

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

JAMES EDWARD BROWN,

Plaintiff,

v.

VIRGINIA DEPARTMENT OF CORRECTIONS,
ET AL.,

Defendants.

CIVIL ACTION No. 6:07-CV-00033

MEMORANDUM OPINION

JUDGE NORMAN K. MOON

On September 21, 2007,¹ James Edward Brown, the pro se plaintiff in this case, filed the instant Complaint *in forma pauperis*, alleging claims under the Americans with Disabilities Act of 1990 (“ADA”). Additionally, some of the language he employs suggests allegations of

¹ The Complaint itself is signed and dated September 27, 2006, and the Complaint also includes a “VERIFICATION” paragraph, “declar[ing] under penalty of perjury the foregoing is true and correct,” dated September 27, 2006. Additionally, the Complaint includes a separate “VERIFIED STATEMENT” of the type that an incarcerated person is required to submit verifying that all available administrative remedies have been exhausted in compliance with 42 U.S.C. § 1997e(a); Plaintiff signed and dated the verified statement September 27, 2007, and the verified statement is purportedly notarized “this 27 day of September, 2007” by a notary whose commission expires on June 30, 2007 (months before the case was filed). And, although Plaintiff’s cover letter of September 15, 2007, submitted with the Complaint, states that “[t]hese injuries occurred during my incarceration of July 2001 to 2007,” the Complaint specifies no conduct that occurred in 2007; moreover, the dates specified in Claim No. 6, the final claim of the complaint, indicate that Claim No. 6 begins “[o]n March 3, 2004,” and concludes “after two years. . . .” However, the Complaint was received by the Clerk of the Court in Roanoke on September 21, 2007. A signed cover letter, dated September 15, 2007, stated that Plaintiff was no longer incarcerated at the time he filed the complaint. Additionally, Plaintiff filed a pleading styled as “ANSWER TO GLENDELL HILL MOTION TO DISMISS” (docket no. 34) acknowledging that “Plaintiff was release [sic] from prison September 3, 2007 and he file [sic] the complaint September 21, 2007.” Electronic records of the federal courts indicate that Plaintiff has previously filed other actions, including *Brown v. Bielec, et al.*, Civ. No. 1:02-cv-01342 (E.D. Va.), in which he sued many of the Defendants named in this action and attempted to state the same claims; on June 1, 2004, that complaint was dismissed at his request. See Complaint at p. 3; see also Plaintiff’s letter dated September 15, 2007, which accompanied the instant Complaint (“I have filed a 1983 civil suite [sic] in that regard matter [sic]. Do [sic] to my inability of representing myself I filed a motion to have the civil suite [sic] dismissed. The judge dismissed the case without prejudice.”). Of the remaining Defendants in this case, Plaintiff encountered 4 of them when he was incarcerated in the Eastern District of Virginia; those Defendants are located in the Eastern District, and the alleged events and occurrences concerning them took place there; nonetheless, I will dismiss the claims against those Defendants for the reasons stated herein.

violations of his civil rights under 42 U.S.C § 1983. Plaintiff, a former inmate in the Virginia Department of Corrections (“VDOC”) and in various local jails in Virginia, alleges that the local jails and the VDOC failed to provide adequate treatment for his medical condition, and that the failure to properly treat his condition led to injury and the deterioration of his condition. Plaintiff seeks damages in the amount of \$1,900,000.00. Originally, Plaintiff named 20 Defendants, but 12 of these have been dismissed because they were not proper defendants or for failure of service. The remaining Defendants have filed the following Motions to Dismiss:

- Glendell Hill’s Motion to Dismiss (docket no. 15).²
- Motion to Dismiss filed by Dr. Cypress and Nurse Elko (docket no. 38).
- Motion to Dismiss filed by Officer Hetlel, Officer Bielec, and Dr. Adams (docket no. 44).
- Motion to Dismiss filed by Fred Schilling and the VDOC (docket no. 65).

The matter has been scheduled several times for hearings regarding the Motions to Dismiss; the latest hearing, scheduled for December 17, 2008, was continued because of Plaintiff’s sudden hospitalization. However, upon further review of the record, it is clear that the

² United States Magistrate Judge Michael F. Urbanski held a hearing on this and other motions and submitted a report and recommendation (“R&R”), which I adopted, denying the motions, in part, insofar as Defendants sought dismissal for failure of service pursuant to Rules 4(m) and 12(b)(5); however, Hill’s arguments for dismissal pursuant to 12(b)(1) and 12(b)(6) were held in abeyance, to be considered “in conjunction with the other pending motions to dismiss . . . filed on similar grounds.” (Docket no. 49.) Thus, Hill’s Motion to Dismiss (docket no. 15), arguing for dismissal pursuant to 12(b)(1) and 12(b)(6), remains for the Court’s consideration. Hill also filed a Reply (docket no. 35) to Plaintiff’s response in opposition to Hill’s Motion to Dismiss (docket no. 34), which Plaintiff filed after Judge Urbanski entered his R&R. In that response, Plaintiff repeated the argument that he stated at Judge Urbanski’s hearing: that his complaint is timely under Va. Code § 8.01-229(A)(3), which, as Judge Urbanski explained to him at the hearing on May 7, 2008, concerns only an action by a convict against his committee and does not apply here. Other than his responses in opposition to the motions addressed in the R&R, Plaintiff has filed no pleadings in response to any of the other motions to dismiss.

Complaint should be dismissed and that it is not necessary to conduct a hearing.³ For the reasons stated herein, I will grant the Motions to Dismiss.

I. STANDARD OF REVIEW

A. Rule 12(b)(1)

Rule 12(b)(1) of the Federal Rules of Civil Procedure permits a party to move for dismissal of an action based on lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). A plaintiff “has the burden of proving that subject matter jurisdiction exists.” *Evans v. B. F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999). In considering a motion to dismiss pursuant to Rule 12(b)(1), a court should “regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment.” *Id.* (internal citation omitted). The moving party’s motion to dismiss should be granted when “the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law.” *Id.* (internal citation omitted).

B. Rule 12(b)(6)

“The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint,” not to “resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.” *Edwards v. City of Goldsboro*, 178 F.3d 231, 243–44 (4th Cir. 1999). In considering a Rule 12(b)(6) motion, a court must accept all allegations in the complaint as true and must draw all reasonable inferences in favor of the plaintiff. *See id.*, at 244; *Warner v. Buck Creek Nursery*,

³ Regarding *in forma pauperis* actions such as the instant case, 28 U.S.C. § 1915(e)(2) provides that “the court shall dismiss the case *at any time* if the court determines that . . . the action or appeal . . . fails to state a claim upon which relief may be granted . . . or . . . seeks monetary relief against a defendant who is immune from suit.” (Emphasis added.) The standard of review for dismissal under § 1915(e)(2)(B) for failure to state a claim upon which relief can be granted is the same standard as under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000).

Inc., 149 F. Supp. 2d 246, 254–55 (W.D. Va. 2001). The plaintiff must allege facts that “raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. ___, 127 S. Ct. 1955, 1965 (2007). “[A] Rule 12(b)(6) motion should only be granted if, after accepting all well-pleaded allegations in the plaintiff’s complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff’s favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief.” *Edwards*, 178 F.3d at 244. A complaint may not be dismissed if it alleges “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp.*, 550 U.S. at ___, 127 S. Ct. at 1974.

Nonetheless, a court need not accept a plaintiff’s unwarranted conclusory allegations or unreasonable inferences, nor need it lend credence to allegations that contradict matters properly established by judicial notice or exhibit. *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002). When dismissing a complaint for failure to state a claim upon which relief may be granted, courts may consider exhibits attached to the complaint, and where a conflict exists between “the bare allegations of the complaint and any attached exhibit, the exhibit prevails.” *United States ex rel. Constructors, Inc. v. Gulf Ins. Co.*, 313 F. Supp. 2d 593, 596 (E.D. Va. 2004) (citing *Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1465 (4th Cir. 1991)); see also *Anheuser-Busch v. Schmoke*, 63 F.3d 1305, 1312 (4th Cir. 1995), *vacated and remanded on other grounds*, 517 U.S. 1206 (1996).

C. Pro Se Complaints

Because pro se complaints “represent the work of an untutored hand requiring special judicial solicitude,” courts must “construe pro se complaints liberally.” *Baudette v. City of Hampton*, 775 F.2d 1274, 1277-1278 (4th Cir.1985). “[T]hose litigants with meritorious claims should not be tripped up in court on technical niceties.” *Id.* at 1277-78 (citation omitted).

Courts need not, however, “conjure up questions never squarely presented to them. . . . Even in the case of *pro se* litigants, they cannot be expected to construct full blown claims from sentence fragments.” *Id.* at 1278. However, the requirement of liberal construction does not mean that courts can ignore a clear failure in the pleading to allege facts which set forth a cognizable claim. *See Weller v. Department of Social Services*, 901 F.2d 387 (4th Cir.1990).

II. FACTUAL ALLEGATIONS

Plaintiff states that he has a condition known as hypokalemia, making him unable to retain adequate potassium levels in his bloodstream and causing paralysis in his extremities when his potassium level becomes low.⁴ The crux of his complaint is that various local jails and the VDOC failed to provide adequate treatment for his condition, and that the failure to properly treat his condition led to injury and the deterioration of his condition. Plaintiff’s 48-page Complaint sets out 6 enumerated claims, within which Plaintiff attempts to state a number of sub-claims; the following is a summary.⁵

⁴ *See* <http://en.wikipedia.org/wiki/Hypokalemia>.

⁵ A court is not obliged to ferret through a complaint, searching for viable claims. *See Holsey v. Collins*, 90 F.R.D. 122 (D. Md.1981) (although pro se complaint contained potentially viable claims, court properly dismissed without prejudice under Fed. R. Civ. P. 8 since voluminous, repetitive, and conclusory complaint is not a “short and plain statement” of facts and legal claims; court specifically observed that dismissal under Rule 8 was proper because such a complaint “places an unjustifiable burden on defendants to determine the nature of the claim against them and to speculate on what their defenses might be,” and “imposes a similar burden on the court to sort out the facts now hidden in a mass of charges, arguments, generalizations and rumors”); *see also Spencer v. Hedges*, 838 F.2d 1210 (Table) (4th Cir. 1988). In the context of Fed. R. Civ. P. 8, it is clear that a plaintiff must provide enough detail to illuminate the nature of the claim and allow defendants to respond. *See Erickson v. Pardus*, 551 U.S. ___, slip op. at 5 (2007). Although district courts have a duty to construe pro se pleadings liberally, a pro se plaintiff must nevertheless allege facts that state a cause of action. *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985) (adding that the duty to construe pro se complaints liberally “does not require [district] courts to conjure up questions never squarely presented to them,” and that “[d]istrict judges are not mind readers”).

In sum, Plaintiff’s Complaint does not comply with the requirements of Federal Rule of Civil Procedure 8. Rule 8(a)(2) requires “a short and plain statement of the claim showing that the pleader is entitled to relief,” and Rule 8(e)(1) requires that each averment of a pleading be “simple, concise, and direct.” A pleading “does not have to set out in detail the facts on which the claim for relief is based,” 2 Moore’s Federal Practice ¶ 8.04[1], at (continued...)

A. Claim No. 1

Plaintiff states that “[i]ncarcerating institutions, their medical providers and correctional administrations failed to accommodate [his] disability with appropriate, safe inmate housing and needed medication in accordance with the Americans with Disabilities Act of 1990” (“ADA”) and failed “in their overall obligation to provide adequate medical care.”

Upon his arrest on July 5, 2000, Plaintiff was housed at the Prince William County Jail in Manassas, Virginia. During his inmate classification interview, he provided information regarding his disability to the jail’s Classification Officer, Ms. Bielec (one of the remaining named defendants); this information included information regarding Plaintiff’s alleged need to have potassium supplements in his possession at all times.

According to Plaintiff, “[t]he jail staff and medical staff of Prince William County Jail failed to house [him] in a handicap compatible cell” and “denied [him] access to [his] medication on an ‘as needed’ basis. . . .” In Plaintiff’s view, “[t]his failure to provide the proper classification into a handicap cell environment based on [his] disability was in violation of the [ADA] and display[ed] deliberate indifference to [his] serious medical need.”

⁵(...continued)

8-22 (3d ed. 2002), but must give the court and the defendant “fair notice of what that plaintiff’s claim is and the grounds upon which it rests.” *Swirkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). A court may dismiss a complaint that is “so confused, ambiguous, vague or otherwise unintelligible that its true substance, if any, is well disguised.” *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988). Here, Plaintiffs’ Complaint is not a “short and plain statement,” nor is it “concise and direct,” and the convoluted and redundant narratives and legal conclusions render the Complaint nearly incomprehensible. The Complaint does not provide the defendants “fair notice” of the claims and facts upon which they are based. Therefore, the Complaint does not comply with Rule 8, and could be dismissed on that ground. Nonetheless, the Court will dismiss the Complaint for the reasons stated herein.

B. Claim No. 2

Plaintiff states that “[i]ncarcerating institutions, responsible health care providers and correctional administration” failed “to provide appropriate, safe, handicap compatible housing and needed medication,” which “resulted in a harmful and deliberately negligent situation that resulted in permanent harm.”

Plaintiff states that, on May 31, 2001, “while housed at Prince William County Jail” (during a separate period of confinement there) in a cell “not designed to be in any way handicap compatible for [his] disability condition and safety,” he suffered “a severe hypokalemic paralysis attack” but “was refused access to” his medication and was told that he would “receive [his] medication during . . . regular ‘med rounds.’” According to Plaintiff, this left him in a “chronic weak condition without medication to prevent the attack of pain and paralysis that inevitably came . . . in force,” and that jail officials had been “warned that these **Hypokalemic** attacks cause a greatly increased chance of paralysis” and other risks. Then, “[a]t about 4:45 p.m., during the evening meal, the officer who served the meals and his inmate trustee assistant[] spilled some liquid on the day room floor of [Plaintiff’s] pod.” Plaintiff, “[u]naware of the spillage and incredibly weak from the neglected and untreated **Hypokalemic** attack[,] . . . stepped into the spilled liquid and fell.”⁶ He states that, as he fell, he hit his head on a steel doorjamb and “was knocked unconscious.”

Plaintiff alleges that, when he recovered consciousness, the nurse refused his request to send him to a hospital emergency room and that “[n]o backboard or other medical support device was used” in removing him from the floor to his bunk. Plaintiff alleges: “[I]n spite of [his]

⁶ Plaintiff adds that Sergeant Hetlel, a named defendant in this case, “acknowledged the spillage and ordered it to be cleaned up.”

initial lack of consciousness and then [his] subsequent warnings of injury, they chose to compound [his] pain and injuries with deliberate indifference to [his] serious medical needs.” The next day, Plaintiff acknowledges, an x-ray was administered⁷ and he was given ibuprofen and Flexeril, a tricyclic antidepressant compound that is used clinically as a long-acting skeletal muscle relaxant and analgesic.⁸

Plaintiff adds that grievances he filed about the incident were denied and ignored, and that “[t]hese policies and environment of distrust regarding medical matters and inmates [sic] medical care were the responsibility and based on the policies established by the facility’s commanding officer, Colonel Glendell Hill.” From the date of his fall “until mid-July of 2001,” Plaintiff states that he attempted to get Dr. Adams to “understand [his] situation.” He states that he “could not walk, potassium supplement or not,” and that, after his fall, his “legs would not move without [him] lifting them with [his] arms and hands.” Plaintiff was, however provided with a walker and a wheelchair; he states that, “[i]n a very short time, [the] walker [became] useless to [him] and [he has] been confined in a wheel chair for several years.” “[A]fter nearly six weeks of grievances and pleas for help,” Plaintiff states, “Dr. Adams began to understand that something was wrong.” Dr. Adams ordered an MRI on July 25, 2001, which was inconclusive. An appointment was scheduled with an orthopedic surgeon, who ordered physical therapy in August 2001. By this time, Plaintiff complains, 90 days had elapsed since his fall, and “muscle weakness had set in and [his] legs were unresponsive to this limited therapy.” Even though he states that his legs were unresponsive to the therapy, he maintains that the physical

⁷ Plaintiff does not state that the x-ray revealed any abnormalities.

⁸ See <http://en.wikipedia.org/wiki/Flexeril>.

therapy “was allowed to run only for about 45 days with sessions only about two times a week,” and that the “therapy was never given a real chance to work and to restore [his] ability to walk.” According to Plaintiff, electromyography conducted on December 12, 2001, “revealed that nerve damage was the primary reason that [he] could not walk.”

Plaintiff states that Dr. Adams ordered the physical therapy discontinued, and then sent Plaintiff to a “board certified specialist in Physical Medicine, Rehabilitation, and Electrodiagnostic Medicine.” Plaintiff alleges that this specialist “ordered extensive physical therapy geared specifically to regenerate nerve function,” but that “her order was ignored by Dr. Adams and subsequently by every Department of Corrections physician with whom [Plaintiff] came into contact.” Plaintiff indicates that he did receive the specialist’s prescriptions for medication, “but her recommendation [for physical therapy was] passed over by Dr. Adams in an act of deliberate indifference to [Plaintiff’s] serious medical needs.”

Plaintiff concedes that “Dr. Adams did order that [Plaintiff] finally be placed in a handicap equipped cell and allowed [Plaintiff] to keep [his] potassium supplement medication with [him]. . . .” However, Plaintiff maintains that Dr. Adams’ “deliberate indifference had cost [Plaintiff his] ability to walk.”

C. Claim No. 3

Plaintiff complains that “[incarcerating institutions, health care providers, and administration continued to fail to provide handicap compatible housing and needed medications” and “also added severe isolation to the mistreatment of persons with handicaps.” According to Plaintiff, he was transferred temporarily on March 13, 2002, “to the custody of the Fairfax County Jail in Fairfax, Virginia,” regarding “a probation violation ‘show cause’ hearing. . . .” At the Fairfax County Jail, Plaintiff claims that he “was again put through a

process of classification and medical examination,” and that he “clearly put both the jail officers and the medical staff ‘on notice’ concerning the serious nature of [his] disability and its care. . . .”

At Fairfax, Plaintiff states, he was placed “in a crowded ‘bullpen’ cell with no available seats,” his walker and wheelchair were taken from him, and his potassium supplement was not returned to him, the medical staff having determined that it would provide him with the supplements on their regular rounds. “After more than a day had passed,” however, “a kindly nurse recognized [Plaintiff] from a . . . prior incarceration and ordered [him] removed from [the] ‘bullpen’ to the . . . infirmary,” and his medication was returned to him, and he “was allowed to keep it on [his] person. . . .” Thereafter, Plaintiff complains, he was “moved to individual cell housing in the disciplinary wing of the jail,” because, according to Plaintiff, “[i]t was . . . the bizarre policy of [the Fairfax] jail’s security administration” to house handicapped people there. Plaintiff states that he was housed there “for several months,” he was “allowed no exercise,” and his “mental health began to decline. . . .” Plaintiff alleges that “Dr. Kaiser was simply ignored when she ordered at least two hours of outside the cell activities,” and that “[j]ail officials were deliberately indifferent to the harm this cruel and totally unnecessary treatments was causing” to Plaintiff. Plaintiff states that “[e]ventually, the psychiatrist ordered increased doses of Zoloft, a serious anti-depressant that had been started in lower doses at Prince William County Jail in an effort to deal with depression that came as [he] lost the ability to walk.”

Plaintiff states that, “[d]uring [his] time at the Fairfax County Jail, [he] was treated fairly by Dr. Kaiser, the medical physician[,] and by the mental health staff. . . .” He states that Dr. Kaiser “worked hard to find the causes of [his] inability to walk”; “sent [him] to three medical specialists”; ordered an x-ray of his lumbar spine; referred him to Dr. Roger Snyder, “an

orthopedic surgeon, who confirmed the earlier diagnosis of left lumbar radiculopathy (severe damage to nerves and nerve roots) and of course **hypokalemia.**” Plaintiff states that his consultation with Dr. Snyder “led to an appointment with . . . a board certified orthopedic specialist,” who gave Plaintiff the “very bad news” that he “had lost so much muscle mass with the delays in diagnosis and treatment . . . that [he] was no long [sic] a viable candidate for treatment by orthopedic surgical means.”

Plaintiff states that, on May 10, 2002, he “filed a grievance with the Fairfax County Jail security staff protesting the terrible isolation and discrimination with which they had treated [him] and other disabled inmates.” Plaintiff believes that the response he received “was designed . . . to put [him] off, because the jail had no desire to address changes in policy needed to protect and facilitate the handicapped.” However, Plaintiff states that the Public Defender who represented him persuaded the circuit court to order his removal from the Fairfax County Jail, and that he was transferred back to Prince William County on August 16, 2002, where Dr. Adams arranged for Plaintiff to be seen by “a radiological specialist” who administered “another MRI” that “was directed toward the thoracic spine area instead of the lumbar portion of [the] spine”; according to Plaintiff, the MRI “was conducted at Prince William Hospital located in Manassas” and showed that Plaintiff’s “spine [was] not broken, but . . . [was] badly compressed in several places as the result of the incident of May 31, 2001[,] and the resultant nerve damage from that compression has rendered [Plaintiff] unable to walk.”

Plaintiff then presents another narrative of an event that occurred on January 10, 2003, which he contends demonstrates “deliberate indifference” on the part of “security staff.” Plaintiff states that, while he was being transported from Prince William County Jail in Manassas, Virginia, to Deep Meadows Correctional Center (“Deep Meadows”) in State Farm,

Virginia, he was not allowed to keep his potassium supplements close at hand, which led to an episode of “**hypokalemic paralysis** caused by deliberate medical indifference.”

D. Claim No. 4

Plaintiff states that “[i]ncarcerating institutions, medical providers, and administration of the Department of Corrections failed to follow previous orders of medical specialists regarding treatment, failed to provide handicap equipped housing, and failed to maintain essential prescribed medication.” On January 10, 2003, Plaintiff was transferred to Deep Meadows. According to Plaintiff, the physician at Deep Meadows discontinued Plaintiff’s prescription for Celebrex, which had been “prescribed by [a] Physical Medicine and Rehabilitative Specialist . . . for the arthritis pain that had set up in the injured areas from the May 31, 2001 incident. . . .” Plaintiff further alleges that the physician at Deep Meadows refused to allow him to keep his potassium supplement on his person and had it administered in “smaller doses at fixed intervals during the day. . . .” Plaintiff was housed at Deep Meadows “from January 10, 2003 until late February in an isolated cell and in a cell space so small that [his] wheel chair could not turn around for [him] to use the restroom,” and Plaintiff “was compelled to urinate on [himself] and defecate due to the isolation and lack of anyone to help handicap prisoners in these tiny one-man cells.”

Plaintiff alleges that, on February 24, 2003, he filed an emergency grievance regarding these issues, and received the answer that he “had been seen evaluated [sic] by the psychiatric department the day before and would be seen by medical in due course but, [sic] to sign up for ‘sick call’ [sic].” In Plaintiff’s view, he was “once again put off while serious medical problems were deliberately ignored.” Then, according to Plaintiff, the psychiatrist at Deep Meadows forced plaintiff to choose between 1) remaining in isolation while taking the anti-depressant

Zoloft, or 2) going off the medication and being permitted to live with other inmates in the medical dormitory. “Fortunately,” Plaintiff states, he “was not [at Deep Meadows] a very long time.”

E. Claim No. 5

Plaintiff alleges the following: “Failure of physicians and security staff at more permanent locations in the Department of Corrections to provide physical therapy and serious treatment for [his] injuries and additional gross negligence and deliberate indifference resulting in additional injury.” According to Plaintiff, he was transferred on May 27, 2003, from Deep Meadows to the Coffeewood Correctional Center (“Coffeewood”) in Mitchells, Virginia. There, he was “housed in what was stated to be handicap compatible housing but which lacked basic handicap facilities such as a shower stool,” and he was “forced by the prison’s medical department . . . to buy [his] own shower stool and other basic handicap needs from personal money.” Plaintiff then states that, “as [his] muscle mass declined, with no physical therapy or treatment of any kind, [his] ability to walk even a few steps with a walker went away.” According to Plaintiff, “from [his] time at Deep Meadows forward, [he] was never to walk a step again, event with the assistance of a walker,” and he adds that, “since then, over three years ago,” he has been “confined to a wheel chair.”

At Coffeewood, the “medical staff was no more sensitive to [Plaintiff’s] problems than anyone else had been so far,” and Plaintiff was housed in a dorm with a small “bunk aisle” that he “shared with another inmate,” which resulted in “friction and tension between [Plaintiff and his cell mate] that could have been avoided had [Plaintiff] been housed properly to begin with.” Plaintiff states that, while at Coffeewood, he “was sent out for tow MRI tests but never had the

results of those tests discussed with [him] by the medical department in spite of [his] continual requests to know what they showed.”

Then, on August 7, 2003, “while being transported to the University of Virginia hospital for a CT scan of [his] pelvis and abdomen regions, [Plaintiff] received additional injuries as the result of the transporting officers’ failure to use the proper safety features.” According to Plaintiff, his wheelchair was secured, but he was not secured in the wheelchair, and a sudden stop resulted in Plaintiff being thrown out of his wheelchair and “directly into the steel cage security barrier. . . .” He states that he “incurred injuries to [his] face, head, neck, left knee, legs, and upper back,” and the “incident would also aggravate the injuries received earlier. . . .” Plaintiff alleges that he was “denied access to emergency treatment . . . even when [he] filed emergency grievances,” and the doctor “would not even authorize x-rays to be taken to assure that nothing was broken.” However, “[t]hree days later . . . the medical authority at Coffeewood . . . agreed to send [Plaintiff] to the hospital for x-rays and emergency treatment,” but only after Plaintiff “threaten[ed] legal action to get her to even listen to [him].” Plaintiff states that he filed grievances and wrote letters regarding these incidents, but his efforts did not lead to any satisfactory outcome.

Thereafter, Plaintiff states, he “reported some suspicious activity on the part of [his] bunkmate,” who had “somehow found a piece of a bullet” and suggested “that he was going to fake an accident for purposes of financial gain by suing the prison officials.” According to Plaintiff, in return “[f]or notifying prison officials of this dangerous and bizarre plan on the part of [his] bunkmate,” Plaintiff was placed under investigation, and, “[f]rom November of 2003 until March 2, 2004, [he] was held in an isolation/segregation cell that was narrow and not handicapped equipped.” Plaintiff states that he “was never charged,” that his “[c]omplaints and

grievances regarding this treatment were sent to the Warden and Grievance Coordinator,” he “was denied the opportunity to end this isolation or to even have a hearing concerning it,” and he was not allowed to “use the Law Library typewriters and resources. . . .”

F. Claim No. 6

Plaintiff states that “[i]ncarcerating institutions, medical providers, and administration continued in the face of real warnings and notification to deny needed medication, avoid physical therapy, and treatment.” According to Plaintiff, he was transferred on March 3, 2004, to Dillywn Correctional Center (“Dillwyn”) in Dillwyn, Virginia, where his “potassium supplement was again denied on an as needed[] basis,” and his “[a]ttempts . . . to notify” Dr. Cypress of his medical needs “were ignored as Dr. Cypress continued the same bad choices that every other DOC physician had chosen.”

However, Plaintiff acknowledges that he “was put in a dormitory with handicap facilities for the restroom and the shower,” that his “bed placement was . . . conducive to [his] being able to get in and out of the building easily,” and that he “was given an inmate job. . . .” Nonetheless, Plaintiff complains that he “did not have [his] medication and treatment, toward being able to walk again, was completely ignored on the grounds of possibly making the injury worse”; he further complains that “the lack of [his] potassium supplement” caused hypokalemic attacks of such severity that he “began to illegally hoard potassium supplements. . . .”

As set forth above, Plaintiff was transferred to Dillwyn on March 3, 2004, and he states that, “[a]fter two years of verbal and written complaints,” he prevailed upon Dr. Cypress to “allow [him] to keep [his] potassium supplement with [him],” and he “was put on self-medication.” Thus, it appears from Plaintiff’s complaint that, since about March 3, 2006, until he left the VDOC, Plaintiff was allowed to have his potassium supplements upon his person at

all times for the purpose of self-medication. Nonetheless, Plaintiff complains that he has not had a follow-up EMG and that, “[w]hile some things have been better at Dillwyn, the problems have continued with credibility and genuine effort to restore [his] ability to walk. Promised treatment has, as of the date of this filing, been non-existent for reasons of the permanency of [his] injuries and the danger of making them worse.”

III. DISCUSSION

A. Glendell Hill

Glendell Hill was the Superintendent of the Prince William County Jail, where Plaintiff was incarcerated from July 5, 2000, to March 13, 2002, and from August 16, 2002, to January 10, 2003. Plaintiff makes no specific reference to Hill in his complaint, other than listing his name in the caption.

There is no federal statute of limitations applicable in § 1983 actions. *Wilson v. Garcia*, 471 U.S. 261, 266 (1985). Accordingly, § 1983 actions are governed by the state statute of limitations for general personal injury cases in the state where the alleged violations occur. *Owens v. Okure*, 488 U.S. 235, 239-40 (1989). Virginia has a two-year statute of limitations for general, personal injury claims. Va. Code Ann. § 8.01-243(a). Therefore, a plaintiff bringing a civil rights action under § 1983 in Virginia must do so within two years from the time when his action accrues. *Id.* However, the time of accrual of a cause of action under § 1983 is a federal question. *Nasim v. Warden, Md. House of Correction*, 64 F.3d 951, 955 (4th Cir. 1995) (*en banc*). Additionally, the Supreme Court of the United States has recognized that, although it had “never stated so expressly, the accrual date of a § 1983 cause of action is a question of federal law that is not resolved by reference to state law.” *Wallace v. Kato*, ___ U.S. ___, 127 S. Ct. 1091, 1095 (2007). In *Nasim*, the United States Court of Appeals for the Fourth Circuit held that

a cause of action under § 1983 accrues and the statute of limitations begins running “when the plaintiff possesses sufficient facts about the harm done to him that reasonable inquiry will reveal his cause of action.” *Id.*

The statute of limitations for ADA claims is one year. *Thompson v. Virginia Dep’t of Game and Inland Fisheries*, 2006 WL 1310363 *3 (W.D. Va.) (the “one-year statute of limitations has been held in Virginia to apply to ADA claims”), *aff’d*, 196 Fed. Appx. 164 (4th Cir. 2006); *Simchick v. Fairfax County School Bd.*, 2006 WL 721372 *4 (E.D. Va. 2006) (holding that the one-year statute of limitations applies to ADA claims, because the ADA was so closely modeled on the Rehabilitation Act and therefore adopting the reasoning set forth in *Wolsky v. Medical College of Hampton Roads*, 1 F.3d 222 (4th Cir. 1993)) (*reconsideration on other grounds granted in part and denied in part*, 2006 WL 1390557); *Childress v. Clement*, 5 F. Supp. 2d 384, 388 (E.D. Va. 1998); *but cf. Peters v. Blue Ridge Reg’l Jail*, 2006 WL 3761624 *2 (W.D. Va. 2006) (using the borrowed two-year statute of limitations for both § 1983 and ADA claims).

Plaintiff’s complaint against Hill is barred by the statute of limitations, which in Virginia is one year for the ADA claims, and two years for the 42 U.S.C. § 1983 claims implied by Plaintiff’s use of the “deliberate indifference” language that constitutes the standard for stating a cognizable Eighth Amendment claim under § 1983 for denial of medical care. Given that Plaintiff’s last date of incarceration in the Prince William County Jail was January 10, 2003, none of the claims he attempts to state occurred within two years (for § 1983 claims) or one year (for ADA claims) of the filing of the instant complaint, and thus Plaintiff fails to state a claim upon which relief may be granted against Hill.

B. Doctor Cypress and Nurse Elko

ADA Claims

As set out in Claim No. 6, the only enumerated claim that could be construed to include timely claims,⁹ Plaintiff encountered Dr. Cypress and Nurse Elko at Dillwyn. Plaintiff's Complaint fails to state a claim under the ADA against Dr. Cypress and Nurse Elko for the following reasons.

First, the ADA does not permit an ADA claim against an individual defendant. *Baird v. Rose*, 192 F.3d 462, 471 (4th Cir. 1999) (affirming dismissal of individual capacity defendants); *McIntyre-Handy v. APAC Customer Services, Inc.*, 422 F. Supp. 2d 611, 618 n.13 (E.D. Va. 2006) (ADA does not permit action against individual defendants); *Allen v. The College of William & Mary*, 245 F. Supp. 2d 777, 786 (E.D. Va. 2003) (the Fourth Circuit "has established that individuals are not liable for violations of the ADA"). Plaintiff thus cannot state an ADA claim against Dr. Cypress or Nurse Elko.

Second, as Dr. Cypress and Nurse Elko argue, the allegations do not satisfy the elements of an ADA 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 subjected to discrimination by any such entity." 42 U.S.C. § 12132. Plaintiff alleges no factual basis whatsoever for an ADA claim against Dr. Cypress or Nurse Elko (indeed, he alleges no facts at all regarding Nurse Elko). "Dismissal of a complaint for failure to state facts supporting each of the elements of a claim is, of course, proper." *Iodic v. U.S. Dep't of Veterans Affairs*, 289 F.3d 270, 281 (4th Cir. 2002).

⁹ Plaintiff filed his complaint on September 21, 2007; thus, any timely claim under § 1983 must have accrued by September 21, 2005, and any timely claim under the ADA must have accrued by September 21, 2006.

In sum, as Defendants argue, “[t]o state a claim under Title II of the ADA, a Plaintiff must be an otherwise qualified individual who is excluded from participation in a program or denied a benefit because of his disability.” *McCoy v. Filbert*, 2000 WL 34510227 *3 (D. Md. 2000) (citing *Baird*, 192 F.3d at 467), *aff’d*, 15 Fed. Appx. 65 (4th Cir. 2001); *accord Carrasquillo v. City of New York*, 324 F. Supp. 2d 428, 443 (S.D. N.Y. 2004) (“Plaintiff’s claim fails because it does not allege that Plaintiff was *prevented* from participating in or benefiting from prison programs and services because of his disability”) (emphasis in original). Like the plaintiff in *McCoy*, Plaintiff “does not identify a single program or benefit available to non-disabled prisoners from which he has been excluded due to his disability.” 2000 WL 34510227 *3. On the contrary, Plaintiff explicitly acknowledges that, at Dillwyn Correctional Center, he was provided handicap facilities, was given an inmate job, and had full access to everything despite his alleged handicap. The Complaint is completely lacking in any factual allegations that plaintiff was excluded from any program or services because of his alleged disability, let alone because of anything Dr. Cypress or Nurse Elko specifically did.

The Court observes that, to establish a prima facie case under Title II of the ADA, Plaintiff must show that: (1) he has a disability; (2) he was either excluded from participation in or denied the benefits of some public entity’s services, programs, or activities for which he was otherwise qualified; and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability. *See Constantine v. George Mason Univ.*, 411 F.3d 474, 498 (4th Cir. 2005); *Baird*, 192 F.3d at 467. States are obligated to make “reasonable modifications” to enable the disabled person to receive the services or participate in programs or activities. 42 U.S.C. § 12131(2) (2000). A reasonable modification does not require the public entity to employ any and all means to make services available to persons with disabilities. Rather, the public entity is

obligated to make those modifications that do not “fundamentally alter the nature of the service or activity of the public entity or impose an undue burden.” *Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1082 (11th Cir.2007). Based on the allegations in the Complaint, the Court finds that the VDOC and the medical decision makers at Dillwyn, Dr. Cypress and Nurse Elko, did not deny Plaintiff the opportunity to receive services, such as conducting personal hygiene or engaging in recreation. Insofar as Plaintiff claims that the he was denied proper medical care, Plaintiff fails to show he was treated in this manner because of his disability. *See Miller v. Hinton*, 288 Fed. Appx. 901, (4th Cir. 2008) (prison’s alleged denial of access to colostomy bags and catheters by inmate, who was a paraplegic confined to a wheelchair who used such supplies for urinary bladder control, did not constitute disability discrimination in violation of ADA absent a showing that inmate was treated in this manner because of his disability), citing *Bryant v. Madigan*, 84 F.3d 246, 249 (7th Cir. 1996) (holding that the ADA is not “violated by a prison’s simply failing to attend to the medical needs of its disabled prisoners. No discrimination is alleged; Bryant was not treated worse because he was disabled.”).

§ 1983 Claims

Plaintiff fails to state a claim against Dr. Cypress and Nurse Elko under § 1983. In order to state a cognizable claim for denial of medical care under the Eighth Amendment, a plaintiff must allege facts sufficient to demonstrate a deliberate indifference to a serious medical need. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). To establish deliberate indifference, a plaintiff must present facts to evince that the defendants had actual knowledge of and disregard for an objectively serious medical need. *Farmer v. Brennan*, 511 U.S. 825 (1994); *see also, Rish v. Johnson*, 131 F.2d 1092, 1096 (4th Cir. 1997). A medical need serious enough to give rise to a constitutional claim involves a condition that places the inmate at a substantial risk of serious

harm, usually loss of life or permanent disability, or a condition for which lack of treatment perpetuates severe pain. *Sosebee v. Murphy*, 797 F.2d 179, 181-83 (4th Cir. 1986) (reversing summary judgment for defendants and remanding where guards knew of serious illness of plaintiff and exhibited deliberate indifference to request for medical treatment prior to inmate's death); *see also Estelle*, 429 U.S. at 104; *Farmer*, 511 U.S. at 832-35; *Loe v. Armistead*, 582 F.2d 1291, 1296-97 (4th Cir. 1978). To bring a constitutional claim against non-medical prison personnel, an inmate must show that such officials were personally involved with a denial of treatment, deliberately interfered with a prison doctor's treatment, or tacitly authorized or were indifferent to the prison physician's misconduct. *Miltier v. Beorn*, 896 F.2d 848, 854 (4th Cir. 1990).¹⁰ Questions of medical judgment are not subject to judicial review. *Russell v. Sheffer*, 528 F.2d 318, 319 (4th Cir. 1975). Claims regarding a disagreement between an inmate and medical personnel over diagnosis or course of treatment and allegations of malpractice or negligence in treatment do not state cognizable constitutional claims under the Eighth Amendment. *Wright v. Collins*, 766 F.2d 841, 849 (4th Cir. 1985); *Estelle*, 429 U.S. at 105-06. An inmate is not entitled to unqualified access to health care; the right to medical treatment is limited to that treatment which is medically necessary and not to "that which may be considered merely desirable." *Bowring v. Godwin*, 551 F.2d 44, 47-48 (4th Cir. 1977).

The United States Court of Appeals for the Fourth Circuit has stated that, for any alleged nontreatment or mistreatment to constitute deliberate indifference, "the treatment must be so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to

¹⁰ Furthermore, a defendant who occupies a supervisory position may not be held liable under a theory of *respondeat superior* in a § 1983 action. *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 690-92 (1978); *Ross v. Reed*, 719 F.2d 689, 698 (4th Cir. 1983) (finding that *respondeat superior* liability has no place in § 1983 jurisprudence).

fundamental fairness.” *Miltier*, 896 F.2d at 851. Furthermore, even “[n]egligence or malpractice in the provision of medical services does not constitute a claim under § 1983.” *Wright*, 766 F.2d at 849.

Even though Plaintiff claims that Dr. Cypress and Nurse Elko were deliberately indifferent to his serious medical needs, his allegations fail to state a claim. A jail official cannot be considered to have acted with deliberate indifference unless he knows of and disregards an excessive risk to an inmate’s health. *Farmer*, 511 U.S. at 837. “[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” *Id.*; see also *Johnson v. Quinones*, 145 F.3d 164, 167-68 (4th Cir. 1998) (because an Eighth Amendment claim has both objective and a subjective elements, even if the defendant doctors were negligent in missing a diagnosis with respect to a serious medical problem, that was not sufficient for a claim).

Plaintiff alleges no facts whatsoever showing any deliberate indifference by either of these Defendants to any serious medical need of Plaintiff. In fact, as the Court has observed, Plaintiff states no facts whatsoever concerning Nurse Elko. Significantly, Plaintiff’s own pleadings reflect only that Dr. Cypress believed (as had other medical personnel before him who dealt with Plaintiff at other) for some time that “it was dangerous to allow [plaintiff] to self-medicate [his] attacks of Hypokalemia,” and thus provided the potassium supplements to Plaintiff “at regular intervals” on regular medical rounds. In addition, Plaintiff’s own pleadings indicate that, with respect to any other treatment, such treatment had the “danger” of “making the injury worse.” Plaintiff’s conclusory contention that Dr. Cypress made “bad choices” is unavailing. As the Court of Appeals stated in *Harris v. Murray*, 761 F. Supp. at 414, “[d]isagreements between an inmate and a physician over treatment do not state a claim under §

1983. *See also Russell*, 528 F.2d at 319 (“Questions of medical judgment are not subject to judicial review”); *Peterson v. Davis*, 551 F. Supp. 137, 146 (D. Md. 1982) (“[t]he mere failure to treat all medical problems to a prisoner’s satisfaction, even if that failure amounts to medical malpractice, is insufficient to support a claim under § 1983”).

Additionally, Plaintiff alleges no direct involvement by these defendants in any allegedly insufficient medical treatment, and thus his claims also fail on that basis. Liability under 42 U.S.C. § 1983 cannot be imposed upon a defendant unless the defendant is shown to have “participated directly” in the alleged violation of the plaintiff’s constitutional rights. *Fisher v. Washington Metropolitan Area Transit Authority*, 690 F.2d 1133, 1142 (4th Cir. 1982) (no basis exists under 42 U.S.C. § 1983 for vicarious liability). Liability under 42 U.S.C. § 1983 cannot be based on the supervisory position of a defendant with respect to the alleged conduct of others. *Ross v. Reed*, 719 F.2d 689, 698 (4th Cir. 1983) (*respondeat superior* liability has no place in § 1983 jurisprudence). Plaintiff alleges no basis whatsoever for any claim that these defendants were deliberately indifferent to any of his serious medical needs. Nor can Plaintiff assert that he suffered a serious injury as a result of any alleged conduct on the part of Dr. Cypress or Nurse Elko. *Strickler v. Waters*, 989 F.2d 1375, 1381 (4th Cir. 1993) (with respect to an Eighth Amendment claim, unless plaintiff has suffered a serious injury as a result of the alleged actions he “simply has not been subject to cruel and unusual punishment within the meaning of the Amendment”); *Staples v. Virginia Dep’t of Corrections*, 904 F. Supp. 487, 492 (E.D. Va. 1995) (dismissing the claims of an inmate under 42 U.S.C. § 1983 because a plaintiff must demonstrate “an unnecessary and wanton infliction of pain which has resulted in serious medical or emotional deterioration”).

Plaintiff encountered Dr. Cypress and Nurse Elko at the Dillwyn Correctional Center, but alleges no serious injury as a result of any conduct of these Defendants. Plaintiff alleges that he did not have his ability to walk restored at Dillwyn, but that is an ability he states he had lost, and was believed to have lost permanently, prior to his arrival at Dillwyn Correctional Center. Furthermore, Plaintiff's Complaint explicitly acknowledges the following: that he promptly met with medical personal upon his arrival at Dillwyn; that he was placed in a dormitory with handicapped facilities at Dillwyn; that he was given an inmate job at Dillwyn; and that he was placed on a self-medication regime at Dillwyn. Plaintiff's own Complaint confirms that he was provided adequate medical care at Dillwyn, which is where he encountered Dr. Cypress and Nurse Elko. Any duty to provide access to medical care was met. Plaintiff's disagreement with Defendants' medical decisions does not amount to deliberate indifference. Accordingly, Plaintiff has failed to allege a basis for a claim under 42 U.S.C. § 1983 against either Dr. Cypress or Nurse Elko.^{11, 12}

¹¹ To the extent Plaintiff believes Defendants were negligent in failing to recognize or treat his medical needs, such a disagreement does not rise to the level of a federal constitutional violation. Rather, such a claim would arise, if at all, under state medical malpractice laws and does not present a colorable claim under § 1983. *See Estelle*, 429 U.S. at 105-06. Having determined that Plaintiff fails to state any claims under federal law upon which relief may be granted, the Court declines to exercise supplemental jurisdiction over any claim Plaintiff may purport to have raised under state law (state law is not invoked in the Complaint). *See* 28 U.S.C. § 1367(c)(3) (providing that "district courts may decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction. . ."). Moreover, although the Court liberally construes pro se complaints, it does not act as an advocate. *Weller v. Department of Soc. Servs.*, 901 F.2d 387, 391 (4th Cir. 1990). Nor is the Court expected to develop tangential claims from scant assertions in the complaint, *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278-79 (4th Cir. 1985), and dismissal is appropriate when the complaint contains a detailed description of underlying facts that fail to state a viable claim, *Estelle*, 429 U.S. at 106-09. Here, it appears likely that any of Plaintiff's claims that could be construed to invoke state negligence law fall outside of Virginia's two-year statute of limitations for general, personal injury claims. Va. Code Ann. § 8.01-243(a).

Additionally, Plaintiff's requests for injunctive relief are moot, given that he is no longer an inmate in the VDOC. *See Williams v. Griffin*, 952 F.2d 820, 823 (4th Cir. 1991).

¹² Defendants have asserted, *inter alia*, that they are entitled to Eleventh Amendment sovereign immunity and qualified immunity. Because I will dismiss the claims against these Defendants for failure to state a claim, I will
(continued...)

C. Officer Hetlel, Officer Bielec, and Dr. Adams

As with Glendell Hill, discussed above, Plaintiff came into contact with these Defendants at the Prince William County Jail, where Plaintiff was incarcerated from July 5, 2000, to March 13, 2002, and from August 16, 2002, to January 10, 2003. As with Hill, Plaintiff's claims against these Defendants are barred by the statutes of limitations, which in Virginia is one year for the ADA claims, and two years for the 42 U.S.C. § 1983 claims implied by Plaintiff's use of the "deliberate indifference" language that constitutes the standard for stating a cognizable Eighth Amendment claim under § 1983 for denial of medical care. As previously discussed, Plaintiff's last date of incarceration in the Prince William County Jail was January 10, 2003, and none of the claims he attempts to state occurred within two years (for § 1983 claims) or one year (for ADA claims) of the filing of the instant complaint, and thus Plaintiff fails to state a claim upon which relief may be granted.

D. Fred Schilling and the VDOC¹³

Claim Nos. 1, 2, and 3

Claim Nos. 1, 2, and 3 relate to Plaintiff's incarceration in local jails and contain no allegations that could be construed as implicating the VDOC or Schilling.

Claim Nos. 1, 2, 3, 4, 5, and Part of Claim No. 6 Are Barred by the Limitations Periods Set Forth Previously

For purposes of § 1983 claims, Claim Nos. 1, 2, 3, 4, and 5 include allegations between July 5, 2000, and March 2, 2004; all of those claims are barred in their entirety by the two-year

¹²(...continued)
not consider Defendants' immunity arguments.

¹³ Fred Schilling, the Director of Health Services for the Virginia Department of Corrections, is a doctor by title; however, according to his pleadings he is not a medical doctor. The Motion to Dismiss filed by Schilling and the VDOC states that Brown was released from the VDOC's custody on September 4, 2007.

statute of limitations applicable to § 1983 claims in Virginia. Claim No. 6 includes allegations between March 3, 2004, and September 27, 2006 (the date Plaintiff signed his complaint, and the latest possible date of occurrence of the allegations suggested by the narrative of Claim No. 6)¹⁴; all allegations between March 3, 2004, and September 21, 2005 (two years prior to the date Plaintiff filed the complaint), are clearly barred by the two-year statute of limitations. The only § 1983 allegations that could possibly survive the statute of limitations would be those that accrued between September 21, 2005, and September 27, 2006, while Plaintiff was incarcerated at Dillwyn.

For purposes of ADA claims, Claim Nos. 1, 2, 3, 4, and 5 include allegations between July 5, 2000, and March 2, 2004; all of those claims are barred in their entirety by the one-year statute of limitations applicable to ADA claims. Claim No. 6 includes allegations between March 3, 2004, and September 27, 2006 (the date Plaintiff signed the complaint); all allegations between March 3, 2004, and September 21, 2006 (one year prior to the date Plaintiff filed the complaint), are clearly barred by the one-year statute of limitations. The only ADA claims that could survive the statute of limitations would be those claims that accrued between September 21, 2006, and September 27, 2006, while Plaintiff was incarcerated at Dillwyn.

VDOC Is Not a “Person” Under § 1983

The VDOC is not a “person” within the meaning of § 1983 and thus is not subject to suit under that statute. *See Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 71 (1989); *see also Howlett v. Rose*, 496 U.S. 356, 365 (1990) (“The State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under § 1983 in

¹⁴ *See* n. 1, *supra*.

either federal court of state court.”). Accordingly, Plaintiff’s claim against the VDOC is dismissed for lack of subject matter jurisdiction.

In His Official Capacity, Schilling Is Not a “Person” Under § 1983

To the extent Schilling is sued in his official capacity, he is immune from suit under § 1983, because neither a state nor its officials acting in their official capacities are “persons” for purposes of § 1983. *See Will*, 491 U.S. at 71. Accordingly, Plaintiff’s claim against Schilling in Schilling’s official capacity must be dismissed for lack of subject matter jurisdiction.

Plaintiff Fails to State a § 1983 Claim Against Schilling

The applicable law regarding § 1983 claims has been set forth above. Plaintiff has alleged no facts to show that Schilling knew of or disregarded an excessive risk to Plaintiff’s health and safety or that he intentionally denied, delayed, or interfered with Plaintiff’s access to medical care and prescribed treatment.

Plaintiff alleges that Schilling responded to some of his grievances. However, given that “[r]uling against a prisoner on an administrative complaint does not cause or contribute to [a constitutional] violation,” *George v. Smith*, 507 F.3d 605, 609 (7th Cir. 2007) (adding that “[a] guard who stands and watches while another guard beats a prisoner violates the Constitution; a guard who rejects an administrative complaint about a completed act of misconduct does not”), and inmates do not have a constitutionally protected right to a grievance procedure, *see, e.g., Adams v. Rice*, 40 F.3d 72, 75 (4th Cir. 1994); *Flick v. Alba*, 932 F.2d 728, 729 (8th Cir. 1991), there is no liability under § 1983 for a prison administrator’s response to a grievance or appeal. Moreover, liability under § 1983 requires personal action by a named defendant; other than naming Schilling in the caption of his complaint, Plaintiff has not alleged that Schilling was personally involved in the alleged violation of his constitutional rights. A plaintiff must

affirmatively allege a defendant's personal involvement in order to state a claim under 42 U.S.C. § 1983, and here, Plaintiff has alleged no direct personal action taken against him by Schilling in violation of his constitutional rights. *See Garraghty v. Va. Dep. of Corrections*, 52 F.3d 1274, 1280 (4th Cir. 1995); *Wright v. Collins*, 766 F.2d 841, 949 (4th Cir. 1985); and *Barrow v. Bounds*, 498 F.2d 1397 (4th Cir. 1974) (Table).

To bring a constitutional claim against non-medical prison personnel such as Schilling, Plaintiff must show that such officials were personally involved with a denial of treatment, deliberately interfered with a prison doctor's treatment, or tacitly authorized or were indifferent to the prison physician's misconduct. *Miltier*, 896 F.2d at 854. Supervisory prison officials are entitled to rely on the professional judgment of trained medical personnel. *Id.* The Court takes judicial notice that Schilling is a policy supervisor who reviews grievances for VDOC policy violations and is not personally involved in the application for or denial of medical treatment. *See Royal v. Bassett*, 2008 WL 5169443 (W.D. Va. Dec. 9, 2008), at *6; *Miltier*, 896 F.2d at 854.

To the extent the complaint could be construed to allege that Schilling is liable under § 1983 in his supervisory capacity, such liability

requires a showing that: (1) the supervisory defendants failed promptly to provide an inmate with needed medical care, *see Boyce v. Alizaduh*, 595 F.2d 948, 953 (4th Cir.1979); (2) that the supervisory defendants deliberately interfered with the prison doctors' performance, *see Gamble v. Estelle*, 554 F.2d 653, 654 (5th Cir.1977); or (3) that the supervisory defendants tacitly authorized or were indifferent to the prison physicians' constitutional violations. *See Slakan v. Porter*, 737 F.2d 368, 372 (4th Cir.1984) (discussing supervisory liability for an inmate's beating by prison guards).

Miltier, 896 F.2d at 854. Here, Plaintiff does not allege that Schilling personally failed to ensure that medical care was available to him at the VDOC facilities where Plaintiff was incarcerated,

nor does Plaintiff allege that Schilling personally interfered with the prison doctors' performance or that Schilling tacitly authorized or was indifferent to any alleged constitutional violations committed by prison medical personnel. Furthermore, supervisory officials are entitled to rely on the expertise of prison doctors in treating inmates and are not deliberately indifferent in failing to intervene in treatment. *Id.*, 896 F.2d at 854-55.

Plaintiff's Complaint explicitly acknowledges the following: that he promptly met with medical personal upon his arrival at Dillwyn; that he was placed in a dormitory with handicapped facilities at Dillwyn; that he was given an inmate job at Dillwyn; and that he was placed on a self-medication regime at Dillwyn. Plaintiff's own Complaint confirms that he was provided adequate medical care at Dillwyn, which is the only VDOC facility implicated in Plaintiff's few timely allegations. Any duty to provide access to medical care was met. Plaintiff's disagreement with the medical decisions does not amount to deliberate indifference.

Plaintiff Fails to State an ADA Claim Against Schilling and the VDOC

Plaintiff's ADA claim against Schilling and the VDOC fails for the same reasons that his claims against Dr. Cypress and Nurse Elko fail. In the first instance, Schilling is an individual, not a "public entity," and thus is not susceptible to suit in his individual capacity. Moreover, Plaintiff does not allege how his condition substantially limited his activities while he was incarcerated at Dillwyn; in fact, his own pleadings indicate that his activities were not limited while he was at Dillwyn. At Dillwyn, Plaintiff was not denied the opportunity to receive services, such as conducting personal hygiene or engaging in recreation, and, insofar as Plaintiff claims that the he was denied proper medical care, Plaintiff fails to show he was treated in this

manner because of his disability.¹⁵ Plaintiff's own statements in his Complaint indicate that he was not excluded from participation in or denied the benefits of services at Dillwyn. In fact, he acknowledges that, at Dillwyn, he was housed in a dormitory with handicapped-accessible facilities. He also acknowledges that he was given an inmate job, that he saw medical staff immediately upon his arrival at the facility, and that he was allowed to follow his desired self-medication regime.^{16, 17}

IV. CONCLUSION

For the stated reasons, Defendants' Motions to Dismiss will be granted; accordingly, the Complaint will be dismissed and stricken from the active docket of the Court.

The Clerk of the Court is hereby directed to send a certified copy of this Memorandum Opinion and the accompanying Order to Plaintiff and to all counsel of record.

Entered this 9th day of January, 2009

/s/ Norman K. Moon
NORMAN K. MOON
UNITED STATES DISTRICT JUDGE

¹⁵ Several Defendants have asserted that Plaintiff fails to allege facts sufficient to show that he has a disability as defined by Title II of the ADA. However, the Court will assume that Plaintiff has alleged sufficient facts to show that he has a disability and that he is a qualified individual with a disability; nonetheless, the Court will dismiss Plaintiff's ADA claims because he fails to allege sufficient facts to show that he was either excluded from participation in or was denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against because of his disability.

¹⁶ Plaintiff's allegations indicate that there was an initial period during Plaintiff's confinement at Dillwyn when Plaintiff was not permitted to self-medicate; however, even assuming that not being permitted to pursue the desired self-medication regime violated a constitutional right or the provisions of the ADA, that time period falls outside of the period covering Plaintiff's timely lodged claims.

¹⁷ Defendants have asserted, *inter alia*, that they are entitled to Eleventh Amendment sovereign immunity and qualified immunity. Because I will dismiss the claims against these Defendants for failure to state a claim, I will not consider Defendants' immunity arguments.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

JAMES EDWARD BROWN,

Plaintiff,

v.

VIRGINIA DEPARTMENT OF CORRECTIONS,
ET AL.,

Defendants.

CIVIL ACTION No. 6:07-cv-00033

FINAL ORDER

JUDGE NORMAN K. MOON

For the reasons stated in the accompanying Memorandum Opinion, Defendants' Motions to Dismiss are hereby GRANTED, any pending motions are DENIED as MOOT, and this case is STRICKEN from the active docket of the Court.

The Clerk of the Court is directed to send a certified copy of this Order and the accompanying Memorandum Opinion to Plaintiff and to all counsel of record.

It is so ORDERED.

Entered this 9th day of January, 2009

/s/ Norman K. Moon
NORMAN K. MOON
UNITED STATES DISTRICT JUDGE