

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

TIMOTHY PURCELL : CIVIL ACTION
 :
 v. :
 :
 PENNSYLVANIA DEPARTMENT of :
 CORRECTIONS and MARTIN F. HORN : NO. 95-6720

MEMORANDUM and ORDER

Norma L. Shapiro, J.

January 9, 1998

Plaintiff Timothy Purcell ("Purcell") is in the custody of the Pennsylvania Department of Corrections ("DOC"). Purcell, claiming discrimination under Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131-12134, filed this action against defendants DOC and Martin F. Horn ("Horn"), Commissioner of the DOC (collectively the "defendants"). Purcell seeks compensatory and punitive damages and injunctive relief. Defendants have filed a motion and a supplemental motion for summary judgment. For the reasons stated below, those motions will be granted in part and denied in part.

FACTS

I. Tourette's Syndrome

A. Nature of Purcell's Tourette's Syndrome

Purcell has been diagnosed as suffering from Tourette's Disorder, also known as Tourette's Syndrome ("Tourette's"). See Report of Michael N. Rubenstein, M.D., at 3-4, attached as Ex. 4 to Pltff.'s Mem. Opp. Summ. J. ["Dr. Rubenstein Report"]; Dep. of Edward A. Carney, M.D., at 7-8, attached as Ex. 5 to Pltff.'s

Mem. Opp. Summ. J. ["Dr. Carney Dep."]. Tourette's is a neurological impairment characterized by motor and verbal tics and coprolalia.¹ See Dr. Rubenstein Report at 3.

Purcell frequently displays both motor and verbal tics. See Dr. Rubenstein Report at 2-3; Dr. Carney Dep. at 7-8, 12; Dep. of Harold Pascal, M.D., at 10-11, attached as Ex. 6 to Pltff.'s Mem. Opp. Summ. J. ["Dr. Pascal Dep."]; Dep. of Nicholas Martyak, M.D., at 11, 15, 37-38, attached as Ex. 3 to Pltff.'s Mem. Opp. Summ. J. ["Dr. Martyak Dep."]. Purcell cannot control his Tourette's symptoms and they occur at unpredictable times; the intensity and character of the attacks vary, but the attacks are most severe when Purcell is under stress, excited or angry. See Dr. Rubenstein Report at 6; Dr. Martyak Dep. at 15-16; Dep. of John L. Young, M.D., at 39, attached as Ex. 8 to Pltff.'s Mem. Opp. Summ. J. ["Dr. Young Dep."]. These conditions necessarily impair Purcell's ability to interact with others because they are "unavoidable for him and often misunderstood and misconstrued." Dr. Rubenstein Report at 6.

Purcell's Tourette's also has manifested itself in Obsessive

¹ Motor tics generally consist of involuntary and uncontrollable facial or body twitches. Verbal tics often include clicks, grunts and shouts of obscenities. See Pltff.'s First Request for Admissions and Defs.' Response, No. 7, attached as Ex. 2 to Pltff.'s Mem. Opp. Summ. J. ["Defs.' First Admissions"]. Coprolalia is "the use of foul language, particularly of words relating to the feces." Dorland's Illustrated Medical Dictionary 358 (25th ed. 1974).

Compulsive Behavior and Attention Deficit Disorder. These conditions cause Purcell to act in a compulsive and impulsive manner and limit his ability to think or concentrate. See id. Stressful situations worsen Purcell's Tourette's and make concentration and thinking even more difficult. See id. at 7; Dr. Martyak Dep. at 51.

Purcell has difficulty suppressing his verbal and motor tics. While he is able to do so for short spans of time, it is uncomfortable later and he must "explode" by releasing the built-up tics. See Dr. Martyak Dep. at 17; Dep. of Nuhad Kulaylat, M.D., at 21, attached as Ex. 10 to Pltff.'s Mem. Opp. Summ. J. ["Dr. Kulaylat Dep."]. It is important for someone with Tourette's to release these symptoms in private to avoid the embarrassment of "exploding" in front of others. See Dr. Kulaylat Dep. at 21.

B. Accommodation for Purcell's Tourette's Syndrome

At all relevant times Purcell was housed in a single-person cell at the State Correctional Institute at Mahanoy ("Mahanoy"). On January 13, 1995, Dr. Carney authorized an "infirmary message" to Purcell that permitted him to return to his cell when he had to release his tics and to remain there until the tics dissipated. See Infirmary Message, attached as Ex. 11 to Pltff.'s Mem. Opp. Summ. J. ["Infirmary Message"]. The purpose of this infirmary message was to permit Purcell to release his

Tourette's tics in private, not in the presence of other inmates.²

During June, 1995, Brenda Lee Shelp ("Shelp"), Unit-A manager, reported that Purcell was defiant and "hiding behind [the Tourette's] in order not to deal with situation at hand." Cumulative Adjustment Record, attached as Ex. 14 to Pltff.'s Mem. Opp. Summ. J. ["Adjustment Record"]. Purcell, claiming discrimination by prison staff because of his Tourette's, submitted a written complaint to Superintendent Martin L. Dragovich ("Superintendent Dragovich"). See Letter from Purcell to Dragovich, dated June 5, 1995, attached as Ex. 15 ["Purcell Letter"]. Superintendent Dragovich, denying discrimination against Purcell, responded that Purcell should "stop your Tourette Syndrome as a convenient excuse to control your environment." Letter from Dragovich to Purcell, dated June 5, 1995, attached as Ex. 16 to Pltff.'s Mem. Opp. Summ. J. ["June 5, 1995 Dragovich Letter"]. Superintendent Dragovich wrote a second letter: "[W]e are not going to allow you to hide behind your Tourette Syndrome diagnosis. You would use it to explain away your problems with staff. You have got to learn that you are to follow lawful orders and not 'pick and choose' using Tourette

² Previously Purcell allegedly had been subjected to "ridicule" and "assaults by guards, inmates who didn't understand Tourette's." Dep. of Timothy Purcell at 230, attached as Ex. 2 to Defs.' Mem. Supp. Summ. J. ["Purcell Dep."].

Syndrome to explain your inability to do what is expected."

Letter from Dragovich to Purcell, dated June 6, 1995, attached as Ex. 17 to Pltff.'s Mem. Opp. Summ. J. ["June 6, 1995 Dragovich Letter"].

On November 7, 1995, Purcell attended his daily class in Computer Aided Drafting and Design ("CADD") at 8:00 a.m. Purcell had been placed on the "call sheet" for an 8:30 a.m. appointment with Harold Heckman, M.D. ("Dr. Heckman"), a private psychiatrist under contract to provide psychiatric services at Mahanoy. Purcell had not requested the appointment with Dr. Heckman; this appointment was a follow-up appointment scheduled by the medical staff. See Dep. of Elizabeth Puglia at 14, 22, attached as Ex. 21 to Pltff.'s Mem. Opp. Summ. J. ["Puglia Dep."].

At about 9:00 a.m., Elizabeth Puglia ("Puglia"), a nurse at Mahanoy, reported to Corrections Officer James Berlando ("Officer Berlando") that Purcell had not reported for his appointment. Puglia asked Officer Berlando to have Purcell report to the medical unit. See Berlando Dep. at 19-21.

Officer Berlando, not knowing where Purcell was at the time, did not remove Purcell from his CADD class. See Purcell Dep. at 284. As Purcell entered his cell block after leaving the classroom, Officer Berlando approached him and instructed Purcell to report to the medical unit. Purcell informed Officer Berlando he needed to return to his cell to release built-up tics

suppressed for the previous three hours.³

Officer Berlando ordered Purcell to report to the medical unit immediately either to see Dr. Heckman or to sign a release from medical treatment. Purcell refused and returned to his cell. Officer Berlando, charging Purcell with misconduct for failing to obey an order, immediately issued a written report.⁴ See Misconduct Report, attached as Ex. 23 to Pltff.'s Mem. Opp. Summ. J. ["Misconduct Report"].

Mary Canino ("Canino"), a prison hearing officer, conducted a hearing on Officer Berlando's charge on November 8, 1995. Purcell, responding to the charge and explaining his reasons for not reporting to the medical unit, submitted a written statement. Purcell stated he had a medical order to remain in his cell to alleviate the Tourette's problems. See Purcell's Statement, attached as Ex. 24 to Pltff.'s Mem. Opp. Summ. J. ["Purcell's Statement"].

Canino found Purcell guilty of misconduct for refusing to

³ Purcell offered other reasons for not following Officer Berlando's instructions: he was not feeling well, he had a pending lawsuit against members of the medical staff and did not trust them and he did not desire psychiatric care. See Purcell Dep. at 298-99.

⁴ Officer Berlando had discretion not to issue a written report; he could have issued a warning, counseled Purcell or provided for other non-punitive penalties. See Defs.' First Admissions, No. 8; Berlando Dep. at 28; Dep. of David DiGuglielmo at 48, attached as Ex. 7 to Pltff.'s Mem. Opp. Summ. J. ["DiGuglielmo Dep."].

obey Officer Berlando's order. Canino reported that Purcell "submitted no evidence of having an attack." Disciplinary Hearing Report, attached as Ex. 26 to Pltff.'s Mem. Opp. Summ. J. ["Hearing Report"]. Canino sanctioned Purcell to confinement to his cell for thirty days and canceled his access to the telephone and group therapy sessions during the thirty-day period. Canino permanently removed Purcell from the CADD class and the band. See Defs.' First Admissions, No. 33. Canino's sanctions delayed Purcell's ability to move to a less restrictive custody classification. See Inmate Handbook at 8-9. Purcell bases his Tourette's disability claim on the sanctions imposed after the November 7, 1995 event.

II. Degenerative Joint Disease

A. Nature of Purcell's Joint Disease

Purcell also suffers from degenerative joint disease in his knees, a herniated disc in his back and flat feet. See Dr. Young Dep. at 26; Dr. Martyak Dep. at 43; Report of Terrence P. Sheehan, M.D., at 6, attached as Ex. 28 to Pltff.'s Mem. Opp. Summ. J. ["Dr. Sheehan Report"]. These disabilities restrict Purcell's ability to stand and walk. See Dr. Martyak Dep. at 42-44, 53, 56; Dr. Kulaylat Dep. at 25, 38. Purcell's joint condition causes him to limp at times; the manifestation of symptoms depends on the weather and other external factors. See Dr. Martyak Dep. at 53.

B. Accommodations for Purcell's Joint Disease

Purcell was housed initially in Mahanoy's D-Unit, A-Pod ("D/A"). While in D/A, Purcell lived in a handicapped-accessible cell and used a handicapped shower.⁵ Because of Purcell's joint problems, Dr. Carney, a physician under contract to provide medical services at Mahanoy, provided Purcell with a "permanent written order" authorizing Purcell to remain seated on his bed during "counts."⁶ See Dep. of James Patrick Berlando at 13-14, attached as Ex. 22 to Pltff.'s Mem. Opp. Summ. J. ["Berlando Dep."]; Inmate Handbook at 5, attached as Ex. 27 to Pltff.'s Mem. Opp. Summ. J. ["Inmate Handbook"]. Counts at Mahanoy typically took four minutes, although recounts were sometimes necessary. See Berlando Dep. at 15.

After living in D-Unit for several months, Purcell learned that a new unit, known as A-Unit, was opening at Mahanoy. He submitted a request to transfer to the new unit to Superintendent Dragovich. Purcell desired to move to A-Unit to be closer to

⁵ The handicapped-accessible cell had a wider door and bars on the side of the toilet, sink and bed. The handicapped shower had a bench seat on which disabled prisoners could sit while bathing. See Purcell Dep. at 131-32.

⁶ A "count" occurs when prison guards circulate through a section of the prison to count the inmates. The prisoners normally are required to stand in front of their cell doors throughout the process. See Berlando Dep. at 13-14.

certain prison facilities.⁷ See Purcell Dep. at 150, 168-70. A-Unit, A-Pod ("A/A") had handicapped-accessible cells and a handicapped shower.

The Mahanoy medical department granted Purcell's request to move to a handicapped-accessible cell in A/A. Purcell's cell had grab bars near the sink and toilet; the handicapped shower had a bench seat on which he could sit. Dr. Martyak authorized Purcell to have a back brace, cane, arch support, knee brace and orthopedic boots. See Medical Restriction, dated January 23, 1995, attached as Ex. 29 to Pltff.'s Mem. Opp. Summ. J. ["January 23, 1995 Medical Restriction"].

On June 1, 1995, Dr. Martyak again authorized Purcell to remain seated on his bed during "counts." See Medical Restriction, attached as Ex. 31 to Pltff.'s Mem. Opp. Summ. J. ["Medical Restriction"]. A few days later, Dr. Martyak modified the authorization to permit Purcell to keep a plastic chair in his cell. See Medical Restriction, attached as Ex. 32 to Pltff.'s Mem. Opp. Summ. J. ["Medical Restriction II"]. Purcell was to sit on the plastic chair in front of his cell door during "counts" to be more visible to the patrolling guards.

On June 22, 1995, Shelp posted a "unit manager's memo"

⁷ A-Unit was located closer than D-Unit to the following facilities: the medical department, dining room, visiting room, property room, laundry room, library, chapel, school, gymnasium, music room and barber shop.

prohibiting inmates (except those with amputated limbs) from keeping chairs in their cells. See Defs.' First Admissions, No. 47. Shelp, when informed of Purcell's medical authorization, did not remove Purcell's chair from his cell.

On or about August 1, 1995, Shelp informed Purcell he had to move from his handicapped-accessible, single cell on A/A. She offered Purcell the choice of moving to a non-handicapped-accessible, double cell on A/A or a non-handicapped-accessible, single cell on A-Unit, B-Pod ("A/B"). Shelp demanded an immediate answer from Purcell. See Defs.' First Admissions, No. 48; Pltff.'s Second Request for Admissions and Defs.' Responses, No. 7, attached as Ex. 19 to Pltff.'s Mem. Opp. Summ. J. ["Defs.' Second Admissions"]; Purcell Dep. at 226. Purcell chose the single cell on A/B.⁸ Purcell believed he would be permitted to take the plastic chair to his new cell on A/B (which lacked grab bars) to aid him in using the sink and toilet and to use in the shower (which lacked a bench).

Purcell moved to his new non-handicapped-accessible cell on A/B. Purcell obtained permission to keep the plastic chair in his cell for use at the toilet and sink. See Defs.' First Admissions, No. 45. For several days, Purcell brought the chair

⁸ Purcell claims he chose the single cell to maintain his "Z-Code status"; defendants maintain Purcell chose the single cell to avoid hitting his head on the top bunk. See Purcell Dep. at 226; Defs.' First Admissions, at 19 n.3.

to the shower. See Purcell Dep. at 359. Officer Berlando then ordered Purcell to refrain from bringing the chair to the shower. Purcell did not use the shower again; he washed himself at the sink in his cell. See id. at 353-54.

On August 18, 1995, John Young, M.D. ("Dr. Young"), a private physician under contract to perform services at Mahanoy, discontinued the authorization permitting Purcell to keep a chair in his cell. See Medical Note, dated August 18, 1995, attached as Ex. 39 to Pltff.'s Mem. Opp. Summ. J. ["Medical Note"]. Dr. Young, without any examination of Purcell, decided it was medically unnecessary for Purcell to keep a chair in his cell.⁹

Apparently Dr. Young decided to rescind Purcell's chair privileges because Purcell was not using his cane properly; he "seemed to use it as an accessory, the way Fred Astaire would have." Defs.' Mem. Supp. Summ. J. at 5-6. Dr. Young also relied on a report from Shelp that Purcell had played ping-pong. Shelp sought support for Dr. Young's order from Superintendent Dragovich, because "[o]therwise we might as well let all inmates have plastic chairs and sit during count." Memorandum from Shelp to Dragovich, dated August 21, 1995, attached as Ex. 40 to Pltff.'s Mem. Opp. Summ. J. ["Shelp Memo"].

⁹ Dr. Young conceded that if he had examined Purcell prior to his decision to revoke Purcell's chair privileges, that would have been reflected in Purcell's medical records. See Dr. Young Dep. at 15, 18.

After receiving a complaint from Purcell, Superintendent Dragovich responded to Purcell: "If you were as physically disabled as you would lead us to believe then perhaps you should be in the infirmary as opposed to a housing unit." Letter from Dragovich to Purcell, dated August 21, 1995, attached as Ex. 43 to Pltff.'s Mem. Opp. Summ. J. ["August 21, 1995 Dragovich Letter"].

After Dr. Young rescinded the orders granting Purcell chair privileges, Purcell was ordered to stand for all subsequent "counts." See Berlando Dep. at 17-18. Purcell had great difficulty washing at his sink without the aid of either grab bars or a chair to lean on. See Purcell Dep. at 353-54. Purcell bases his joint disease disability claim on his relocation from a handicapped-accessible cell and removal of his chair privileges.

DISCUSSION

I. Standard of Review

Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A defendant moving for summary judgment bears the initial burden of demonstrating there are no facts supporting the plaintiff's claim; then the plaintiff must introduce specific,

affirmative evidence there is a genuine issue for trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-324 (1986). "When a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

The court must draw all justifiable inferences in the non-movant's favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). A genuine issue of material fact exists only when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." Id. at 248. The non-movant must present sufficient evidence to establish each element of its case for which it will bear the burden at trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986).

II. ADA Title II

A. Prison Programs & Services Under Title II

Purcell has based his disability claims on Title II of the ADA, 42 U.S.C. §§ 12131-12134 ("Title II"). Title II 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,¹⁰ or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

Title II does not specifically define the terms "services, programs, or activities of a public entity." The defendants claimed prisons are not "public entities" under Title II, but "the ADA appl[ies] to state and locally-operated correctional facilities." Yeskey v. Pennsylvania Dept. of Corrections, 118 F.3d 168, 171 (3d Cir. 1997), cert. filed, 66 U.S.L.W. 3298 (Oct. 8, 1997); see Crawford v. Indiana Dept. of Corrections, 115 F.3d 481, 487 (7th Cir. 1997); Duffy v. Riveland, 98 F.3d 447, 454-55 (9th Cir. 1996); Harris v. Thigpen, 941 F.2d 1495, 1522 n.41 (11th Cir. 1991) (applying Rehabilitation Act to prison).¹¹

Title II applies to Mahanoy, a state correctional institution.

Purcell claims he was denied use of a handicapped-accessible cell or a plastic chair to sit on during "counts" and bathing, he was removed from CADD and music classes and lost telephone privileges because of his disabilities. Purcell had "no right to more services than the able-bodied inmates, but [he had] a right,

¹⁰ A "public entity" is "any State or local government," "any department, agency, special purpose district, or other instrumentality of a State or States or local government," or "the National Railroad Passenger Corporation, and any commuter authority (as defined in section 502(8) of Title 45)." 42 U.S.C. § 12131(1).

¹¹ "Whether suit is filed under the Rehabilitation Act or under the [ADA], the substantive standards for determining liability are the same." McDonald v. Pennsylvania Dept. of Public Welfare, 62 F.3d 92, 94 (3d Cir. 1995).

if the [ADA] is given its natural meaning, not to be treated even worse than those more fortunate inmates." Crawford, 115 F.3d at 486.

B. Qualified Individual With a Disability

Defendants argue a prisoner can never be a "qualified individual with a disability" under Title II. A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable modifications ... meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). Defendants argue inmates "are not free citizens," so application of the ADA to prisoners would make the statute "meaningless." Defs.' Mem. Supp. Summ. J. at 13.

But "[r]ights against discrimination are among the few rights that prisoners do not park at the prison gates.'" Yeskey, 118 F.3d at 174 (quoting Crawford, 115 F.3d at 486). "Congress 'invoke[d] the sweep of [its] authority, including the power to enforce the [F]ourteenth [A]mendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.'" Id. (quoting 42 U.S.C. § 12101(b)(4)). An inmate can be a "qualified individual with a disability."

Defendants next argue that, even if the ADA does provide

coverage for inmates, Purcell was not "disabled" for purposes of Title II. "Disability" is defined in the ADA as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A). Defendants acknowledge that Purcell has Tourette's, a history of degenerative joint disease and a herniated disc. See Defs.' Mem. Supp. Summ. J. at 14. But they argue these conditions are not serious enough to affect a "major life activity."

An individual suffers a substantial limitation on a major life activity if that person is "[s]ignificantly restricted as to the condition, manner or duration under which [he] can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.2(j) (quoted in Kelly v. Drexel Univ., 94 F.3d 102, 105 (3d Cir. 1996)). Walking and standing are considered "major life activities." See 29 C.F.R. § 1630.2(i); Kralik v. Durbin, Nos. 97-3089 & 97-3106, 1997 WL 763336, at *2 (3d Cir. Dec. 12, 1997).

Defendants argue Purcell's degenerative joint disease, herniated disc and foot problems were not serious because various prison officials observed Purcell standing and using his cane in a "Fred Astaire" manner. Despite these observations, Purcell has provided numerous doctor's reports stating that his bone problems

are serious. See, e.g., Dr. Martyak Dep. at 42-44, 56; Dr. Kulaylat Dep. at 25, 38. Defendants themselves provided Purcell with the cane, braces and orthopedic shoes for which they now claim he had no need. Whether Purcell's joint disease and related problems were serious enough to affect the major life activities of walking and standing must be determined at trial.

Defendants also maintain Purcell's Tourette's was not serious enough to affect a major life activity because certain prison officials were able to communicate with him. The fact that officials could communicate with Purcell on discrete occasions does not mean the condition did not seriously affect Purcell. Purcell can usually suppress his verbal and motor tics while interacting with others; he then must "explode" in privacy to release the tics. Purcell can only suppress the tics for limited periods of time ranging from a few minutes to a few hours. See Dr. Rubenstein Report at 4-5, 7-8. According to Dr. Rubenstein, it

may not at all times be obvious to observers the exact degree or extent to which these internal stresses are building. It certainly would not be apparent to an observer how long one was suppressing activity unless he was watching the individual for a continuous period, nor would it be obvious in normal circumstances for an observer to understand the need to release the manifestations of one's Tourette's Syndrome.

Id. at 7.

The ability to communicate with others for extended periods of time is a major life activity under Title II. See 29 C.F.R. §

1630.2(i). Several doctors, including those provided by defendants, reported Purcell's Tourette's substantially limited his ability to interact with fellow inmates and prison staff. See, e.g., Dr. Martyak Dep. at 51; Dr. Rubenstein Report at 6-7. Defendants, recognizing Purcell's Tourette's disability, previously granted Purcell special benefits (e.g., a single cell). Whether Purcell's Tourette's affected him seriously enough to qualify as a disability under Title II must be determined at trial.

C. Discrimination/Failure to Accommodate

A cause of action exists under Title II only if a qualified individual with a disability was discriminated against or denied the benefits of a public entity's programs or services. See 42 U.S.C. § 12132. In prison situations, courts must be careful when applying anti-discrimination statutes to give weight to the unique needs of prison administration. If the challenged prison policies concerned security, then they "are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.'" Turner v. Safley, 482 U.S. 78, 86 (1987) (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974)). Defendants have made no allegations any of the actions

taken regarding Purcell were occasioned by prison security concerns; they claim they did not believe Purcell was disabled at all. Therefore, the special deference for prison security concerns described in Turner is not warranted here.

For his joint disease, Purcell requested either metal grab bars by his cell's sink and toilet and a bench in the shower, or the use of a plastic chair to make bathing easier. For his Tourette's, he wanted access to his cell to release his tics.

The prison was prohibited from "[o]therwise limit[ing] a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others." 28 C.F.R. § 35.130(b)(1)(vii). The prison also was required to "make reasonable accommodations in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability." 28 C.F.R. § 35.130(b)(7); see Juvelis v. Snider, 68 F.3d 648, 653 (3d Cir. 1995) (§ 504 of the Rehabilitation Act "requires some affirmative steps to accommodate handicapped persons").

Defendants argue they had no obligation to "provide to individuals with disabilities personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; readers for personal use or study; or services of a personal nature including assistance in eating, toileting, or dressing." 28 C.F.R. § 35.135.

Defendants rely on Adelman v. Dunmire, No. 95-4039, 1996 WL 107853 (E.D. Pa. Mar. 12, 1996); in Adelman, the court determined a state court had no duty to supply a wheelchair to a party involved in litigation, when the party did not allege he could not access the courthouse without a wheelchair or could not procure one for himself. See id. at *3. Defendants deny any obligation to provide a plastic chair for Purcell for use in his cell and shower.

Adelman is distinguishable because Purcell had no other means of obtaining a chair. He could not supply his own chair or install grab bars in his cell; he could not provide his own bench in the shower. If the terms of the regulations requiring "reasonable accommodations in policies," 28 C.F.R. § 35.130, are to have any effect at all, defendants should have "accommodated" Purcell's joint disease by allowing him to remain in a handicapped-accessible cell or have a chair in his cell and the shower room.

Defendants also had an obligation to "accommodate" Purcell's Tourette's by permitting him to return to his cell when he needed to release his verbal and motor tics. Defendants imposed sanctions on Purcell in November, 1995, when he insisted on remaining in his cell to alleviate his Tourette's. Defendants argue the sanctions for disobeying a guard's order were justified, even if Officer Berlando should have allowed Purcell

to remain in his cell.

Defendants, relying on Griffin v. Commissioner of Pa. Prisons, No. 90-5284, 1991 WL 269975 (E.D. Pa. Dec. 10, 1991), aff'd, 961 F.2d 208 (3d Cir. 1992), assert inmates are subject to punishment when they disobey any order, regardless of its nature. Griffin held that an inmate had to obey a guard's order to double cell. The court determined there was a valid reason for the order, it was not illegal, the inmate should have known he had to obey the order and the inmate would not have suffered any serious injury by following the order. See id. at *4.

These considerations do not apply to Purcell. While Officer Berlando may have had a valid reason for issuing the order to report to the medical unit, Purcell had reason to believe he did not have to obey that order because of the medical authorizations he had received from prison doctors permitting him to return to his cell at all times to alleviate his tics. Purcell might have suffered injury by following Officer Berlando's order, because he would have "exploded" while proceeding to the medical unit at that time.

Defendants were obligated to "accommodate" Purcell's Tourette's in a reasonable manner. Punishing Purcell for remaining in his cell to release his tics in private, as doctors had recommended and ordered, might violate Title II. Summary judgment is not warranted on Purcell's Title II claims.

III. Interference with ADA Rights

Purcell also alleges interference with his rights under Title II. Apart from prohibiting discrimination itself, the ADA provides:

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, ... any right granted or protected by [the ADA]."

42 U.S.C. § 12203(b).

Defendants claim "[n]othing in the record indicates that any DOC or Mahanoy official or employee interfered with Purcell's ADA rights." Defs.' Mem. Supp. Summ. J. at 19. Purcell has presented evidence of the following interference with his accommodation rights under Title II: Superintendent Dragovich's derogatory letters to Purcell; decisions to discipline Purcell for exercising his right to remain in his cell to release his tics; and revocation of medical authorizations permitting Purcell to remain seated during "counts," based on observations of lay persons.

Purcell has created a question of material fact whether these events happened and were sufficient to "interfere" with his rights under Title II. Summary judgment is not appropriate on Purcell's interference claim.

IV. Retaliation

Purcell raised a claim of retaliation under 42 U.S.C. §

12203(a).¹² Defendants, arguing there is no evidence of retaliation, moved for summary judgment; Purcell does not oppose summary judgment on this claim. See Pltff.'s Mem. Opp. Summ. J. at 1 n.1. The court will grant summary judgment on Purcell's retaliation claim.

V. Injunctive Relief

Purcell seeks injunctive relief on several different grounds. First, he seeks an injunction that Mahanoy officials accommodate his medical needs. Purcell was transferred from Mahanoy to the State Correctional Institute at Graterford ("Graterford") in December, 1995. Any claim for injunctive relief ordering Mahanoy officials to act one way or another is moot; summary judgment on this claim will be granted.

Second, Purcell seeks expungement of his prison record, a reassessment of his classification level and related relief. Even though he was transferred to Graterford, the effects of his Mahanoy discipline still affect him. Defendants claim his transfer to a new prison moots claims for injunctive relief. See Weaver v. Wilcox, 650 F.2d 22 (3d Cir. 1981). In Weaver, the prisoner sought not monetary damages but injunctive relief on

¹² 42 U.S.C. § 12203(a) provides: "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the ADA]."

behalf of inmates at his former prison; he was no longer imprisoned there. See id. at 27. However, Purcell's claim is not moot because the Mahanoy discipline continues to affect him. Summary judgment is not appropriate on this claim for injunctive relief.

Third, Purcell, relying on 28 C.F.R. § 35.107, seeks injunctive relief ordering the DOC to designate specific individuals to coordinate the prison system's compliance with the ADA. Section 35.107 states:

A public entity that employs 50 or more persons shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to it alleging noncompliance with this part or alleging any actions that would be prohibited by this part. The public entity shall make available to all interested individuals the name, office address, and telephone number of the employee or employees designated pursuant to this paragraph.

Following implementation of the ADA, DOC appointed three individuals in its central office to serve as ADA Coordinators: Daniel R. Tepsic ("Tepsic"), Director of Human Resources, who handles ADA employment issues; Jacob D. Blik ("Blik"), Director of the Bureau of Operations, who handles ADA construction and design issues; and William Harrison ("Harrison"), Director of the Bureau of Inmate Services, who handles ADA inmate transfer problems. There is no designated individual who serves as ADA coordinator for inmate concerns (except transfers). See Defs.'

Supp. Mem. Supp. Summ. J. at 2.

Defendants claim prison officials at each facility handle, on an informal basis, issues involving treatment of disabled inmates. These officials include: the Health Care Administrator; the Grievance Coordinator; a Unit Manager; the Deputy Superintendent for Facilities Management; the Medical Director; and the Superintendent. Defendants correctly point out that the regulation allows them to designate "at least" one individual as coordinator, so it is not impermissible to designate several coordinators. See 28 C.F.R. § 35.107. However, defendants have not "designated" any of these individuals as coordinators; they simply claim any of those officials is capable of handling inmate disability complaints.

It is not enough for defendants to suggest inmates can contact any prison official for ADA assistance. The regulation mandates designation of a specific person or persons who will handle ADA complaints. In addition, the regulation requires that the DOC make available the names, addresses and telephone numbers of the coordinators. See id. Obviously, if the DOC has not designated anyone as the official ADA coordinator, then it is unable to provide that information to the inmates or the public.

Defendants' assertion that any prison official is capable of handling inmate ADA complaints does not withstand scrutiny. Marva Cerullo ("Cerullo"), Mahanoy's Health Care Administrator

and one of the individuals defendants claim is capable of processing inmate disability problems, admitted she generally does not handle such complaints. She stated she was not aware of any written criteria for handling inmate ADA complaints; she said she would have to decide them based on "common sense." Dep. of Marva Cerullo at 4-5, 8, attached as Ex. C to Pltff.'s Supp. Mem. Opp. Summ. J. ["Cerullo Dep."].

Section 35.107 was promulgated by the DOJ pursuant to Congress' express directions. See 42 U.S.C. § 12134. The "DOJ's regulations should be accorded 'controlling weight unless [they are] arbitrary, capricious, or manifestly contrary to the statute.'" Yeskey, 118 F.3d at 171 (citation omitted).

Any commentary accompanying the DOJ regulations is to receive the same weight. See id. The DOJ commentary on § 35.107 states the regulation was designed to "help[] to ensure that individuals dealing with large agencies are able to easily find a responsible person who is familiar with the requirements of the Act and this part and can communicate those requirements to other individuals in the agency who may be unaware of their responsibilities." 28 C.F.R. Part 35, App. A, § 35.107. An individual at the DOC with knowledge of ADA requirements and the special problems of persons suffering from Tourette's in a prison setting would have been helpful as Purcell was transferred from institution to institution. DOC currently is frustrating that

purpose by not identifying any individual who has been trained regarding inmate disability issues.

An individual has the right to enforce the designation requirements of § 35.107. See, e.g., Clarkson v. Coughlin, 898 F. Supp. 1019, 1045 (S.D.N.Y. 1995); Tugg v. Towey, 864 F. Supp. 1201, 1211 (S.D. Fla. 1994). The intent of Congress and the DOJ cannot be achieved without enforcing the mandate of § 35.107; summary judgment will not be granted on this claim.¹³ See Cort v. Ash, 422 U.S. 66, 78 (1975).

VI. Punitive Damages

Purcell seeks punitive damages. Defendants argue punitive damages are unavailable under the ADA. Title I adopts the remedies and procedures available under Title VII of the Civil Rights Act of 1964 ("Title VII"). See 42 U.S.C. § 12117(a). Title II adopts the remedies and procedures of § 505 of the Rehabilitation Act, 29 U.S.C. § 794a. See 42 U.S.C. § 12133. Section 505(a)(2) of the Rehabilitation Act incorporates the remedies and procedures available under Title VI of the Civil Rights Act of 1964 ("Title VI") for individuals aggrieved by

¹³ Defendants aver Purcell suffered no injury by DOC's failure to designate an ADA inmate coordinator. However, if DOC had followed the requirements of § 35.107 and appointed a coordinator, he or she could have educated the Mahanoy staff of the effects and treatment of Tourette's and degenerative bone disorders and the institutional obligation of accommodation under Title II. If so, defendants may have acted differently toward Purcell and prevented his alleged harm. Evidence of causation is sufficient to survive this motion for summary judgment.

recipients of federal funds. See 29 U.S.C. § 794a(a)(2).

Title VI created an implied cause of action. See Guardians Assoc. v. Civil Service Commission, 463 U.S. 582, 593-95 (1983) (opinion of White, J.); Cannon v. Univ. of Chicago, 441 U.S. 677, 694-703, 710-11 (1979) (finding implied cause of action under Title IX of the Education Amendments of 1972 ("Title IX") partly because Title IX was modeled after Title VI). The remedies available for an implied cause of action under Title VI are available in an action under Title II of the ADA. See Jeremy H. v. Mount Lebanon Sch. Dist., 95 F.3d 272, 282 n.17 (3d Cir. 1996); Bracciale v. City of Phila., No. 97-2464, 1997 WL 672263, at *8 (E.D. Pa. Oct. 29, 1997) (Shapiro, J.).

Courts are to "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." Franklin v. Gwinnett County Public Schs., 503 U.S. 60, 66, 70 (1992) (Title IX case). Regardless of whether the claim is under an express statute or an implied cause of action, "'federal courts may use any available remedy to make good the wrong done.'" Id. (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)); see also J.I. Case Co. v. Borak, 377 U.S. 426, 433-34 (1964).

"That a statute does not authorize the remedy at issue 'in so many words is no more significant than the fact that it does not in terms authorize execution to issue on a judgment.'" Id. at 68 (quoting Deckert v. Independence Shares Corp., 311 U.S.

282, 288 (1940)). The "same contextual approach used to justify an implied right of action more than amply demonstrates the lack of any legislative intent to abandon the traditional presumption in favor of all remedies." Id. at 72. There is a presumption that all remedies, including punitive damages, are available in a cause of action under Title II.

Under the general rule of Franklin, a court may award punitive damages unless: 1) there is clear direction to the contrary by Congress; 2) such relief would be inappropriate. See id. at 71; Burns-Vidlak v. Chandler, No. 95-892, 1997 WL 641109, at *6 (D. Haw. June 24, 1997). For actions filed under Title I of the ADA, Congress has provided clear direction to the contrary. In actions under Title I, relying upon the remedies available under Title VII, a party is precluded from recovering punitive damages against "a government, government agency or political subdivision." 42 U.S.C. § 1981a(b)(1); see Herman v. City of Allentown, No. 96-6942, 1997 WL 727698, at *14 (E.D. Pa. Nov. 21, 1997); Curran v. Philadelphia Housing Auth., No. 95-8046, 1997 WL 587371, at *1 (E.D. Pa. Sept. 5, 1997); Waring v. City of Phila., No. 96-1805, 1996 WL 208348, at *3 (E.D. Pa. Apr. 26, 1996). By its own terms, § 1981a is limited to actions under Title VII and Title I of the ADA. See 42 U.S.C. § 1981a(a).

However, Title II of the ADA, incorporates the remedies of Title VI through § 505(a)(2) of the Rehabilitation Act. The §

505(a)(2) remedies provided for Title II are the same as the remedies for violations of § 504 of the Rehabilitation Act. See 29 U.S.C. § 794a(a)(2). Decisions on the availability of punitive damages under § 504 of the Rehabilitation Act are instructive on whether such damages are available for violations of Title II. See McDonald, 62 F.3d at 94.

Congress has not provided a clear direction that punitive damages are unavailable for violations of § 504 or § 505(a)(2), see Franklin, 503 U.S. at 66; § 1981a does not apply to suits under § 504, § 505(a)(2) or Title II of the ADA. "To the contrary, the Congress has confirmed the importance of awarding damages against states when they violate § 504." Burns-Vidlak, 1997 WL 641109, at *6. In 1986, Congress enacted the Civil Rights Remedies Equalization Act (the "Equalization Act") which abrogated states' Eleventh Amendment immunity in § 504 and Title VI actions and provided that plaintiffs have the same remedies against a state as are available against private defendants. See 42 U.S.C. § 2000d-7. The Equalization Act provision that all remedies are available in an action under § 504 applies to § 505(a)(2) and Title II of the ADA (which incorporates the remedies of Title VI).

Defendants, arguing punitive damages are never available against governmental entities, rely on City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981), an action against a

municipality under 42 U.S.C. § 1983. The Supreme Court, basing its decision on the common law tradition of shielding municipalities from punitive damages, found no clear statement from Congress altering that tradition, see id. at 259-66, and held that punitive damages were not available in § 1983 actions against municipalities. See id. at 271.

Congress, through the Equalization Act, has provided that all remedies available against private defendants are available "to the same extent" against the states. 42 U.S.C. § 2000d-7(a)(2). This abrogation of states' Eleventh Amendment immunity applies to actions under § 504 and Title VI, the source of the remedies under Title II of the ADA. See 42 U.S.C. § 2000d-7(a)(1). The Equalization Act is clear evidence Congress has provided "all appropriate remedies," Franklin, 503 U.S. at 66, including punitive damages, are available for violations of Title II.¹⁴ Defendants' motion for summary judgment on punitive damages will be denied.

CONCLUSION

Much of this litigation was avoidable had the DOC realized

¹⁴ Several other courts have concluded punitive damages are available under § 504 or Title II of the ADA. See, e.g., Kilroy v. Husson College, 959 F. Supp. 22, 24 (D. Me. 1997); Hernandez v. City of Hartford, 959 F. Supp. 125, 133-34 (D. Conn. 1997); DeLeo v. City of Stamford, 919 F. Supp. 70, 73-74 (D. Conn. 1995); Kedra v. Nazareth Hosp., 868 F. Supp. 733, 740 (E.D. Pa. 1994). But see Adelman v. Dunmire, No. 95-4039, 1996 WL 107853, at *4 (E.D. Pa. Mar. 12, 1996) (punitive damages unavailable).

the ADA applies to state penal institutions. Whatever the outcome of trial in this action, it should now be possible to reconcile institutional and inmate needs and avoid such litigation in the future.

An appropriate Order follows.

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

TIMOTHY PURCELL : CIVIL ACTION
 :
 v. :
 :
 PENNSYLVANIA DEPARTMENT of :
 CORRECTIONS and MARTIN F. HORN : NO. 95-6720

ORDER

AND NOW, this 9th day of January, 1998, upon consideration of defendants' motion and supplemental motion for summary judgment, plaintiff Timothy Purcell's ("Purcell") response thereto, and in accordance with the attached Memorandum, it is hereby **ORDERED** that defendants' motions are **GRANTED IN PART AND DENIED IN PART** as follows:

1. Defendants' motions are **DENIED** as to plaintiff Purcell's claim for discrimination or failure to accommodate under Title II of the ADA.
2. Defendants' motions are **DENIED** as to plaintiff Purcell's claim for interference with his rights under Title II of the ADA.
3. Defendants' motions are **GRANTED** as to plaintiff Purcell's claim for retaliation under the ADA.
4. As to plaintiff Purcell's claims for injunctive relief:
 - a. Defendants' motions are **GRANTED** as to plaintiff Purcell's claim for injunctive relief ordering action at the State Correctional Institute at Mahanoy; said claims are moot.
 - b. Defendants' motions are **DENIED** as to plaintiff Purcell's claim for injunctive relief expunging his record, reassessing his classification level and related relief.
 - c. Defendants' motions are **DENIED** as to plaintiff Purcell's claim under 28 C.F.R. § 35.107.
5. Defendants' motions are **DENIED** as to plaintiff Purcell's claim for punitive damages.

Norma L. Shapiro, J.