UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

EDWARD CABLE Plaintiff, v. PATRICIA A. COYNE-FAGUE, Et al	)	C.A. No. 1:17-cv-590-MSM-PAS

MEMORANDUM AND ORDER

Mary S. McElroy, United States District Judge.

The Plaintiff is a prisoner in the custody of the State of Rhode Island, confined at the Adult Correctional Institutions, serving a sentence of imprisonment for twenty-four (24) years. In a Complaint filed initially in 2017, and amended after counsel was appointed for him, he alleged that he has been held in solitary confinement for more than eight (8) of the thirteen-and-one-half (13-1/2) years since his initial imprisonment in 2004. He maintains that as a direct result of such a lengthy period under the conditions of solitary confinement[1] he has developed extreme mental

[1] In summary, Mr. Cable describes those conditions as 23-hour isolation from other inmates while confined to an 80-sq. ft. cell, release from that cell for only one hour per day to a chainlink fenced cage, denial of commissary items, visitations, and telephone calls to varying degrees, and denial of rehabilitative and educational programming. The only human contact, he alleges, is through a slot in the door. ECF No. 54, ¶¶18-22. Except that Mr. Cable does not allege that the lights are kept on 24/7, these conditions seem virtually identical to those described as "extreme isolation" in *Wilkinson v. Austin,* 545 U.S. 209, 214, 125 S.Ct. 2384, 2389, 162 L.Ed.2d 174 (2005) ("inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact.") *Wilkinson* concerned only procedural due process,

illness, with escalating physical and emotional symptoms, and that the Defendants have, with "deliberate indifference,[2]" caused him to live in a persistent and indefinite cycle of worsening mental health which, in turn, causes him to engage in obstructive behavior which then results in additional discipline and longer and more frequent solitary confinement, thus escalating his aberrant behavior. He contends his right under the Eighth Amendment to the United States Constitution to be free from cruel and unusual punishment, his corresponding right under R.I.Const.Art.I §8 to be free from cruel punishment, and his rights as a disabled person protected by the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101, and the Rehabilitation Act, 29 U.S.C. §794, have all been violated.

The defendants, all Department of Corrections officials, admit that Mr. Cable has been held for multiple periods in solitary confinement, but have moved to dismiss,

---

however, and the Supreme Court held unanimously that the conditions of confinement were such a significant departure from ordinary conditions that they implicated a due process interest worthy of protection. *Id.,* 545 U.S. at 229, 125 S.Ct. at 2398 (finding procedurally adequate Ohio's multi-level detailed system of classification). *Wilkinson* pointedly noted, however, that there was no Eighth Amendment claim before it, and that "[i]f an inmate were to demonstrate that the new Policy did not in practice operate in this fashion, resulting in a cognizable injury, that could be the subject of an appropriate future challenge." *Id.,* 545 U.S. at 230, 125 S.Ct. at 2398.

In *DuPonte v. Wall,* 288 F. Supp.3d 504, 510 (D.R.I. 2018), another judge in this District described conditions of disciplinary segregation in the same institution in similar terms. In this case, however, Cable adds allegations that, as a person with diagnosable mental illness, he is denied adequate psychiatric and psychological services. Complaint, ECF No. 26, ¶54(g).

[2] "Deliberate indifference" is defined as "the equivalent of recklessly disregarding [a substantial risk of serious harm] ... of which [the defendant] is aware." *Farmer v. Brennan,* 511 U.S. 825, 836-37, 114 S.Ct. 1970, 1979, 128 L.E.2d 811 (1994).

(MTD #1, ECF No. 28) throwing a kitchen sink of defensive allegations, including, *inter alia,* failure to state a claim upon which relief can be granted as to each defendant, qualified immunity, failure to waive sovereign immunity, statute of limitations, and failure to allege a physical injury under the Prisoner Litigation Reform Act.[3] Even further, the defendants contend that the DOC and the state employees are improper defendants in a lawsuit brought pursuant to 42 U.S.C.A. § 1983, and that there is a mismatch between the capacities in which the defendants were sued and the relief requested. A second and third Motion to Dismiss (MTD 2 and 3, ECF Nos. 46-1, 51) also contend that defendants Wall, Weeden and Dinitto were not timely served in their individual capacities.

With respect first to the substantive grounds for dismissal, the Court has reviewed the Amended Complaint, and the many memoranda relative to the Motion to Dismiss. I find the defendants' claims generally without merit. The "plausible on its face" standard of *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 863 (2009), applies to all these claims.[4] *DuPonte v. Wall,* 288 F. Supp.3d 504, 512 (D.R.I. 2018) (Eighth Amendment claim). *See Medina-Rodriguez v. Farmacia Medina Inc.,* 302 F. Supp.3d 479, 482 (D. P.R. 2017) (standard under ADA); *Kelley v. Mayhew,* 973 F. Supp.2d 31, 40 (D. Me. 2013) (same standard under

---

[3] 42 U.S.C.A. § 1997(e).

[4] The Plaintiff seeks only injunctive relief (and costs and fees) from the violation he asserts of R.I.Const.Art. I §8, thus making unnecessary an inquiry into whether that provision affords a tort-like cause of action or would impose a higher standard in an action for damages. *Cf. Bandoni v. State,* 715 A.2d 580, 594 (R.I. 1998) (no private cause of action for damages under R.I.Const. art. I §23).

Rehabilitation Act). I find the pleading of the Amended Complaint satisfies this criterion. With *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994), as the Eighth Amendment touchstone, the Complaint sets forth conditions of confinement which, if proven, would constitute a deprivation "objectively, 'sufficiently serious,'" to constitute a "denial of the 'minimal civilized measure of life's necessities.'" *Farmer*, 511 U.S. at 834, 114 S.Ct. at 1977.[5]

With respect to the remaining claims of defense as a matter of law relative to the pleading, such as qualified immunity, failure to waive sovereign immunity, and the like, I find all but one, discussed below, unpersuasive. Although the Complaint could be more specific with respect to the conduct of each defendant individually, I find it has alleged sufficiently specific facts against "the defendants" to withstand the relatively low *Iqbal* threshold of sufficiency. The defendants do correctly point out a lack of precise correlations between the capacities in which each defendant is sued and the relief requested. The limitations of relief are well known. *Guillemard-Ginorio v. Contrera-Gomez,* 585 F.3d 508 (1st. Cir. 2009). Damages lie only against defendants in their individual capacities; injunctive relief is appropriate as against defendants sued in their official capacities. *Tang v State of R.I., Dept. of Elderly Affairs,* 904 F. Supp. 55, 60 (D.R.I. 1995). I will construe the Complaint to effectuate a limitation of remedies to those defendants against whom they are appropriate.

---

[5] While there is not a body of caselaw applying the "cruel punishment" prohibition in the Rhode Island Constitution, the Rhode Island Supreme Court has held that the phrase is the equivalent of the Eighth Amendment's prohibition against "cruel and unusual punishment." *State v. Monteiro,* 924 A.2d 784, 795 (2007).

Duart v. Mici, Civil Action No. 19-12489-LTS, 2020 WL 488559 at *2 (D. Mass. Jan. 30, 2020) (examining the substance of the pleadings to construe the complaint to assert individual capacity claims for damages and individual and official capacity claims for injunctive relief.)

The defendants have correctly asserted that the state is not a "person" under 42 U.S.C. § 1983. *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 71, 109 S.Ct. 2304, 2312 (1989). I therefore GRANT the Motion to Dismiss the R.I. Department of Corrections as a defendant from Counts I and Count II.

Finally, the defendants have raised a procedural objection to the timeliness of service. All defendants were sued in both their individual and official capacities. Individual capacity service, however, was initially made only against defendant Cloud; on March 27, 2018, DOC senior legal counsel accepted service for him in his individual capacity only. (ECF No. 13.) Service was made on Wall, Weeden and Dinitto on March 9, 2018, with the Attorney General accepting service for them only in their official capacities, presumably refusing to accept for them individually. (ECF Nos. 10-1, 10-2 and 10-3.) Service in their individual capacities against Wall, Weeden and Dinitto was not made until November 6, 2019 (ECF Nos. 43, 44 and 48). By that time, the plaintiff had requested, by motion filed on October 24, 2019, a 90-day extension of time from this Court (ECF No. 38). He alleged in his memorandum that he had been unsuccessful in attempts with DOC to achieve individual service in a way that would not compromise personal information of the individual involved.

(ECF No. 38-1). On October 28, 2019, the Court granted that motion to extend by text order.

Soon thereafter, on November 6, 2019, the plaintiff served Wall, Weeden and Dinitto, with service accepted by DOC legal counsel in their individual capacities. (ECF Nos. 43, 44 and 48).

There are now pending three motions filed by the defendants which, *inter alia,* seek dismissal because of the November 6th late service. (ECF Nos. 28, 42 and 51). It should be noted that even though the plaintiff's motion for extension, filed on October 24, 2019, was granted by text order on October 28, 2019, before any response was received, there has at no time been a motion to vacate the October 28th Order. Instead, members of the Attorney General's staff promptly filed notices of appearance to represent all three defendants in their individual capacities. (ECF Nos. 40, 41, 49, 50).

In any event, the granting of that extension to effectuate service was correct. Fed. R. Civ. P. 4(m) allows a court *sua sponte* or on motion to extend the time within which service must be made, even if there was no good cause for the failure to serve on time. *Gray v. Derderian*, No. C.A. 04-3121, 2007 WL 296212 at *2 (D. R.I. Jan. 26, 2007). That is true regardless of whether the original time has already expired. *Id.* at *3 (no motion for extension filed until nearly five months after expiration of original period). In this case, the Amended Complaint was filed on May 18, 2019. While it is true that by that time, the plaintiff was no longer *pro se*, several factors weighed in favor of granting extended time. First, each defendant was served in some

capacity with the original Complaint in the Spring of 2018, while the plaintiff was acting *pro se*. That original Complaint, while filed on the court's *pro se* prisoner form, and therefore not identifying formally all legal grounds for relief, did plead in detail the essential facts that are repeated in the Amended Complaint. Thus all defendants have been on notice of the grounds for the lawsuit and the general claims against them. Second, the problem here arises because the state has in the past made a decision about acceptance of service based on the capacity in which its employees are sued, as if an individual capacity defendant is a different person than an official capacity one – as if service is made only into the employee's "individual" left hand and not his "official" right hand when handed to him. Thus, when service was first made by the plaintiff, who was *pro se* at the time, DOC's limited acceptance of the papers created a problem. (ECF Nos. 10-1, 10-2, 10-3.) Third, it appears *pro se* prisoners were further hampered at the time by the question of whether service would be accepted by DOC (individual capacity) or the Attorney General (official capacity).

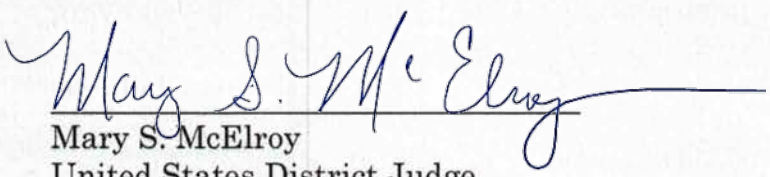
Since that time, in a positive development, these issues have presumably been eliminated. Rhode Island Attorney General has entered into an agreement with the District Court to accept service for plaintiffs granted IFP status for all state employees and state departments through NEF electronic notice, unless there is cause for specifically declining. *See* Agreement, effective May 1, 2019.

This is a non-frivolous lawsuit. *Gray*, 2007 WL 296212 at *4. Considering that no cause need be shown to grant additional time for service under Rule 4(m), and in light of the fact that the Agreement will hopefully obviate this kind of problem in the

future, I find that the plaintiff made individual service pursuant to an extension previously granted, and that the various motions to dismiss based on late service should be DENIED.

The defendants' Motion to Dismiss the Department of Corrections from Counts I and II is GRANTED. It is DENIED with respect to all other contentions.

IT IS SO ORDERED.



Mary S. McElroy
United States District Judge

2/5/2020