

**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.

**SUPPLEMENTAL AUTHORITY IN SUPPORT OF PLAINTIFFS' MOTION *IN LIMINE*
TO EXCLUDE DEFENDANT'S AFFIRMATIVE DEFENSES OF UNDUE BURDEN
AND FUNDAMENTAL ALTERATION**

At oral argument on May 13, 2024, this Court asked for supplemental briefing identifying case law applying the Americans with Disabilities Act (“ADA”) regulations contained in 28 C.F.R. § 35.164 in the prison context. Plaintiffs list cases below where courts have found that defendants were not entitled to assert defenses of undue burden and fundamental alteration due to their failure to comply with the requirements of 28 C.F.R. § 35.164.

In *Chisholm v. McManimon*, the Third Circuit reversed a grant of summary judgment to correctional defendants in an ADA case based on their failures to comply with the requirement that a high-level official or his or her designee provide a written statement concluding that accommodating a deaf prisoner would be an undue burden or fundamental alteration. 275 F.3d 315, 325, 328 (3d Cir. 2001). The Third Circuit reversed the district court’s grant of summary judgment to defendants on these affirmative defenses because “it is not clear from the record that MCDC complied with the requirements of Section 35.164. Specifically, there is no indication that MCDC issued written statements of its reasons for denying Chisolm’s requested auxiliary aids.” *Id.* at 328.

In *Armstrong v. Davis*, the Northern District of California found after a bench trial that correctional defendants “did not present a viable defense” of undue burden or fundamental alteration. No. C 94-02307 CW, 1999 WL 35799705, at *36 (N.D. Cal. Dec. 22, 1999). The court held that “any decision that compliance with the ADA would create an undue burden or fundamental alteration must be made by the head of the public agency and ‘accompanied by a written statement of the reasons for reaching that conclusion.’” *Id.* (quoting 28 C.F.R. § 35.164). The defendants did not “provide any evidence that the [the prison defendant] had created a written statement of reasons that would support” a defense of undue burden or fundamental alteration. *Id.*

These cases hold that the requirements of 28 C.F.R. § 35.164 apply to the correctional context and, where a defendant does not comply with its terms, the defendant is barred from asserting the defenses of undue burden and fundamental alteration. As demonstrated in the brief in support of Plaintiffs' motion (ECF 316) and reply (ECF 357), Defendant has not complied with the requirements of 28 C.F.R. § 35.164. The appropriate remedy is, therefore, to preclude 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).

Dated: May 14, 2024

Respectfully submitted,

/s/ Matthew W. Callahan

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th 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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