

**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,

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

v.

**VIRGINIA DEPARTMENT OF
CORRECTIONS, *et al.*,**

Defendants.

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

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

ARGUMENT

Plaintiffs noted in their motion that Defendant had not complied with federal regulations that limited the defenses of undue burden and fundamental alteration to instances in which a Defendant argues that (1) Plaintiffs made no specific requests for accommodation in this case to trigger the written statement requirement and (2) the ADA coordinator staff at the prisons are “designees” of the “head of the public entity” and their written grievance denials count as the “written statement” necessary for 28 C.F.R. § 35.164. Both of these arguments fail.

First, Plaintiffs clearly made many specific requests for accommodations or else there would be no case before this Court. The record in this case reflects many, many instances of Plaintiffs requesting accommodations through the grievance process. The allegations in Plaintiffs’ Amended Complaint detail the many other ways in which they placed Defendant on notice of their needs and sought accommodations. Simply, there is no way to see the record in this case and maintain that Plaintiffs have not made any specific requests for accommodations—or that Defendant has refused them.

Second, Defendant makes no argument that it has complied with the DOJ guidance document limiting these defenses to instances in which a “high level official, no lower than a Department head” denied the request and issued written reasons for the denial. 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). Rather, Defendant claims that the low-level employees tasked with ADA compliance at these

prisons count as the “designee” of the “head of the public agency” as required by the plain language of the federal regulation in 28 C.F.R. § 35.164. Not only does Defendant discard the guidance document issued by DOJ, which is interpreting its own regulation, but Defendant’s interpretation clearly undermines the regulation’s goal of ensuring that someone with both budget knowledge and budget authority made the decision that there is an undue burden or fundamental alteration at issue in the case. The regulations specify that the decision-maker must consider “all resources available for use in the funding and operation of the service, program, or activity” *id.*, something that the low-level staff tasked with ADA coordination do not have authority to do.

Defendant falsely states that following the DOJ guidance with regard to 28 C.F.R. § 35.164 would require every request for accommodation to be reviewed personally by a Department head. That is not true – such review is only necessary if a defendant wishes to take advantage of the specific affirmative defenses of undue burden and fundamental alteration, for which it is a prerequisite. If a defendant merely wishes to defend a decision on the merits, no such review is required.

Defendant’s argument that the ADA coordinators’ grievance denials qualify under 28 C.F.R. § 35.164 fails for an additional, independent reason: none of the grievance responses discuss either an undue burden or a fundamental alteration. Merely denying a request for accommodation in writing is not enough; the regulations explicitly require a “written statement of *the reasons for reaching that conclusion*” where the conclusion is that “the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens.” 28 C.F.R. § 35.164 (emphasis added). The grievance denials provided to Plaintiffs do not contain any mention of undue burden or fundamental alteration,

much less a list of clear reasons why Plaintiffs' requests would constitute one or the other. Thus, even if the ADA Coordinators were appropriate designees under the regulation, their written statements would be inadequate. Accordingly, because Defendant has failed to comply with the procedural requirements of federal law, this Court should preclude them from arguing the affirmative defenses of undue burden and fundamental alteration.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' Motion in *Limine* to prevent Defendant from arguing the defenses of undue burden and fundamental alteration at trial.

Dated: May 13, 2024

Respectfully submitted,

/s/ Eve L. Hill

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th 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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