

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

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

Plaintiffs,

v.

Case No. 3:23cv127

VIRGINIA DEPARTMENT OF CORRECTIONS,

Defendant.

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

The Virginia Department of Corrections (“VDOC” or “Defendant”), by counsel, submits the following Response in Opposition to Plaintiffs’ Motion *In Limine* to Preclude Defendant from Arguing the Affirmative Defenses of Undue Burden and Fundamental Alteration. (ECF Nos. 315, 316.)

ARGUMENT

Plaintiffs have filed a Motion *In Limine* wherein they request that the Court prevent VDOC from arguing the affirmative defenses of undue burden or fundamental alternation at trial. The Plaintiffs essentially ask this Court to prevent VDOC from explaining its decision to deny unspecified accommodations at trial. Plaintiffs’ argument is not well grounded in the facts of this case nor the law. As an initial matter, the Plaintiffs do not even explain what decision of VDOC’s they seek to prevent argument regarding the defense of undue burden and fundamental alternation. This is contrary to courts’ interpretation of 28 C.F.R. § 35.164.

Further, although the Plaintiffs cite to a an American with Disabilities Act (“ADA”) “Primer” from the U.S. Department of Justice’s website to allege that any alleged accommodation

denial must have come from “a high level official, no lower than a Department head.” (ECF No. 316, at 3), there is no such requirement in the plain language of the DOJ regulation or any case law supporting such. Further, as directed by the Fourth Circuit, in ADA cases such as this one, “our context is a prison. [The Court] view[s] the reasonableness of accommodations through the lens of operating a prison.” *Richardson v. Clarke*, 52 F.4th 614, 621, 2022 WL 16729415 (4th Cir. 2022). In this case, any Request for Accommodation form submitted by any of the Plaintiffs at Deerfield Correctional Center (“Deerfield”) or Greenville Correctional Center (“Greenville”) was responded to by a Deerfield or Greenville ADA Coordinator or Assistant Coordinator in writing. This meets the requirement of 28 C.F.R. § 35.164. VDOC has not waived its affirmative defenses of undue burden or fundamental alteration, and the Plaintiffs’ request that VDOC be prevented from arguing those defenses at trial should be denied.

I. Plaintiffs fail to explain what denial of a requested auxiliary aid or service VDOC has denied and therefore should be prevented from arguing the affirmative defenses of undue burden and fundamental alteration.

To prevent a defendant from arguing the affirmative defense of undue burden or fundamental alteration, a plaintiff must, *at least*, identify the specific accommodation or proposed action that was denied. *See Kirola v. City and County of San Francisco*, 2010 WL 3476681, *6-7 (N.D. Cal. Sept. 2, 2010) (emphasis added) (holding that written “undue burden” statement only required when a public entity denies a *specific* proposed action and declining to exclude evidence that proposed modifications would constitute an undue burden for lack of prior written statement). Although the Plaintiffs infer that “Plaintiffs’ numerous requests for auxiliary aids and other access to communications aids” had been denied, Plaintiffs do not specifically identify any of these requests or VDOC’s denials of them. In fact, although the Plaintiffs intend to introduce expert testimony from Richard Subia that prisons can provide certain assistive devices to blind and low

vision inmates, (ECF No. 282-1, at 12-19), the Plaintiffs have admitted in this case that they have never even requested the use of these devices at Deerfield and Greenville. (ECF No. 303-1 (Plaintiffs' responses to VDOC's Requests for Admissions wherein they admit that they never requested an omniReader, Amigo HD, Ruby 10, and Topaz Ultra)). VDOC therefore has never denied the Plaintiffs the use of these devices. Accordingly, "because Plaintiffs failed to request any specific accommodation until now, it would have been impossible for Defendants to evaluate and provide a written statement regarding the undue burden of Plaintiffs' proposed accommodation previously." *Gray v. Golden Gate Nat'l Recreational Area*, N.D. Cal. No. C 08-00722 EDL, 2013 WL 12386845 at *25 n.12 (N.D. Cal. Feb. 20, 2013) (citation omitted). Plaintiffs fail to identify what specific request for an "auxiliary aid or service" VDOC denied and failed to provide a justification for, and so they cannot now claim that VDOC should be prevented from arguing undue burden or fundamental burden at trial.

II. VDOC designated its decision-making power about ADA accommodation requests to Deerfield and Greenville's ADA Coordinators and Assistant ADA Coordinators

28 C.F.R. § 35.164 requires a public entity's "head" or "his or her designee" to provide a written statement if a specifically requested accommodation is denied because if it is found to be an undue burden or would result in a fundamental alternation. Plaintiffs stretch this regulation to allege that, pursuant to a "Primer" guide on DOJ's website about Title II of the ADA, the language "his or her designee" must be interpreted to be "a high level official, no lower than a Department head." (ECF No. 316, at 3.)

In this case, as explained, any Request for Accommodation form submitted by any of the Plaintiffs at Deerfield or Greenville was responded to by a Deerfield or Greenville ADA Coordinator or Assistant Coordinator in writing. This meets the requirement of 28 C.F.R. § 35.164. As the ADA Coordinator or Assistant Coordinators, these individuals act as the VDOC

Director's designee on issues affecting specific ADA requests at Deerfield and Greensville. Here, our context is prison. *Richardson*, 52 F.4th at 621. Reasonableness of an inmate's ADA accommodation request—including whether it is an undue burden or fundamental alteration—is considered through this lens. *Id.* The Director of VDOC has designated his authority to make ADA accommodation decisions at specific institutions to the ADA and ADA coordinators of those facilities. This meets the plain language of 28 C.F.R. § 35.164.

If the Court were to accept the Plaintiffs' argument, every time an inmate requested an accommodation, that request would have to be reviewed by the VDOC Director himself or another such agency head. This would prevent individual facilities from acting upon such requests as quickly as possible and would delay any requesting inmate from receiving the requested accommodation or notice of that denial. Surely, that is not what the Plaintiffs intend to achieve with their interpretation of 28 C.F.R. § 35.164.

CONCLUSION

For these reasons and the reasons detailed herein, VDOC respectfully requests that the Court deny the Plaintiffs' Motion *In Limine* to Preclude Defendant from Arguing the Affirmative Defenses of Undue Burden and Fundamental Alteration

Respectfully submitted,

VIRGINIA DEPARTMENT OF CORRECTIONS

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of May, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to all counsel of record for the Plaintiff.

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