IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISON

BASIL MOHANDIE,	)	
	)	
Plaintiff,	)	No. 3:17-cv-50355
	)	
v.	)	Honorable Iain D. Johnston
	)	
JOHN VARGA, and WEXFORD HEALTH SOURCES, INC.,	)	
	)	
Defendants.	)	

DEFENDANT JOHN VARGA'S RESPONSE TO ORDER TO SHOW CAUSE

Defendant, John Varga in his official capacity as Warden of the Dixon Correctional Center ("Warden")[1], by and through his attorney Kwame Raoul, Attorney General for the State of Illinois, and pursuant to this Honorable Court's Order to Show Cause, ECF No. 96, states as follows:

BACKGROUND

On May 10, 2019, Plaintiff filed his Second Amended Complaint ("SAC"). ECF No. 54. On July 23, 2019, Warden filed his motion to dismiss. ECF No. 67. On March 18, 2021, this Honorable Court entered an Order to Show Cause directing the parties to respond to two issues that would defeat standing: 1) mootness of injunctive relief because of Plaintiff's transfer from Dixon Correctional Center ("DCC") to Joliet Treatment Center ("JTC"); and, 2) unavailability of monetary relief because of State Sovereign Immunity and a lack of injury-in-fact. Order to Show Cause ("Order"), ECF No. 96.

[1] John Varga is no longer the Warden of Dixon Correctional Center. Pursuant to FED. R. CIV. P. 25(d), Sonja Nicklaus, the current Warden of Dixon Correctional Center, should be automatically substituted, in her official capacity as Warden of Dixon Correctional Center in place of John Varga.

ARGUMENT

First, Plaintiff's transfer from DCC to JTC moots his claim for injunctive relief against Warden because the Warden is unable to provide any injunctive relief for an inmate housed at a separate facility. Second, Plaintiff's claim for monetary damages against Warden must fail because the claim does not allege unconstitutional conduct that would sustain abrogation of State Sovereign Immunity pursuant to section five of the Fourteenth Amendment.

1. Injunctive Relief

Plaintiff's SAC does not specify the requested injunctive relief. Instead, it merely requests, "appropriate injunctive relief…." SAC, ECF No. 54, P. 6 Prayer for Relief. Any possible injunctive relief must, "extend no further than necessary…." 18 U.S.C. § 3626(a)(1). The SAC alleges, "Plaintiff will be in imminent danger of attack if he is placed in a two-person cell." SAC, ¶ 25. Thus, the only potentially appropriate injunctive relief would be an order requiring Warden house Plaintiff in a one-person cell. However, Plaintiff is no longer housed at DCC.

Courts must dismiss as moot claims or defendants from complaints filed by prisoners when those prisoners transfer facilities. *See e.g., Santiago v. Wells*, 196 Fed. Appx. 416, 417 (7th Cir. 2006); *Lehn v. Holmes*, 364 F.3d 862, 871 (7th Cir. 2004); *Higgason v. Farley*, 83 F.3d 807, 811 (7th Cir. 1996). Here, Plaintiff contends that because he is still in the custody of the Illinois Department of Corrections ("IDOC") his claim is not moot, and Warden bears the "formidable burden" of proving mootness. Response to Order to Show Cause ("Plaintiff's Response") ECF No. 98, P. 2. Plaintiff quotes *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) for that claim. *Id*. This citation is wholly inapposite. *Already LLC* quotes *Friends of the Earth, Inc. v. Laidlaw*

Environmental Services (TOC), Inc., 528 U.S. 167, 190 (2000) thusly, "a *defendant claiming that its voluntary compliance moots* a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 91 (emphasis added). Warden is not claiming that his "voluntary compliance" moots the request for injunctive relief; in fact, Warden is not even claiming there was any "voluntary compliance" in the first instance. This is not a case where Warden has moved Plaintiff to a single-cell in the Warden's institution and thus retains the ability to move Plaintiff to a double-cell once this litigation concludes. Rather, in this case, Warden is entirely unable to exercise any discretion or control over Plaintiff because Plaintiff is no longer in the Warden's custody or control. Neither the IDOC, JTC nor any employee at JTC is a Defendant in this action and therefore cannot be enjoined by this Honorable Court. FED. R. CIV. P. 65(d). Thus, the claim for injunctive relief is moot.

2. Damages

As this Honorable Court stated in its Order, "[c]laims for monetary relief against state officials in their official capacities are barred by the Eleventh Amendment. *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). Thus, Plaintiff's only option, when suing Warden Varga in his official capacity, is to request injunctive relief." Order, P. 2. Although it might be possible for Plaintiff to sustain an official capacity claim for monetary damages pursuant to the Americans with Disabilities Act ("ADA") or Rehabilitation Act ("RA"), Warden disagrees with Plaintiff's analysis to the extent it implies *any* cause of action purportedly brought under the ADA or RA will defeat State Sovereign Immunity.

Section five of the Fourteenth Amendment enables Congress to enforce the Fourteenth Amendment through "appropriate legislation." The Supreme Court has balanced State Sovereign

Immunity and Congress's Fourteenth Amendment power by limiting Congress's ability to abrogate State Sovereign Immunity to conduct that violates the Constitution. *Tennessee v. Lane*, 541 U.S. 509, 520 (2004). Thus in *Tennessee v. Lane*, the Supreme Court upheld a right of action for monetary damages against the State of Tennessee under the ADA, but specifically limited their holding to the context of constitutionally mandated court access. *Id*. at 530-31. The Supreme Court extended this analysis to the prisoner context in the case of *United States v. Georgia*, 546 U.S. 151, 159 (2006) and held, "insofar as Title II [of the ADA] creates a private cause of action for damages against the States for conduct that actually violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity." The lower courts were ordered to,

> determine in the first instance, on a claim-by-claim basis, (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid." *Id*.

Here, none of the State's conducted violated Title II. As the SAC makes clear, any alleged misconduct relating to Plaintiff's cell classification was perpetrated by Defendant Wexford or its employees or agents. SAC, ¶¶ 14, 16, 18, 19, 20, and 23. Plaintiff's Response further states,

> plaintiff suffered harm because of the negligence of a Wexford employee (a state law claim set out in Paragraphs 14-21 of the Second Amended Complaint) and because of Wexford's failure 'to have adopted and enforced policies to require accurate appraisals by its employees of the ability to engage in conversation and express concerns and needs.'" ECF No. 98, P. 3.

Thus, according to both the SAC and Plaintiff's Response to the Order, Warden did not violate Title II of the ADA.

Second, neither Warden nor the State violated Plaintiff's Constitutional rights. Perhaps the most important allegation in the SAC is contained in paragraph 25 which states, "Plaintiff *will* be in imminent danger of attack *if* he is placed in a two-person cell." SAC, ¶ 25. (emphasis added). The Eighth Amendment requires prison employees to protect inmates from harm. A plaintiff must allege that "he is incarcerated under conditions posing a substantial risk of serious harm." *Brown v. Budz*, 398 F.3d 904, 910 (7th Cir. 2005). A "substantial risk" means "risks so great that they are almost certain to materialize if nothing is done." *Id*. at 911. Plaintiff has merely, conclusory pled he "*will* be in imminent danger *if* he is placed in a two-person cell." SAC, ¶ 25. (emphasis added). Such conclusory and conditional pleading is insufficient to state a claim under the Eighth Amendment.

The third and final element from *United States v Georgia* is not applicable in this case because Warden's conduct did not violate Title II. 546 U.S. at 159. Therefore, under the analysis compelled by *United States v. Georgia*, the conduct alleged by Plaintiff is insufficient to invoke the ADA and RA's abrogation of State Sovereign Immunity allowed by section five of the Fourteenth Amendment state a claim for monetary damages against any Defendant acting in their official capacity as a state employee.

CONCLUSION

Plaintiff is no longer housed at the facility Warden operates and no one operating or employed at Plaintiff's current institution is a Defendant in this case. Thus, this Honorable Court is precluded from ordering any injunctive relief and the claim for injunctive relief is moot. Plaintiff's allegations in the SAC do not raise a Constitutional concern that would justify the abrogation of State Sovereign Immunity. Thus, Plaintiff is

not entitled to monetary damages. Consequently, Plaintiff has no injury that can be redressed by this Court and no standing to sue Warden in his official capacity.

April 23, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on April 23, 2021, he electronically filed the foregoing document with the Clerk of the Court for the United States District Court for the Northern District of Illinois using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ James Robinson