IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

THE NATIONAL FEDERATION OF THE BLIND OF VIRGINIA, *et al*.,

Plaintiffs,

v.

VIRGINIA DEPARTMENT OF CORRECTIONS, *et al.*,

Defendants.

Case No. 3:23-cv-127-HEH

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION *IN LIMINE* TO PRECLUDE DEFENDANT FROM ARGUING THE AFFIRMATIVE DEFENSES OF UNDUE BURDEN AND FUNDAMENTAL ALTERATION

Plaintiffs submit this motion *in limine* in order to preclude Defendant from arguing or presenting evidence at trial concerning the affirmative defenses of undue burden and fundamental alteration.

PRELIMINARY STATEMENT

In this action under the Americans with Disabilities Act ("ADA") and Rehabilitation Act, six blind Plaintiffs and a nonprofit organization are alleging that the Virginia Department of Corrections ("VDOC") has failed to provide equally effective communication to blind prisoners.

In its Answer to Plaintiffs' Amended Complaint, VDOC pled the affirmative defenses of undue burden and fundamental alteration. ECF 144. Federal law requires that such defenses, when asserted in the communication context, be documented in a written statement by the head of the agency attesting that they are appropriate. Because Defendant has not produced such a statement here, Defendant should be barred from arguing those defenses at trial.

ARGUMENT

Plaintiffs' lawsuit challenges VDOC's failure to provide auxiliary aids and services required by the ADA and the Rehabilitation Act. *See, generally,* Amend. Compl. ECF 136; 28 C.F.R. 35.160; 28 C.F.R. 41.51(e). While covered entities may be excused from the obligation to provide equally effective communication if doing so constitutes an undue burden or fundamental alteration, federal regulations establish strict rules limiting the availability of the affirmative defenses. Those regulations require that:

> In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with this subpart would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens **must be made by the head of the public entity** or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity **and must be accompanied by a written statement of the reasons for reaching that conclusion**.

28 C.F.R. § 35.164 (emphasis added).[1] According to U.S. Department of Justice guidance interpreting this requirement, "[t]he decision that a particular aid or service would result in an undue burden or fundamental alterations must be made by a high level official, no lower than a Department head and must be accompanied by a written statement of the reasons for reaching that conclusion." ADA Update: A Primer for State and Local Governments, Communicating with People Who Have Disabilities, https://www.ada.gov/resources/title-ii-primer/ (Feb. 28, 2020) (last accessed May 6, 2024).

Defendant has failed to comply with these stringent requirements in this case. Despite Plaintiffs' numerous requests for auxiliary aids and other access to communications aids, Defendant never provided, and has not produced in discovery, any written statement of reasons for the denial from the head of VDOC or any department head. Even if Defendant were to produce one now, its introduction would be barred because it was not produced in discovery. *See Garcia v. Praxair, Inc.*, No. 1:18-CV-01493-SAB, 2021 WL 38183, at *3 (E.D. Cal. Jan. 5, 2021) ("Plaintiff's motion is granted to the extent that it seeks to preclude Defendant from introducing any documents that were not produced in discovery in this matter." (citing Fed. R. Civ. P. 37(c))).

Defendant's failure to comply with federal law entirely deprives it of the opportunity to assert these defenses. *See Williams v. Hayman*, 657 F. Supp. 2d 488, 500 n.8 (D.N.J. 2008) (holding that defenses of undue burden and fundamental alteration are "inapplicable to this case" "[b]ecause Defendants have offered no such written statement" by the head of the agency);

[1] Identical language is included in the federal regulations covering access to existing facilities, including that "The decision that compliance would result in such alteration or burdens must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion." 28 C.F.R. § 35.150(a)(3). This brief cites to cases construing both provisions below.

Chisolm v. McManimon, 275 F.3d 315, 328, 330–32 (3d Cir. 2001) (denying summary judgment to defendants in part because "there is no indication [defendant] complied with the requirements of Section 35.164"). This Court, like the Southern District of New York, "thus is constrained to find that the [defendant], by its decision not to comply with the prerequisites that [the federal regulation] imposes on the pursuit of an undue burden defense, has elected to forgo that defense as to liability." *Am. Council of Blind of N.Y., Inc. v. City of N. Y.*, 495 F. Supp. 3d 211, 239–40 (S.D.N.Y. 2020).[2]

The proper remedy for a waived affirmative defense is to preclude the defendant "from presenting evidence, testimony, and argument at trial regarding the … affirmative defenses." *Johnson v. City of San Diego*, No. 3:17-CV-00410-L-NLS, 2019 WL 1538410, at *3 (S.D. Cal. Apr. 9, 2019); *see also Laborers' Pension Fund v. A & C Env't, Inc.*, 301 F.3d 768, 773–74 & n.3 (7th Cir. 2002) (noting district court granted motion *in limine* to exclude evidence of non-viable affirmative defense of fraud in the inducement). Because Defendant has waived the affirmative defenses of undue burden and fundamental alteration by failing to follow the relevant federal law, it should be precluded from offering evidence, testimony, or argument on those defenses at trial.

CONCLUSION

For the foregoing reasons, this Court should preclude Defendant from arguing or presenting evidence at trial concerning the affirmative defenses of undue burden and fundamental alteration.

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[2] This case concerned the identically-worded 28 C.F.R. § 35.150(a)(3) mentioned in footnote 1, *supra*.

Dated: May 6, 2024

Respectfully submitted,

<u>/s/ Samantha Westrum</u>
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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May 2024, I filed the foregoing electronically with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing ("NEF") to the following:

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I hereby certify that I will mail the foregoing document by U.S. Mail and electronic mail to the following non-filing user:

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