time, Plaintiff had only been in the RHU for two weeks. These allegations, standing alone, are insufficient to establish that either Defendant Flinchbaugh or Defendant Clark was personally involved in any alleged constitutional violation.

As for Defendants Smith and Adams, in addition to alleging that each was a member of one (Adams) or both (Smith) of the PRC's already mentioned, Plaintiff alleges that he submitted an inmate request to Defendant Smith on May 29, 2015, asking to be placed on single-cell (Z-code) status in general population, and that Defendant Adams responded to the request by stating that Defendant Norton would start the process (Id. at ¶¶ 45, 48-50). Because no further allegations are asserted against Defendant Smith, Plaintiff has failed to establish Defendant

Smith's personal involvement in any of the alleged constitutional misconduct. Not so with Defendant Adams, as Plaintiff alleges further that Defendant Adams was SCI-Albion's grievance coordinator when he was previously incarcerated there, that she was ultimately responsible for processing the paperwork regarding Plaintiff's Z-code request, and that she delayed the paperwork for over three months (Id. at ¶ 78). These additional allegations are sufficient to establish Defendant Adams personal involvement in Plaintiff's alleged retaliation claim, the merits of which will be addressed later in this opinion.

c. Defendants Norton, Szelewski, Martucci, Giroux, and Kosinski

Defendants argue that the only involvement of Defendant Norton was as Plaintiff's inmate counselor (ECF No. 26, Defendants' Brief, at p. 6). Although true, Plaintiff alleges that, in her role as counselor, Defendant Norton was responsible for processing the Z-code paperwork, but delayed the process for over three months. In addition, Plaintiff alleges that Defendant Norton taunted him regarding the time Plaintiff was kept in solitary confinement. (ECF No. 23, Amended Complaint, at ¶ 51). These allegations are minimally sufficient to establish Defendant Norton's personal involvement in Plaintiff's retaliation claim. The same cannot be said of Defendants Szelewski, Martucci, Giroux, and Kosinski, however.

Defendant Szelewski's only alleged involvement was as a hearing examiner who found Plaintiff guilty of an allegedly false misconduct report. (Id. at ¶ 87).[4] This allegation fails to implicate Defendant Szelewski's involvement in any alleged constitutional violation, as any

[4] Plaintiff further alleges that Defendant Szelewski was a Security Captain at SCI-Albion during Plaintiff's previous incarceration there, and that, in that former capacity, he had performed a "pretextual search" of Plaintiff's cell after Plaintiff filed his previous lawsuit. (Id. at ¶ 87). In making this allegation, Plaintiff is apparently attempting to show that Defendant Szelewski's conduct during Plaintiff's previous incarceration at SCI-Albion two years earlier establishes that Defendant Szelewski had retaliatory animus toward Plaintiff that caused his later finding of guilt. The Court, however, find's this connection too remote and tenuous.

disciplinary sanctions that may have resulted from the finding of guilt did not impose "'atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" Smith v. Mensinger, 293 F.2d 641, 653 (3d Cir. 2002), quoting Sandin v. Conner, 515 U.S. 472, 484 (1995). Defendant Martucci's only alleged involvement is that she received and either threw away, or delayed processing, a number of Plaintiff's grievances; however, "any allegations of improprieties in the handling of his grievance[s] do not state a cognizable claim under § 1983." Williams v. Armstrong, 566 Fed. Appx. 106, 108 (3d Cir. 2014). Defendants Giroux and Kosinski are alleged to have denied Plaintiff the use of a phone for the hearing impaired to contact his family members or an attorney (ECF No. 23, Amended Complaint, at ¶¶ 72-73, 79), while Defendant Kosinski is also alleged to have denied Plaintiff's request for a number of other items that would accommodate his deafness and blindness (Id. at ¶ 72-73). Plaintiff adds that both Defendants Giroux and Kosinski were named as defendants in his previous civil suit; however, any alleged connection between Defendants' more recent denials and Plaintiff's prior lawsuit is too remote and tenuous to establish retaliatory animus. Thus, Plaintiff has failed to establish the personal involvement of Defendants Giroux and Kosinski in any constitutional misconduct.[5]

3. Eighth Amendment Claims

"The Cruel and Unusual Punishments Clause of the Eighth Amendment proscribes 'punishments which are incompatible with the evolving standards of decency that mark the progress of a maturing society.'" Tillman v. Lebanon County Corr. Fac., 221 F.3d 410, 417 (3d Cir. 2000) (footnote omitted), quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976). In order to

[5] The Court notes, however, that the allegations against Defendants Giroux and Kosinski are sufficient to allege their personal involvement in Plaintiff's ADA and Rehabilitation Act claims, the merits of which are addressed later in this opinion.

establish an Eighth Amendment claim, a plaintiff must first prove "a sufficiently serious objective deprivation." Tillman, 221 F.3d at 418. This objective component is narrowly defined. "[C]onditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Only "extreme deprivations" are sufficient to make out an Eighth Amendment claim. Hudson v. McMillian, 503 U.S. 1, 9 (1992). A prisoner must show that the condition, either alone or in combination with other conditions, deprived him of "the minimal civilized measure of life's necessities," or at least a "single, identifiable human need." Wilson v. Seiter, 501 U.S. 294 (1991) citing Rhodes, 452 U.S. at 347. These needs include "food, clothing, shelter, sanitation, medical care and personal safety." Griffin v. Vaughn, 112 F.3d 703, 709 (3d Cir. 1997). Whether the required showing has been made depends on a number of factors including the extent of any injury actually incurred. Lane v. Culp, 2007 WL 954101, at *5 (W.D.Pa. Mar. 28, 2007) citing Cowans v. Wyrick, 862 F.2d 697, 700 (8th Cir. 1988).

In addition to meeting the objective standard of deprivation, a Plaintiff seeking to establish an Eighth Amendment claim must demonstrate that "a prison official subjectively acted with a sufficiently culpable state of mind, *i.e.*, deliberate indifference." Tillman, 221 F.3d at 418. This subjective component is also narrowly construed. A defendant's conduct violates the Eighth Amendment "only if he knows that the inmate[ ] face[s] a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." Farmer v. Brennan, 511 U.S. 825, 847 (1994).

a. Deprivation of Food

Plaintiff alleges that Defendant Beringer spit in his food and/or informed Plaintiff he had tampered with his food for a period of fifteen days while Plaintiff was confined in the RHU. As a result, Plaintiff alleges that he did not eat during that fifteen day period, and that Defendant Beringer falsified the log book during that time, stating that Plaintiff had eaten when he had not. (ECF No. 23, Amended Complaint, at ¶ 82).

An Eighth Amendment violation may occur if a prison official serves "unsanitary, spoiled or contaminated food." Robles v. Coughlin, 725 F.2d 12, 15 (2d Cir. 1983). Prisoners must receive "nutritionally adequate food that is prepared and served under conditions which do not present an immediate danger to the health and well[-]being of the inmates who consume it." Id., citing Ramos v. Lamm, 639 F.2d 559, 571 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981)). "[O]nly a substantial deprivation of food to a prisoner sets forth a viable Eighth Amendment claim." Lindsey v. O'Connor, 327 F. App'x 319, 321 (3d Cir. 2009).

Here, Plaintiff's allegations against Defendant Beringer are sufficient to survive Defendants' motion to dismiss. See Rodriguez v. Wetzel, 2015 WL 1033842, at *11 (W.D. Pa. Mar. 9, 2015) ("[T]he Eighth Amendment's prohibition against cruel and unusual punishment is implicated" when prison officials systematically "den[y] a series of meals to an inmate over a span of weeks").

b. Length of RHU Confinement

The United States Court of Appeals for the Third Circuit has held that a prolonged term in administrative segregation (similar to the RHU) does not inflict an additional punishment without basis under the Eighth Amendment. Griffin, 112 F.3d at 709. In Griffin, a prisoner spent fifteen months in administrative segregation. Id. at 708. Here, Plaintiff spent only 108 days, or about four and a half months, in the RHU. Thus, as a matter of law, Plaintiff's 108-day stint in

the RHU was not so onerous as to state an Eighth Amendment claim upon which relief can be granted.[6]

c. Delaying Transfer to General Population and Failing to Accommodate Disabilities

Plaintiff claims that Defendants violated his Eighth Amendment rights by delaying his transfer to general population and failing to accommodate his deafness and partial blindness. To state such a claim, Plaintiff must show he was deprived of "the minimal civilized measure of life's necessities," or at least a "single, identifiable human need." Wilson, 501 U.S. 294, 305 (1991), citing Rhodes, 452 U.S. at 347. As noted earlier, such needs are "food, clothing, shelter, sanitation, medical care and personal safety." Griffin, 112 F.3d at 709.

The alleged delay in transferring Plaintiff to general population does not implicate a deprivation of either "the minimal civilized measure of life's necessities" or a "single, identifiable human need." There is little doubt Plaintiff's stint in the RHU was uncomfortable compared to living in SCI Albion's general population; however, the Constitution "does not mandate comfortable prisons." Rhodes, 452 U.S. at 349. Thus, Plaintiff's claim that prison officials violated his Eighth Amendment rights by delaying his transfer to general population will be dismissed.

Plaintiff's claim that prison officials' failed to reasonably accommodate his disabilities also falls short of an Eighth Amendment violation. Plaintiff is blind in his right eye, deaf in his left ear, and seventy-five percent deaf in his right ear. (ECF No. 23, Amended Complaint, at

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[6] The Court notes that Plaintiff attempts to state a Fourteenth Amendment claim based upon the same allegations supporting his Eighth Amendment claim (ECF No. 23, Amended Complaint, at ¶¶ 123-124); however, any attempted Fourteenth Amendment claim against the Defendants based upon the same facts as alleged to support the Eighth Amendment claim is barred by the doctrine set forth in Albright v. Oliver, 510 U.S. 266 (1994) (plurality) and Graham v. Connor, 490 U.S. 386 (1989); see also County of Sacramento v. Lewis, 523 U.S. 833, 843 (1998) (holding that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard applicable to that provision and not under the rubric of substantive due process)..

¶ 26). When Plaintiff was detained and re-incarcerated at SCI-Albion, he was not wearing his hearing aid in his right ear, and his requests to obtain one were denied. (Id. at ¶ 61). He was not given access to a hearing aid until November 2016. (Id.). Plaintiff also asked for his case to protect his specialized eye glasses, his vibrating watch (to alert him to the proper time to position himself in the RHU for requests), and a hearing-impaired-friendly phone for calls to his family and attorney. (Id. at ¶ 72). These requests were also denied. (Id. at ¶ 73). While prisons must provide adequate medical care, Griffin, 112 F.3d at 709, prison officials' denial of the accommodations Harris requested for his vision and hearing impairments did not deprive him of "the minimal civilized measure of life's necessities." Thus, Plaintiff's Eighth Amendment claim for failure to reasonably accommodate his disabilities will be dismissed.

d. Verbal and Emotional Abuse

Plaintiff claims that his Eighth Amendment rights were violated by Defendants' frequent verbal and emotional abuse. In particular, Plaintiff alleges that Defendant Norton taunted him about his attempt to transfer from the RHU to the general population, saying "[l]ook at [it] this way, at least you have a single cell in the RHU" (Id. at ¶ 51); Defendant Beringer called him "a nigger who doesn't deserve anything" (Id. at ¶ 81); and unnamed prison officials would often refer to his previous lawsuit by joking "[n]ext time, we're going to sue him." (Id. at ¶ 91).

"It is well settled that verbal harassment of a prisoner, although deplorable, does not violate the Eight Amendment." Robinson v. Taylor, 204 Fed.Appx. 155, 156 (3d Cir. 2006) (citations omitted); Richardson v. Sherrer, 344 Fed.Appx. 755, 757 (3d Cir. 2009); Lindsey v. O'Connor, 327 Fed.Appx. 319, 320 (3d Cir. 2009); Burdos v. Canino, 641 F. Supp. 2d 443, 455 (E.D. Pa. 2009) ("threats and offensive language are not actionable under § 1983"). Thus, Plaintiff's Eight Amendment claim for verbal and emotional abuse will be dismissed.

4. First Amendment Retaliation Claims

Prisoners alleging retaliation for exercising their First Amendment rights must show three elements: (1) the conduct leading to the retaliation was constitutionally protected; (2) the prisoner endured an adverse action by prison officials; and (3) the exercise of a constitutional right was a substantial or motivating factor in the alleged retaliatory action. Rauser v. Horn, 241 F.3d 330, 333–34 (3d Cir. 2001). If a prisoner shows the three retaliation elements, prison officials "may still prevail by proving that they would have made the same decision absent the protected conduct for reasons reasonably related to a legitimate penological interest." Id. at 334.

An adverse action is sufficient "'to deter a person of ordinary firmness from exercising his First Amendment rights.'" Allah v. Seiverling, 229 F.3d 220, 225 (3d Cir. 2000), quoting Suppan v. Dadonna, 203 F.3d 228, 235 (3d Cir. 2000). "'Government actions, which standing alone do not violate the Constitution, may nonetheless be constitutional torts if motivated in substantial part by a desire to punish an individual for exercise of a constitutional right.'" Allah, 229 F.3d at 224 quoting Thaddeus-X v. Blatter, 175 F.3d 378, 386 (6th Cir. 1999) (en banc). It "need not be great in order to be actionable" but must be "more than de minimus." McKee v. Hart, 436 F.3d 165, 170 (3d Cir. 2006) (internal quotations and emphasis omitted).

To prove that a protected activity was a substantial or motivating factor in an alleged retaliatory action, a plaintiff must show "(1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or (2) a pattern of antagonism coupled with timing to establish a causal link." Watson v. Rozum, 834 F.3d 417, 424 (3d Cir. 2016). "[T]he timing of the alleged retaliatory action must be 'unusually suggestive' of retaliatory motive before a causal link will be inferred." Estate of Smith v. Marasco, 318 F.3d 497, 512 (3d Cir. 2003) (internal quotation marks omitted) quoting Krouse v. Am. Sterilizer Co., 126 F.3d 494, 503 (3d Cir. 1997). When temporal proximity is not close enough to unduly

suggest a retaliatory motive, the test is "timing plus other evidence." Farrell v. Planters Lifesavers Co., 206 F.3d 271, 280 (3d Cir. 2000).

First, it is beyond dispute that Plaintiff has alleged that he engaged in constitutionally protected conduct by virtue of the 22 grievances he allegedly filed during his RHU confinement, in addition to numerous written requests (ECF No. 23, Amended Complaint, at ¶¶ 96, 98).

Second, Plaintiff has sufficiently alleged that he suffered an adverse action in the form of his prolonged detention in the RHU, among other things, which would arguably deter a person of ordinary firmness from exercising his First Amendment rights. In particular, Plaintiff has adequately alleged that Defendants Norton and Adams purposely delayed the processing of his Z-code paperwork to move him from the RHU to general population, and that Defendant Beringer allegedly fabricated a misconduct charge against him to keep him in the RHU, as well as tampered with his food for a fifteen day period, which would also be considered an adverse action.

Finally, Plaintiff has sufficiently alleged a pattern of antagonism coupled with temporal proximity between his protected activity and said Defendants allegedly retaliatory conduct, to satisfy the third prong of his retaliation claim. Thus, the Court finds that Plaintiff has sufficiently alleged a *prima facie* case of retaliation against Defendants Norton, Adams, and Beringer to avoid dismissal at this early stage of the proceeding.

5. ADA Title II and RA Claims

Plaintiff claims that Defendants have refused to provide him reasonable accommodations for his disabilities and have discriminated against him in violation of both the Rehab Act and the

ADA.[7]

Title II of the ADA provides, in relevant part, that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services or activities of a public entity or be subjected to discrimination by such entity." 42 U.S.C. § 12132. The term "public entity," as defined by Title II of the ADA, does not include individuals. 42 U.S.C. § 12131(1). Thus, the law is clear that individuals, sued in their official capacities, are not "public entities" under the ADA and are not subject to liability thereunder. Emerson v. Thiel College, 296 F.3d 184, 189 (3d Cir. 2002) (individuals are not subject to liability under Titles I or II of the ADA). Accordingly, Plaintiff's ADA and Rehab Act claims against the Defendants in their individual capacities are barred as a matter of law and will be dismissed.

Nonetheless, the Third Circuit has recognized the right to sue state officials under the ADA and Rehab Act to the extent a plaintiff seeks prospective injunctive relief against the state officials acting in their official capacities. Koslow v. Commonwealth of Pa., 302 F.3d 161, 178 (3d Cir. 2002). In this case, Plaintiff seeks prospective injunctive relief in the form of an order "requiring Defendants to make reasonable accommodations for [his] disabilities, including, but not limited to, providing him with an accessible telephone device." (ECF No. 23, Amended Complaint, at ¶ 128). Thus, the Court must determine whether Plaintiff has set forth sufficient allegations to satisfy the standards of the ADA (and the Rehab Act) to maintain an action for prospective injunctive relief.

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[7] The substantive standards for determining liability under the ADA and the Rehab Act are identical and are subject to the same analysis by the courts. McDonald v Pennsylvania, 62 F.3d 92, 95 (3d Cir. 1995); Sherer v. Pennsylvania Dept. of Corr., 2007 WL 4111412, at *8 (W.D.Pa. 2007) (citation omitted). Thus, the Third Circuit Court of Appeals has found that they are appropriately considered in tandem. Pennsylvania Protection and Advocacy, Inc. v. Pennsylvania Dept. of Public Welfare, 402 F.3d 374, 379 n.3 (3d Cir. 2005). Accordingly, only the ADA claim will be addressed here, with the understanding that the same analysis holds true for the Rehab Act claim.

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by any such entity." 42 U.S.C. § 12132; Iseley v. Beard, 200 Fed.Appx. 137, 142 (3d Cir. 2006). Here, Defendants assert that Plaintiff falls short of stating a claim under the ADA because he does not allege that the failure to accommodate his alleged disabilities precluded him from participating in a service, program, or activity. In particular, Plaintiff alleges that, due to the failure to accommodate his disabilities, he was regularly denied the opportunity to make daily requests for showers, haircuts, shaves, and trips to the yard (ECF No. 23, Amended Complaint, at ¶¶ 65-69). As to these allegations, the Court agrees with Defendants that Plaintiff has failed to state a claim under the ADA. See Thomas v. Pennsylvania Dept. of Corrections, 615 F.Supp.2d 411, 427 (W.D.Pa. 2009), citing Bryant v. Madigan, 84 F.3d 246, 248 (7th Cir. 1996) ("using the toilet, sink and shower facilities or being able to dress oneself, are not programs or activities as contemplated by Title II of the ADA any more than sleeping is").

However, the same cannot be said of Plaintiff's allegation that he was denied access to a hearing-impaired telephone, as the use of a telephone may be properly considered a service provided by the institution. See 28 C.F.R. § 35.104(1); Chisholm v McManimon, 275 F.3d 315, 329 (3d Cir. 2001) (upholding claim under Title II of the ADA, holding that "[to] the extent that other non-disabled inmates had access to communication by telephone, [the prison] was required to provide [the plaintiff] with such access on nondiscriminatory terms"); Gallagher v. Allegheny County, 2011 WL 284128 at *8 (W.D.Pa. Jan. 25, 2011). In addition, Plaintiff's complaint that he was denied the use of a vibrating watch to alert him to the proper time to position himself in the RHU for requests is also sufficient to raise an ADA claim because such denial conceivably

impacted Plaintiff's ability to request participation in a service, program, or activity. Thus, Defendants' motion to dismiss Plaintiff's ADA and Rehab Act claims based upon Defendants' denial of access to a hearing-impaired telephone and a vibrating watch will be denied to the extent Plaintiff seeks prospective injunctive relief. The only question remaining is against whom shall such claim be allowed to proceed? According to Plaintiff's allegations, the only two Defendants who are specifically implicated in the denial of access to a hearing-impaired telephone are Defendants Giroux and Kosinski. (ECF No. 23, Amended Complaint, at ¶¶ 72-73, 79). Thus, Plaintiff's ADA and Rehab Act claims for prospective injunctive relief will be allowed to proceed against Defendants Giroux and Kosinski, in their official capacities, at this early stage of the proceeding.[8]

An appropriate Order will follow.

/s/ Susan Paradise Baxter
SUSAN PARADISE BAXTER
United States Magistrate Judge

Dated: July 19, 2017

[8] The Court notes that it is unlikely either Defendant Giroux or Defendant Kosinski is in a position to provide the relief requested if Plaintiff is ultimately successful in proving his claim, particularly since Defendant Giroux is no longer the Superintendent at SCI-Albion; however, it is not the Court's responsibility to determine the individual(s) against whom Plaintiff may obtain the relief he requests. It is incumbent upon Plaintiff to ascertain the appropriate individual(s) through discovery and to amend the complaint accordingly, if necessary.