UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN DORN, Plaintiff,	)	
	)	No. 1:15-cv-359
-v-	)	
	)	Honorable Paul L. Maloney
MICHIGAN DEPARTMENT OF CORRECTIONS, et al., Defendants.	)	

ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR RECONSIDERATION

Plaintiff John Dorn is prisoner under the control of the Michigan Department of Corrections (MDOC). Defendants filed two motions to dismiss, raising jurisdictional concerns and the failure to state a claim. (ECF Nos. 17 and 20.) This Court granted the motions in part. (ECF No. 25.) In relevant part, the Court found that Defendants were entitled to sovereign immunity for Plaintiff's Rehabilitation Act and Americans with Disabilities Act (ADA) claims.

Plaintiff filed a motion for reconsideration. (ECF No. 34.) This Court ordered Defendants to file a response, which they have done (ECF No. 54.) Having reviewed the motion and response, the Court will grant Plaintiff partial relief from the previous order.

I.

Under the Local Rules, a court may grant a motion for reconsideration when the moving party demonstrates both a "palpable defect" by which the court and parties have been misled and a showing that a different disposition of the case must result from the correction

of the mistake. W.D. Mich. LCivR 7.4(a). The decision to grant or deny a motion for reconsideration under this Local Rule falls within the district court's discretion. *See Evanston Ins. Co. v. Cogswell Props., LLC*, 683 F.3d 684, 691 (6th Cir. 2012) (citation omitted). The "palpable defect" standard does not expand the authority of the district court to reconsider an earlier order; it is merely consistent with a district court's inherent authority. *See Tiedel v. Northwestern Michigan Coll.*, 865 F.2d 88, 91 (6th Cir. 1988). The Sixth Circuit has held that "'[d]istrict courts have inherent power to reconsider interlocutory orders and reopen any part of a case before entry of final judgment.'" *In re Saffady*, 524 F.3d 799, 803 (6th Cir. 2008) (quoting *Mallory v. Eyrich*, 922 F.2d 1273, 1282 (6th Cir. 1991)). A party seeking reconsideration of an interlocutory order must show (1) an intervening change in the controlling law, (2) new evidence previously not available, or (3) a need to correct error to prevent manifest injustice. *Louisville/Jefferson Cty. Metro Gov't v. Hotels.com, L.P.*, 590 F.3d 381, 389 (6th Cir. 2009) (citing *Rodriguez v. Tennessee Laborers Health & Welfare Fund*, 89 F. App'x 949, 959 (6th Cir. 2004)); *see Carter v. Robinson*, 211 F.R.D. 549, 550 (E.D. Mich. 2003) (citing *NL Indus., Inc. v. Commercial Union Ins. Co.*, 65 F.3d 314, 324 n.8 (3d Cir. 1995)). The decision to grant or deny a motion for reconsideration of an interlocutory order also falls within the discretion of the district court. *Rodriguez,* 89 F. App'x at 952.

II.

Plaintiff asserts three errors. First, Plaintiff asserts the Court erred in holding that the State was immune from claims brought under the Rehabilitation Act. Second, Plaintiff asserts he pled sufficient facts to establish a violation of the Equal Protection Clause, which

would abrogate immunity under the ADA. Third, Plaintiff asserts enforcement of the Policy Directive is sufficient to show a violation of the Due Process Clause, which would abrogate immunity under the ADA.

A. Rehabilitation Act

Defendants concede that the Court erred in granting them Eleventh Amendment immunity and dismissing the official capacity claims brought under the Rehabilitation Act. (ECF No. 54 Def. Resp. at 2 PageID.332.) Plaintiff pleaded that the MDOC has accepted federal funds. The Sixth Circuit has held that a state, and its branches like the MDOC, waives sovereign immunity claims by accepting federal financial assistance. *Nihiser v. Ohio EPA*, 269 F.3d 626, 628 (6th Cir. 2001). Accordingly, Plaintiff's Rehabilitation Act claims (Count 2 of the First Amended Complaint (ECF No. 15)) will be reinstated.

B. Americans with Disabilities Act – Equal Protection

The Court did not ask Defendants to respond to second error alleged by Plaintiff. In the prior Opinion, the Court concluded that Plaintiff had not alleged a private cause of action under Title II of the ADA for conduct actually violating the Fourteenth Amendment. Plaintiff asserts that it can establish the claim by pleading any violation of the Fourteenth Amendment, and that this Court did not consider the possibility that the Equal Protect Clause could be violated by Defendants' conduct.

The Court is not persuaded that any error occurred. First, in both motions, Defendants argued that Plaintiff did not have an Equal Protection basis for asserting abrogation of sovereign immunity for his ADA claim. (ECF No. 18 Def. Br. at 10 PageID.111; ECF No. 21 Def. Br. at 10 PageID.140.) Despite the clarity and specificity of

this argument, Plaintiff did not address it in his response. Indeed, the phrase "Equal Protection" does not appear in Plaintiff's joint response to the motions. Plaintiff cannot now complain that the Court somehow erred by failing to consider a response not previously asserted. Second, in both motions, Defendants cited and briefly discussed *Babcock v. Michigan*, No. 12-cv-12010, 2014 WL 2440065 (E.D. Mich. May 30, 2014). (ECF No. 18 at 10 PageID.111; ECF No. 21 at 10 PageID.140.) Plaintiff asserts that the holding in *Babcock* has arguably been overruled, and an assumption in the opinion is wrong. But, the opinion was subsequently affirmed by the Sixth Circuit in a published opinion. *Babcock v. Michigan*, 812 F.3d 531 (6th Cir. 2016). Furthermore, in the opinion Plaintiff is asking this Court to reconsider, this Court did not cite either the district court's or the circuit court's opinions in *Babcock.* Third, the Sixth Circuit has held that HIV-infected inmates are not a suspect class entitled to protection under the Equal Protection Clause. *Mofield v. Bell*, 3 F. App'x 441, 443 (6th Cir. 2001) (citing *Dow v. Wigginton*, 21 F.3d 733, 739-40 (6th Cir. 1994)). The circuit court has also held that MDOC policies to prevent the spread of communicable diseases rationally advance a legitimate state interest. *Id.* Thus, while MDOC's policies and conduct, as pleaded in the complaint, might violate the individualized assessment required by the ADA, Plaintiff has not pleaded a violation of the Equal Protection Clause as a means of abrogating sovereign immunity for the purposes of an ADA Title II claim against a state entity.

C. ADA – Due Process

Plaintiff contends that he has adequately pled a violation of his Due Process rights, which functions to abrogate Michigan's sovereign immunity for his ADA claim. Specifically,

Plaintiff argues that, at his prison hearing, he was not able to challenge a presumption contained in the MDOC Policy Directive that actual or attempted sexual penetration could transmit HIV. The complaint selectively quotes the Policy Directive. In the earlier Opinion, the Court summarized and quoted multiple provisions of the Policy Directive.

The Court is not persuaded that any error occurred in finding that Plaintiff had not sufficiently alleged a violation of Due Process. Plaintiff received a hearing where he was found guilty of engaging in sexual conduct with another prisoner. Plaintiff then received a second hearing for his security reclassification. Those hearings satisfy the requirements of due process. Plaintiff pleads the required words, that he was denied a "meaningful opportunity to present evidence on his likelihood of transmitting HIV." (Compl. ¶ 71 PageID.94.) That naked assertion is devoid of any factual enhancement; it is a formulaic recitation of the elements of a cause of action, and is insufficient to state a plausible claim. *SFS Check, LLC v. First Bank of Delaware*, 774 F.3d 351, 355 (6th Cir. 2014) (citations omitted). Absent from the complaint are any allegations that Plaintiff was not provided sufficient notice of the charges or the potential punishment, that he was unable to call witnesses, or that he was unable to present any particular documentary evidence. (ECF No. 25 Opinion at 12-13 PageID.204-05).

III.

Plaintiff is entitled to part of the relief he seeks. The parties agree that this Court erred in dismissing Plaintiff's claim under the Rehabilitation Act. Plaintiff has not persuaded the Court that any error occurred in the dismissal of his ADA claim. For these reasons,

Plaintiff's motion for reconsideration (ECF No. 34) is **GRANTED IN PART.** Plaintiff's Rehabilitation Act claim is **REINSTATED. IT IS SO ORDERED.**

Date: April 24, 2018

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge