

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

ANDREW REED,

Plaintiff,

2:20-cv-01577-CB

v.

ALLEGHENY COUNTY,

Defendant.

ALLEGHENY COUNTY’S BRIEF IN SUPPORT OF MOTION TO DISMISS

Table of Contents

I. Facts.....	I
2. Marijuana is an Illegal Drug & Cannot Be In a Jail	3
3. Reed’s Only Preserved ADA and PHRA claim is for “Regarded as Disabled”	4
4. Reed Fails to Satisfy <i>Prima Facie</i> Burden for ADA and PHRA.....	5
5. Reed Has No Cause of Action under the PHRA.....	12
6. Reed Has No Cause of Action under the MMA.....	14
7. Reed’s Punitive Damage Claim Must Be Stricken	17

I. Facts¹

Plaintiff Andrew Reed has filed a three-count complaint alleging:

- 1) Violation of the Americans with Disabilities Act;
- 2) Violation of the Pennsylvania Human Relations Act; and,

¹ For the limited purpose of this MOTION TO DISMISS and Supporting BRIEF, Allegheny County accepts as true the well-pled facts of Mr. Reed’s Complaint.

1 3) Violation of the Pennsylvania Medical Marijuana Act.

2 Mr. Reed claims he suffers from flat foot syndrome and an inverted foot condition, which
3 he calls disabilities. (ECF #1, ¶ 6, Complaint.) Beginning September 4, 2018 he received a medical
4 marijuana identification card and uses medical marijuana for his disabilities. (ECF #1, ¶¶ 8, 9,
5 Complaint.) In September 2018, Mr. Reed applied for a job with the Allegheny County Jail as a
6 Corrections Officer. (ECF # 1, ¶ 10.) Mr. Reed passed the written exam, physical fitness test,
7 and a psychological exam. (ECF #1, ¶¶ 12, 13.) Mr. Reed does not allege that he ever disclosed
8 to Allegheny County that he had any “disabilities.” (See Complaint, generally.) Moreover, he did
9 not request any accommodations. (See Complaint, generally.)

10 In February 2019, Mr. Reed was advised he would have to undergo a mandatory drug test
11 as part of his application. (ECF #1, ¶ 14.) Mr. Reed told Allegheny County that he, “was a medical
12 marijuana patient.” (ECF #1, ¶ 15.) Mr. Reed contends a Human Resources representative told
13 him that his “status as a medical marijuana patient would not be a problem” and he could move
14 forward in the hiring process once “they received a copy of his medical marijuana identification
15 card.” (ECF #1, ¶ 16.) Mr. Reed says he provided a copy of the card and took the drug test.
16 (ECF #1, ¶ 17.)

17 Mr. Reed next says that this representative advised him that he would no longer be
18 considered for the Corrections Officer position because, “the legal team couldn’t come to a
19 decision on whether to hire him” because he tested positive for marijuana use. (ECF #1, ¶ 18.)
20 Mr. Reed contends that he then contacted the representative and said he would, “surrender his
21 medical marijuana card and cease using medical marijuana if that was the only thing preventing
22 him from being hired as a Corrections Officer.” Mr. Reed says that the representative said there
23
24

was nothing they could or would for him. (ECF # 1, ¶ 19.) Mr. Reed asserts that he has exhausted administrative remedies with the EEOC and PHRC. (ECF # 1, ¶ 31.)

Allegheny County has filed a MOTION TO DISMISS. This Brief is submitted in support.

2. Marijuana is an Illegal Drug & Cannot Be In a Jail

Marijuana is a Schedule I “controlled substance” under the Federal Controlled Substances Act (“CSA”). (CSA, [21 U.S.C. § 802\(6\)](#); [21 U.S.C.A. § 812](#).) Schedule I is the most restricted schedule drug in the United States. This is the same category as such drugs as heroin, LSD, and Ecstasy. *Id.* Marijuana is defined under Federal law as a drug or other substance that:

- a. Has a high potential for abuse;
- b. Has no currently accepted medical use in treatment in the United States; and,
- c. There is a lack of accepted safety for use under medical supervision.

([CSA, 21 U.S.C. § 812\(b\)\(1\)](#).) “This classification renders the manufacture, distribution, or possession of marijuana a criminal offense.” [Gonzales v. Raich, 545 U.S. 1, 2, 125 S.Ct. 2195, 2197 \(2005\)](#). [21 U.S.C.A. § 841\(a\)\(1\)](#), [§ 844\(a\)](#) (penalties).

Another key issue here is that this case involves a criminal correctional facility’s inherent right to enforce law and order within its walls, both in relation to inmates and employees. Criminal correctional facilities are uniformly recognized by courts as institutions that are subject to heightened security standards and different treatment than typical businesses. The government, “must be able to take steps to maintain security and order at [an] institution and make certain no weapons or illicit drugs reach detainees.” [Bell v. Wolfish, 441 U.S. 520, 538, 99 S.Ct. 1861, 1874 \(1979\)](#). The government has legitimate interests in limiting rights in a Jail, “that stem from its need to manage the facility” in which an inmate is detained. *Id.* The “effective

management of the detention facility” is a valid concern for the government. *Id.* See also [Block v. Rutherford](#), 468 U.S. 576, 104 S.Ct. 3227 (1984). “An important function of the corrections system is the deterrence of crime.” [Pell v. Pocunier](#), 417 U.S. 817, 822, 94 S.Ct. 2800, 2804 (1974); [Allegheny County Prison Employees Indep. Union v. Allegheny County](#), 315 F.Supp. 728, 733 (W.D.Pa. 2004) (Recognizing a jail has legitimate interests in limiting rights of its employees in certain circumstances because it is “extremely important” for penological and safety reasons to prevent contraband, reducing “rogue employee” actions and maintaining law and order in a jail.)

3. Reed’s Only Preserved ADA and PHRA claim is for “Regarded as Disabled”

Only those claims alleged that are “fairly within the scope of the prior [administrative] complaint, or the investigation arising therefrom” are considered to have been exhausted. [Antol v. Perry](#), 82 F.3d 1291, 1295 (3d Cir. 1996) (quoting [Walters v. Parsons](#), 729 F.2d 233, 237 (3d Cir. 1984) (per curiam)). Failure to comply with this requirement constitutes failure to exhaust administrative remedies and provides sufficient ground to dismiss the claim. [Hildebrand v. Allegheny Cnty.](#), 757 F.3d 99, 112-13 (3d Cir. 2014); [Ganaway v. City of Pittsburgh](#), No. 2:05-cv-1657, 2008 WL 336297 (W.D.Pa. Feb 4, 2008).

Mr. Reed’s EEOC Charge is attached to the MOTION TO DISMISS as Exhibit “A”. The only claim raised in the Charge is alleged discrimination for being regarded as disabled.

I believe that I was denied employment based on the County’s perception that I was a disabled individual who was unable to perform the essential duties of the Correctional Officer position without the use of medical marijuana. However, neither [the HR Representative] nor any other representative of Allegheny County spoke to me about my disability or my medical marijuana usage. As such, I believe that I was denied employment due to Allegheny County regarding me as a disabled individual in violation of federal and state law.

(Exhibit “A,” Charge, *emphasis added*.)

However, in the Complaint, Mr. Reed seeks to pursue claims of discrimination under both the ADA and PHRA based upon known health conditions, a record of impairment (Complaint ¶¶ 33, 41); and a failure to accommodate – ADA only (Complaint ¶ 34). Mr. Reed also claims in his Complaint that he was denied, “the opportunity to provide any relevant or substantive information concerning his status as a medical marijuana user.” (ECF #1, ¶ 36.)

A review of the Charge establishes that Mr. Reed has failed to preserve all theories of liability other than that of discrimination for being “regarded as disabled.” These new claims are not preserved and should be dismissed with prejudice.

4. Reed Fails to Satisfy *Prima Facie* Burden for ADA and PHRA²

Under the ADA and PHRA, employers are prohibited from discriminating, “against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement....” and other conditions of employment. [42 U.S.C. § 12112\(a\)](#). A “qualified individual with a disability” is defined as a person, “with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” [42 U.S.C. § 1211\(8\)](#). A “disability” is defined as: “(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such impairment; or (C) being regarded as having such an impairment.” [42 U.S.C. § 12102\(2\)](#).

Mr. Reed’s *prima facie* burden in an ADA/PHRA discrimination case is to show:

I. He is disabled as defined by the ADA/PHRA;

² The PHRA has been interpreted to be the same as the ADA in relevant respects and Pennsylvania courts generally interpret the PHRA in accord with the ADA, finding that disposition of an ADA claim, “applies with equal force” to a PHRA claim. [Rinehimer v. Cemcolift, Inc., 292 F.3d 375, 382 \(3d. Cir. 2002\)](#).

2. He is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodation³; and,
3. He has suffered adverse employment as a result of the discrimination.

Taylor v. Phoenixville School Dist., 184 F.3d 296, 306 (3d Cir. 1999).

a. ADA & PHRA Exclude Marijuana Use from Protection

Both the ADA and the PHRA exclude illegal drug users from the term “individual with a disability” when “the covered entity acts on the basis of such use,” and defines “illegal use of drugs” as the “use of drugs which is unlawful under the [CSA].” 42 U.S.C. § 12210. The PHRA uses different language but accomplishes similar ends. 43 P.S. § 954(p. 1) (excluding “current, illegal use of or addition to a controlled substance” from the definition of “handicap or disability”).

Allegheny County has not found Third Circuit precedent or on point federal law, which interpreted the use of medical marijuana under Pennsylvania’s medical marijuana statute (“MMA”) as it relates to the ADA. In James v. City of Costa Mesa, 700 F.3d 394 (9th Cir. 2012) the United States Court of Appeals for the Ninth Circuit held that medical marijuana qualified as an illegal use of drugs for purposes of the ADA and, therefore the plaintiff’s use of medical marijuana brought him within the ADA’s illegal drug exclusion. Id. at 405. As for the PHRA, the Pennsylvania Commonwealth Court has recently held that the MMA does not amend the PHRA.

Harrisburg Area Community College v. Penna. Human Relations Commission, No. 654 C.D. 2019, ---

³ As noted earlier, the only claim Mr. Reed preserved in his Charge is of being “regarded as” disabled. In 2008 the ADA was amended to provide that employers are not required to provide reasonable accommodation to individuals who meet the definition of disability by being “regarded as” being disabled. 42 U.S.C. § 12201(h). Therefore, an individual who is “regarded as” disabled is not entitled to a reasonable accommodation. Robinson v. First State Comm. Action Agency, 920 F.3d 182, 186 (3d Cir. 2019).

[A.3d ---, 2020 WL 6325862 \(Oct. 29, 2020 Pa.Commw.\)](#). Mr. Reed's ADA and PHRA claims should be dismissed.

b. Reed not “disabled” as defined by ADA/PHRA

To the extent this Court elects to consider Mr. Reed's ADA and PHRA claims, the only claim he preserved in his Charge is that of being “regarded as” having a disability; prong (C) of the three-prong definition of disability. [42 U.S.C. § 12102\(2\)\(C\)](#). A person is “regarded as” having a disability if he:

- a. Has a physical or mental impairment that does not substantially limit major life activities but is treated by the covered entity as constituting such limitation;
- b. Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or,
- c. Has no such impairment but is treated by a covered entity as having a substantially limiting impairment.

[Rinehimer v. Cemcolift, Inc.](#), 292 F.3d 375, 381 (3d Cir. 2002). To be covered under the “regarded as” prong of the ADA, the employer must “regard the employee to be suffering from an impairment within the meaning of the statutes, not just that the employer believed the employee to be somehow disabled.” *Id.* (internal citations omitted).

Mr. Reed's case fails on this point. The only “physical or mental impairment” that Mr. Reed claims is that he suffers from a “flat foot syndrome and an inverted foot condition.” (ECF #1, ¶ 6.) However, nothing in either his Charge or Complaint asserts that this condition is the reason Allegheny County did not offer him a job. Instead, Mr. Reed asserts Allegheny County did not offer him a job because he tested positive for marijuana. “Reed [was denied] the

1 opportunity to become a Corrections Officer with Allegheny County because he was a medical
2 marijuana user.” (ECF #1, ¶ 22.) Mr. Reed even avers that the HR Representative advised him
3 that the reason the “‘legal team couldn’t come to decision on whether to hire him’ [was] because
4 he tested positive for marijuana use.” (ECF #1, ¶ 18.) Mr. Reed further makes it clear that his
5 lawsuit is based upon his being denied the job because he tested positive for marijuana. (ECF #1,
6 ¶¶ 19, 20, 21.) Testing positive for a drug is not a “physical or mental impairment.” There are
7 no facts to support that he was denied the job because Allegheny County regarded him as unable
8 to do the job because of some unspecified (and undisclosed) impairment with his foot.

9 As a matter of law, Mr. Reed does not have a claim under the ADA and PHRA for being
10 regarded as disabled. Count I should be dismissed.

11
12 **c. Reed Not Otherwise Qualified to Perform the Job**

13 Mr. Reed sought to obtain the position of a Corrections Officer in a governmental
14 correctional facility while taking a drug that is a Schedule I narcotic under the Federal CSA, and
15 a violation of federal law to possess or use. The Jail is charged with enforcing the law and holding
16 those behind bars who are charged or convicted with violating the law. This law enforcement
17 agency cannot be in the position to hiring employees who are in active and opinion violation of
18 criminal laws. See [Section 2](#), *supra*. Allegheny County asserts that there is no precedent in this
19 Circuit holding otherwise.

20
21 **d. Reed Has Not Suffered Adverse Employment Because of his Impairment**

22 Mr. Reed has the burden of establishing a causal connection between his perceived
23 impairment and the decision not to hire him. [Taylor v. Phoenixville School Dist.](#), 184 F.3d 296, 306
24

(3d Cir. 1999). He cannot meet this burden. As detailed in [Section b, supra](#), his Charge and Complaint make it clear that the reason Mr. Reed was not hired as a Corrections Officer was because he tested positive for marijuana. Not because of some condition of his foot. He fails to establish causation. His ADA and PHRA claims should be dismissed.

e. Reed Cannot Satisfy Even The Newly Raised Claims

As mentioned above, Mr. Reed has raised claims that are not preserved in his EEOC Charge and are therefore waived. Even if those claims were preserved, they are still not viable.

New Claim of Failure to Accommodate⁴

A *prima facie* claim for failure to accommodate requires that the plaintiff allege that:

1. He was disabled and his employer knew it;
2. He requested an accommodation or assistance;
3. His employer did not make a good faith effort to assist; and,
4. He could have been reasonably accommodated.

[Capps v. Mondelez Glob., LLC, 847 F.3d 144, 157 \(3d Cir. 2017\)](#). None of these requirements are satisfied. Mr. Reed does not allege that Allegheny County knew he had a disability. He states in the Complaint that, “[b]y disclosing his status as a medical marijuana user, Reed made clear his status as a disabled individual who may require accommodations to perform the essential functions of the Corrections Officer position.” (ECF # 34.)

However, Mr. Reed’s advising Allegheny County that he had a medical marijuana card under the Pennsylvania Medical Marijuana Act (“MMA”) does not satisfy the ADA’s requirements

⁴ This newly raised claim was only asserted under the ADA. The legal analysis is equally applicable under the PHRA.

1 of imputing knowledge to the employer. The MMA does not refer to the ADA (or PHRA) in any
2 way. Nor does the MMA use the standard of “disability” required under the ADA.

3 Furthermore, in an insightful opinion by the Pennsylvania Commonwealth Court in a case
4 in which only a PHRA claim was raised, the court held that the PHRA does not require providing
5 accommodations for medical marijuana users, in that case a nursing student who had a disability
6 and sought an accommodation to allow her to use medical marijuana. The court ruled [*Harrisburg*](#)
7 [*Area Community College v. Penna. Human Relations Commission*, No. 654 C.D. 2019, --- A.3d ---,](#)
8 [*2020 WL 6325862 \(Oct. 29, 2020, Commw. Ct.\)*](#).

9 Also, Mr. Reed never sets forth facts in either the Charge or his Complaint that satisfy
10 Prong 2 – that he requested an accommodation. Nor does Mr. Reed set forth facts that satisfy
11 Prong 4 – that he could have been accommodated. From reading the Complaint, there is no
12 averment that Mr. Reed disclosed his foot condition in any manner that would be defined as a
13 “disability” under the ADA. Mr. Reed never stated he needed or asked for an accommodation
14 because of it. (ECF #1, Complaint, generally.) This defeats any argument as to Prong 3 – that
15 the employer did not make a good faith effort. Given all of the above and Mr. Reed’s failure to
16 disclose any information to support the existence of a disability, request for accommodation, or
17 express a need for accommodation, Allegheny County had no reason to believe any interactive
18 process action on its part was needed.

19 It is worth nothing that Mr. Reed also presents a factual contradiction between his Charge
20 and his Complaint. Consistent with the case law stated in the exhaustion/preservation section
21 above, Mr. Reed’s case must rest upon the factual scenario fairly preserved within the scope of
22 what he stated in his Charge – not contradictory facts he presents now.

1 In the Charge, Mr. Reed never stated he advised Allegheny County that he had a disability
2 or that he wanted an accommodation. The Charge avers only that once Mr. Reed was told he
3 would have to take a drug test he told an HR Representative that he had a medical marijuana
4 card “for the treatment of chronic pain related to my flat foot/inverted foot condition.” (Ex. A.)
5 He never stated this was a disability, that this condition would interfere with his ability to perform
6 the job, or that it would require any accommodation. (Ex. A, *generally*.)

7 Significantly, Mr. Reed admits that he did not need the marijuana to perform the job of
8 Corrections Officer. (ECF #1, ¶ 19.) He also (by omission) admits that he did not advise
9 Allegheny County he would need an accommodation if he did not use marijuana. Mr. Reed’s own
10 words are an admission that Allegheny County was not on notice that he had a disability, needed
11 an accommodation, or wanted one. Mr. Reed’s not using the marijuana would be entirely within
12 his control and requires no action, assistance, or agreement by Allegheny County.

13 Since February 2019, at least, Mr. Reed has been aware that he was rejected from
14 employment with the Allegheny County Jail because he tested positive for marijuana, a Schedule
15 I controlled drug. Mr. Reed has been free for the past two years to stop taking the marijuana,
16 get himself clean, and reapply for a corrections officer position with Allegheny County. However,
17 he has failed to take any such proactive measures. Mr. Reed’s Complaint lacks the fundamental
18 facts to support his ADA and PHRA claims and should be dismissed.

19 **Other New Claims of Discrimination**

20 Mr. Reed raises for the first time in his Complaint claims of discrimination for known
21 health conditions, a record of impairment (Complaint ¶¶ 33, 41); and a claim that he was denied,
22 “the opportunity to provide any relevant or substantive information concerning his status as a
23 medical marijuana user.” (ECF #1, ¶ 36.)
24

1 Factually, these claims are not supported by the record. According to the Complaint Mr.
 2 Reed never disclosed any “health conditions,” or demonstrated a “record of impairment.”
 3 Further, there is nothing to support his not having an opportunity to provide information. He
 4 had the phone number for the HR Representative, and felt comfortable talking with her.
 5 However, by his own admission he never spoke to this Representative to disclose he had a
 6 disability or disclose he wanted an accommodation.

7 Mr. Reed avers in the Charge that after he tested positive, the HR Representative called
 8 him and advised he would not be hired in the next Correctional Officer Class. “When I asked
 9 her why, she simply stated that the legal team had not made a determination on my situation yet.
 10 I followed up that call by providing [the HR Rep] with a copy of my medical marijuana card but
 11 never heard back.” (Ex. A, Charge.)

12 Mr. Reed attempts to contradict the facts he preserved in his Charge by asserting in his
 13 Complaint that he “made clear his status as a disabled individual who may require
 14 accommodations” and that Allegheny County refused to engage in the interactive process. (ECF
 15 #1, ¶¶ 34, 35.)

17 **5. Reed Has No Cause of Action under the PHRA**

18 **A. Reed has failed to Timely Exhaust**

19 A party seeking relief under the PHRA must exhaust his administrative remedies by filing
 20 a timely complaint with the PHRA. [43 Pa.C.S. § 959\(a\), § 962](#); [Churchill v. Star Enterprises, 183 F.3d](#)
 21 [184, 190 \(3d Cir. 1999\)](#); [Kepple v. GPU Inc., 2 F. Supp. 2d 730, 739 \(W.D.Pa. 1998\)](#) (a plaintiff may
 22 not seek federal judicial relief unless administrative remedies are first exhausted). The PHRA
 23 requires that any administrative complaint be filed within 180 days of the alleged act of
 24

discrimination. [43 Pa.C.S. § 959\(h\)](#); [Woodson v. Scott Paper Co.](#), 109 F.3d 913, 925 (3d Cir. 1997).

In order to determine whether administrative remedies are timely exhausted at the motion to dismiss stage, it is appropriate for the Court to look to the Charge filed with the particular agency. [Hildebrand v. Allegheny Cnty.](#), 757 F.3d 99, 112-13 (3d Cir. 2014).

Mr. Reed admits that he did not file his Charge with the EEOC until September 20, 2019⁵. (ECF #1, ¶ 26.) He states his EEOC Charge was dual-filed with the PHRC. (ECF #1, ¶ 27.) He is apparently relying upon his EEOC filing date to satisfy his 180-day filing obligations with the PHRC. However, the option of dual-filing does not have the implications Mr. Reed suggests. As the Third Circuit has set forth the dual-filing agreement between the PHRC and the EEOC, “is relevant only to the issue of whether a plaintiff has satisfied the administrative exhaustion requirements of the federal-anti-discrimination statutes. [Woodson v. Scott Paper Co.](#), 109 F.3d 913, 926 (3d Cir. 1997) (*emphasis added*). A plaintiff’s filing a Charge with the EEOC,

does not mean that a plaintiff can initiate PHRC proceedings as required by the PHRA merely by filing with the EEOC. Whether a plaintiff has initiated PHRC proceedings under the PHRA is a state law issue. The worksharing agreement [between the PHRC and the EEOC] says nothing about whether a plaintiff has invoked the PHRC procedures if the PHRC has never received his or her claim, nor could it, given that the Pennsylvania Supreme Court held in [Fye v. Central Transportation Inc.](#) 487 Pa. 137, 409 A.2d 2 (1979), that EEOC procedures are not a sufficient surrogate for PHRC remedies.

[Woodson](#), 109 F.3d at 926-27. Consistent with *Woodson*, Mr. Reed must produce evidence from the PHRC that the PHRC has actually received his complaint. Mr. Reed has failed to do this. His PHRA claim should be dismissed for failure to exhaust administrative remedies.

⁵ The Charge itself has an EEOC time-stamp of September 10, 2019. (Ex. A.)

Moreover, on the face of his Complaint, the EEOC filing date is more than 180 days after his cause of action arose. 180 days before September 20, 2019 is March 24, 2019. Even by a generous reading of the Complaint, Mr. Reed took the drug test in February 2019 (ECF #1, ¶¶ 14, 17) and was advised “shortly thereafter” that he would not be hired. (ECF #1, ¶ 18.)⁶ Mr. Reed falls well short of the 180-day deadline. His PHRA claim should be dismissed.

B. Reed has failed to Plead Exhaustion

Mr. Reed states his EEOC case was “dual-filed” with the PHRC. (ECF #1, ¶ 27.) However, he does not plead that he received a right to sue from the PHRC. Allegheny County has never received anything from the PHRC regarding Mr. Reed and has not been able to confirm that any action was filed with the PHRC on his behalf or that a right to sue notice has been issued. Consistent with *Hildebrand*, Allegheny County is entitled demand at this stage of the proceeding that Mr. Reed produce proof of this matter actually being filed with the PHRC.

Mr. Reed has failed to adequately establish that he exhausted his administrative remedies under the PHRA. His PHRA count should be dismissed.

6. Reed Has No Cause of Action under the MMA

The third count of the Complaint asserts that Mr. Reed was denied a job “solely” because he uses medical marijuana. (ECF # 1, ¶ 46.) He asserts this is discrimination in violation of the

⁶ Mr. Reed is well aware of the date that he was advised he was not hired. It is memorialized in an email he sent to Allegheny County. A copy of that email is attached as Exhibit “C.” That date is February 15, 2019. A date that puts Mr. Reed outside the 180-day PHRA statute of limitations. Allegheny County recognizes that at the motion to dismiss stage the court must accept those well-pled facts and information available through public records and matters of which the Court can take judicial notice. However, Mr. Reed does not have well-pled facts, and he cannot use vague language in his complaint to avoid the consequences of his failure to file a Charge in a timely manner. The attached email is offered to support this argument that Mr. Reed must be ordered to re-plead. Or, given the black-and-white clarity of this issue, Mr. Reed should withdraw his PHRC claim.

1 Pennsylvania Medical Marijuana Act (“MMA”). (ECF #1, ¶ 47.) Allegheny County can find no law
2 that holds that an employer – let alone a law enforcement employer - can be liable under the
3 MMA for failing to hire an applicant who fails a mandatory drug test.

4 In 2016 Pennsylvania enacted the MMA. In a declaration of policy it stated, “[s]cientific
5 evidence suggests that medical marijuana is one potential therapy that may mitigate suffering in
6 some patients and also enhance quality of life. [35 P.S. § 10231.102\(1\)](#). The MMA is only a
7 “temporary measure” pending Federal approval of a medical marijuana system. [35 P.S. §](#)
8 [10231.102\(4\)](#). Marijuana dispensed under this statute requires a Pennsylvania resident to have
9 serious medical condition that is enumerated in the MMA and meet certain other requirements
10 for certification.

11 The MMA provides with regard to “employment” that “No employer may discharge,
12 threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding an
13 employee’s compensation, terms, conditions, location or privileges *solely on the basis* of such
14 employee’s status as an individual who is certified to use medical marijuana.” [35 P.S. §](#)
15 [10231.2103\(b\)](#) (emphasis added).

16 In Mr. Reed’s case, the facts do not support that he was discriminated against solely on
17 the basis of his status as an individual certified to use medical marijuana. Thus, his case does not
18 satisfy the MMA’s requirements. Mr. Reed had applied for a law enforcement position with the
19 Allegheny County Jail. The Jail is charged with the responsibility of enforcing criminal sentences
20 and holding individuals charged with violation of criminal statutes, including those related to
21 federal and state violations for possession and use of marijuana. (See [Section “2”](#) *supra*.) Mr. Reed
22 admits that he tested positive for marijuana. (ECF #1, ¶ 18.)

23 It is undisputable that marijuana use, and possession are violations of federal law. *Id.* The
24

1 Complaint establishes that the reason Mr. Reed was not hired was not because he had a
2 certification to use medical marijuana, but because he failed a drug test and sought to work in a
3 law enforcement facility that must uphold federal and state crime laws. (ECF # 1, ¶ 18.) Nothing
4 in the MMA, nor any decisional law located by Allegheny County, provides a cause of action for
5 him under these circumstances.

6 To the extent this Court finds the MMA claim survives, the MMA would not provide Mr.
7 Reed the relief he seeks. Mr. Reed's Complaint seeks an award of "back pay, front pay, lost
8 benefits, and other emoluments of employment and other relief as is necessary to make him
9 whole," "compensatory damages for pain, humiliation, emotional distress, and damage to
10 reputation," attorneys' fees and costs. (ECF #1, pg. 7, Requests for Relief.) However, nothing in
11 the MMA provides this Court the authority to award those damages.

12 The MMA contemplates that a person bringing a claim under the MMA will bring it to the
13 Department of Health of the Commonwealth, referred to as the "Department" throughout the
14 MMA. [35 P.S. § 10231.103](#). Chapter 13 of the MMA addresses offenses under the MMA. Most
15 are wholly inapplicable here because they deal with criminal issues, falsification of identification
16 of cards, alteration of medical marijuana, and disclosure of information. 35 P.S. §§ 10231.1301 –
17 10231.1307. The only part of the MMA that remotely relates to Mr. Reed's lawsuit is [35 P.S. §](#)
18 [10231.1308](#). This section gives authority only to "the department" to assess a civil penalty for a
19 violation of the act. Even so, the penalty can be no more than \$10,000 per violation. Before
20 assessing any penalty, the department is to weigh five factors:

- 21 i. The gravity of the violation;
- 22 ii. The potential harm resulting from the violation to patients,
23 caregivers or the general public;
- 24 iii. The willfulness of the violation;

- iv. Previous violations, if any, by the person being assessed; and,
- v. The economic benefit to the person being assessed for failing to comply.

[35 P.S. § 10231.1308\(b\)\(1\)](#). The department is also authorized to issue a warning rather than a monetary penalty. [35 P.S. § 10231.1308\(b\)\(2\)](#). Nothing in this section provides for a federal court to have jurisdiction to award Mr. Reed the relief he seeks in this lawsuit. At a broader level, Allegheny County has not found any all decisional law in the Western District, the Third Circuit, or Pennsylvania appellate law that supports that Mr. Reed has a valid private right of action against Allegheny County as styled in his Complaint.

There is no clear law in this jurisdiction that supports application of the MMA in this case. The MMA count should be dismissed. Alternatively, the relief Mr. Reed seeks should be stricken.

7. Reed's Punitive Damage Claim Must Be Stricken

Mr. Reed's request for relief also seeks punitive damages under the ADA. (ECF #1, pg. 7, Requests for Relief.) However, the ADA does not allow for the recovery of punitive damages against a municipal government such as Allegheny County. [Doe v. County of Centre, Pa., 241 F.3d 437, 457-58 \(3d Cir. 242 F.3d 437\)](#). This request for relief should be stricken.

WHEREFORE, Defendant Allegheny County respectfully requests that its MOTION TO DISMISS be GRANTED.

Respectfully submitted,

s/ Virginia Spencer Scott
Virginia Spencer Scott
Assistant County Solicitor
Pa. I.D. #61647

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CERTIFICATION OF CONFERRAL BEFORE FILING MOTION AND BRIEF

Before filing the MOTION TO DISMISS and BRIEF IN SUPPORT, pursuant to the Chambers Rules of this Court, undersigned counsel met and conferred with Plaintiff's counsel once by phone and twice by email during which counsel presented the arguments it would be raising in the MOTION TO DISMISS, provided a draft copy of the Brief, and requested that Plaintiff either amend his complaint or agree to dismiss Allegheny County. Plaintiff's counsel politely declined to do either.

Respectfully submitted,

s/ Virginia Spencer Scott
Virginia Spencer Scott
Assistant County Solicitor
Pa. I.D. #61647