

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Derrick Phipps, et al.,)	
)	
<i>Plaintiffs</i>)	
)	
-vs-)	No. 07 CV 3889
)	
Sheriff of Cook County and Cook)	<i>(Judge Bucklo)</i>
County,)	
)	
<i>Defendants.</i>)	

**PLAINTIFFS’ MOTION FOR
SUMMARY JUDGMENT ON LIABILITY**

For many years, defendants, the Sheriff of Cook County and Cook County, have ignored their duty to accommodate the needs of wheelchair bound detainees at the Cook County Jail. Plaintiffs have been harmed by defendants’ disregard of federal law and bring this damages action pursuant to the Rehabilitation Act, U.S.C. §794, and Title II of the Americans with Disabilities Act (“ADA”), 42 U.S.C. §§12131-12165 et seq.

Now before the Court is the motion of the plaintiff class for summary judgment on liability on their claims concerning accessible toilets, sinks, and shower facilities.¹ Plaintiffs discuss in Part I of this memorandum the importance of these facilities to wheelchair bound detainees. Plaintiffs then set out

¹ Pursuant to the Court’s order of March 26, 2008, this case is proceeding as a class action for

All former and current wheelchair bound inmates at the Cook County Department of Corrections who after July 11, 2005 were subjected to discrimination because of their disability in violation of §202 of the [ADA] and §504 of the Rehabilitation Act.

the statutory and regulatory framework of the Rehabilitation Act and the ADA in Part II, and show in Part III that defendants have violated these statutes and their implementing regulations. Plaintiffs demonstrate in Part IV that defendants are unable to show that accommodating the special needs of wheelchair bound detainees would impose an undue burden on the jail.

I. The Importance of Accessible Toilets, Sinks, and Shower Facilities to Wheelchair Bound Detainees

Persons who are wheelchair bound require special toilets, showers, and lavatories. (Plaintiffs' Rule 56 Statement, ¶¶49-60.) Many wheelchair bound persons rely on a suppository to stimulate a bowel movement and must sit on the toilet for thirty minutes waiting for the medication to take effect. (Plaintiffs' Rule 56 Statement, ¶¶36, 56.) It is easy for the wheelchair bound detainee to fall of the toilet if there is no grab bar. (Plaintiffs' Rule 56 Statement, ¶¶36, 64) And it is difficult for the wheelchair bound detainee to transfer to and from a conventional toilet, which is much lower than an "accessible toilet." (Plaintiffs' Rule 56 Statement, ¶56.) Moreover, sitting on a low toilet can be painful. (Plaintiffs' Rule 56 Statement, ¶51.)

An accessible lavatory (or sink) is especially important to wheelchair bound detainees at the Cook County Jail, which does not provide laundry service, but requires detainees to wash their underwear in the lavatory. (Plaintiffs' Rule 56 Statement, ¶60.) The jail does not provide one-time use catheters (Plaintiffs' Rule 56 Statement, ¶57), and a catheterized detainee must wash his catheter, as best he can, in the lavatory. (Plaintiffs' Rule 56

Statement, ¶60.) These tasks are impossible for a wheelchair bound detainee who is unable to reach the sink.

Wheelchair accessible showers are the final aspect of accommodation presented by plaintiffs' motion for summary judgment. Showers are important to wheelchair bound detainees, who are otherwise unable to attend to personal hygiene needs. (Plaintiffs' Rule 56 Statement, ¶36.) Many wheelchair bound detainees are unable to shower without an appropriate shower chair. (Plaintiffs' Rule 56 Statement, ¶¶36, 44, 55, 61.)

II. The Statutory Framework

A. The Rehabilitation Act

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, provides in pertinent part as follows:

No otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The Rehabilitation Act applies to all of the operations of a unit of local government, as well as the operations of any instrumentality of a local government, when the local government received federal financial assistance.² 29 U.S.C §794(b). Defendants are subject to the Rehabilitation Act because Cook

² Congress amended the Rehabilitation Act in the Civil Rights Restoration Act of 1987, Pub.L. No. 100-259, 102 Stat. 28, to overrule *Grove City College v. Bell*, 465 U.S. 555 (1984) and make the Rehabilitation Act and several other statutes apply to an entire entity if any portion of that entity received federal funds.

County receives money from the federal government. (Plaintiffs' Rule 56 Statement, ¶6.)

The Rehabilitation Act is implemented by regulations issued by the Department of Justice and found at 28 C.F.R. §42.501 et seq.

28 C.F.R. §42.521 applies to facilities in existence on June 3, 1980, such as the "RTU" at the Cook County Jail. (Plaintiffs' Rule 56 Statement, ¶7.) The rule requires that such facilities become "readily accessible to and usable by handicapped persons," 28 C.F.R. §42.521(a), within three years.³ 28 C.F.R. §42.521(d). Defendants have ignored this rule.

28 C.F.R. §42.522 applies to facilities constructed or modified after June 3, 1980, such as Cermak Hospital (Plaintiffs' Rule 56 Statement, ¶8) and Division 2. (Plaintiffs' Rule 56 Statement, ¶10.) The regulation requires that any new or modified facility be "readily accessible to and usable by handicapped persons" 28 C.F.R. §42.522(a), by complying with the "Uniform Federal Accessibility Standards" ("UFAS"). 28 C.F.R. §42.522(b). The "UFAS" standards set out detailed specifications, *inter alia*, for accessible lavatories, toilets, and showers in jails. (Plaintiffs' Rule 56 Statement, ¶9.) Defendants have also ignored this rule.

³ This regulation was originally adopted in 1980 and was reissued on August 26, 2003 to respond to the suggestion in *Cureton v. NCAA*, 198 F.3d 107 (3d Cir. 1999) that regulations issued before enactment of the Civil Rights Restoration Act of 1987, see note 2 above, were invalid. 68 FR 51364, 51335 (August 26, 2003).

B. The Americans with Disabilities Act

Title II of the Americans with Disabilities Act (“ADA”), 42 U.S.C. §§12131-12165 et seq., requires “public entities” to accommodate the needs of persons with disabilities. The Sheriff of Cook County and Cook County are “public entities” subject to the ADA. (Plaintiffs’ Rule 56 Statement, ¶11.)

Title II of the ADA requires the Attorney General to promulgate regulations to implement the statute. 42 U.S.C. §12134(a). The regulations adopted by the Attorney General required defendants to modify the RTU “to avoid discrimination on the basis of disability.”⁴ Defendants ignored this rule and failed to retrofit existing fixtures and make simple changes in policies that would have minimized discrimination against wheelchair bound detainees.

The regulations also provide that any facility of a “public entity” which is constructed or altered after January 26, 1992 (such as Cermak Hospital or Division 2), must be “readily accessible to and usable by individuals with disabilities.” 28 C.F.R. §35.151(a), (b). The ADA regulations require compliance with either the Uniform Federal Accessibility Standards (“UFAS”) of the Rehabilitation Act or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (“ADAAG”). 28 C.F.R. §35.151(c).

⁴ 28 C.F.R. §35.130(b)(7) provide, in pertinent part, that “[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”

Defendants failed to comply with these standards in constructing Cermak Hospital and retrofitting Division 2.

C. Differences between the Rehabilitation Act and the ADA

Although “[t]he Rehabilitation Act is materially identical to and the model for the ADA,” *Crawford v. Indiana Dept. of Corrections*, 115 F.3d 481, 483 (7th Cir. 1997), there are significant differences in the regulations implementing the two statutes.

The regulations implementing the Rehabilitation Act allowed a three year grace period (which began no later than August 26, 2003, see note 3 above), for recipients of federal aid to make existing facilities “readily accessible and usable by handicapped persons.” 28 C.F.R. §42.521(a). The ADA imposes a lesser burden on public entities, requiring modifications “to avoid discrimination on the basis of disability.” 28 C.F.R. §35.130(b)(7).

The regulations also differ for new construction or alterations to existing facilities. The Rehabilitation Act requires compliance with the Uniform Federal Accessibility Standards (“UFAS”). 28 C.F.R. §42.522(b). The ADA allows use of the standards of either the UFAS or the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (“ADAAG”). 28 C.F.R. §35.151(c).

III. The Cook County Jail Does Not Comply with the Accessibility Requirements of Federal Law

The Rehabilitation Act, the ADA, and the accompanying regulations promulgated require defendants to operate the Cook County Jail so that it is

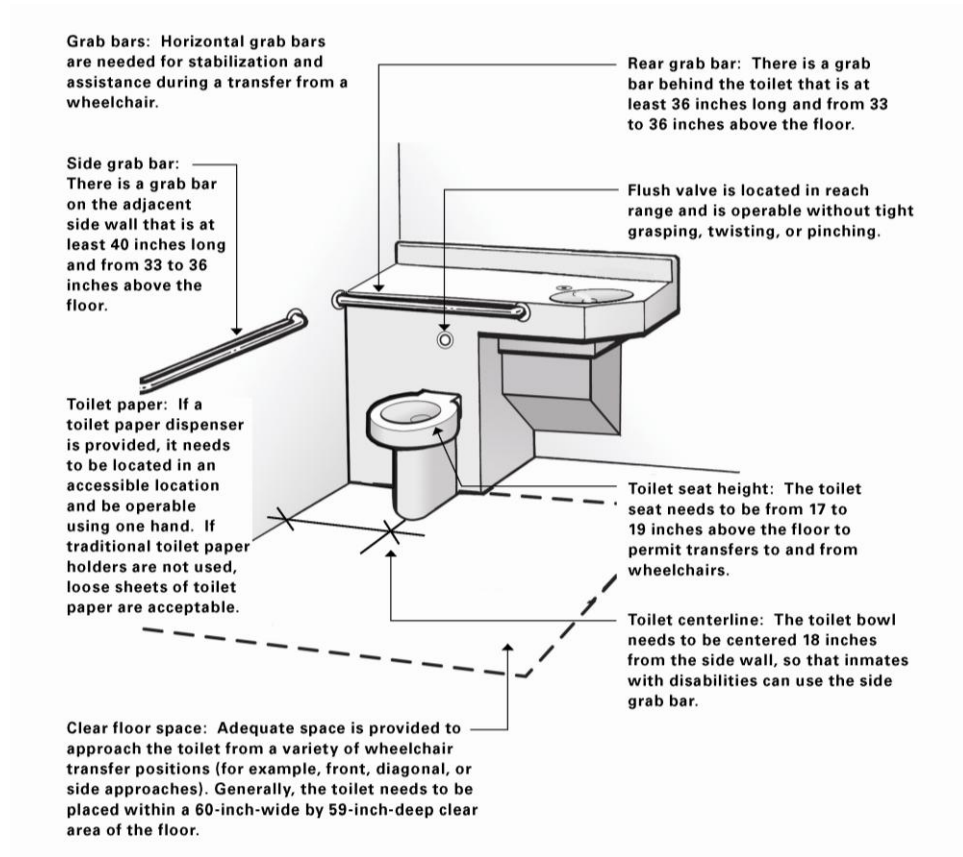
“readily accessible and usable” by handicapped persons, 28 C.F.R. §42.521(a), and “individuals with disabilities.” 28 C.F.R. §35.150(a). Defendants have failed to make the jail accessible to the wheelchair bound detainees in the plaintiff class and have thereby violated the Rehabilitation Act and the ADA.

One way to make a jail accessible for wheelchair bound detainees is to follow the design guidelines of the “AFAS” or the “ADAAG.” The core of the standards that apply to this case are illustrated in Exhibit 12. (Plaintiffs’ Rule 56 Statement, ¶12.) Relevant to plaintiffs’ motion for summary judgment are the requirements for

1. Toilets — height, accessibility, and grab bars. (Plaintiffs’ Rule 56 Statement, ¶13.)
2. Lavatories — height and accessibility. (Plaintiffs’ Rule 56 Statement, ¶14.)
3. Showers — height of the shower nozzle, shower controls, and soap shelf or dispenser. (Plaintiffs’ Rule 56 Statement, ¶15.)

A. Accessible Toilets

An accessible toilet will have rear and side grab bars, clear floor space for wheelchair transfer, and an accessible flush valve, (Plaintiffs’ Rule 56 Statement, ¶15), as illustrated in page 3 of Plaintiff’s Exhibit 8:



Neither of the two toilets in the intake area (“RCDC”) is accessible for persons in wheelchairs. The toilets are too high and lack grab bars. (Plaintiffs’ Rule 56 Statement, ¶14.) The predictable result for class member David Knight is that he soiled himself while waiting in the intake area. (Plaintiffs’ Rule 56 Statement, ¶58.) The officers made him put his clothes in a garbage bag, but did not assist Knight to find soap and water to clean up. *Id.* Knight was required to wait in the holding cell wearing a garbage bag. *Id.*

The toilets in Cermak Hospital are not ADA compliant. (Plaintiffs’ Rule 56 Statement, ¶26.) For example, the toilet in Room 3247 — the typical fixture at Cermak Hospital — does not have enough clear floor space, is

too far from the side wall, and does not have grab bars. (Plaintiffs' Exhibit 10 at 7.)



Defendants' expert revealed that he had reported to defendants – four or five years before this litigation began — that the toilets in the RTU did not comply with the ADA. (Plaintiffs' Rule 56 Statement, ¶30.) These toilets were too low, too close to adjacent fixtures, and did not appropriate grab bars. (Plaintiffs' Exhibit 10 at 7.)

Defendants' expert conceded that defendants would not have incurred any undue financial expense if they had attempted to make the toilets in the RTU accessible for wheelchair bound detainees. (Plaintiffs' Rule 56 Statement, ¶30.)

Defendants modified the toilets in Division 2 during the pendency of this case in an attempt to make those toilets wheelchair accessible. (Plaintiffs' Rule 56 Statement, ¶34.) Plaintiffs' expert reported on October 22, 2008

that the toilets were not accessible. (Plaintiffs' Exhibit 12.) Defendants sought to remedy some of the deficiencies in March of 2009 by installing grab bars, but failed to provide adequate clear floor space to approach the toilet, as illustrated in Plaintiffs' Exhibit 12:



B. Accessible Lavatories

The basic requirement for an accessible lavatory is clearance to allow a forward approach by a person using a wheelchair. (Plaintiffs' Rule 56 Statement, ¶17.) With two potential exceptions,⁵ the lavatories in Cermak Hospital are inaccessible to a wheelchair bound person.

⁵ The lavatories in Rooms 3215 and 3243 are designed to be accessible. The experts disagree about whether the fixtures have been installed properly. Plaintiffs do not ask the Court to resolve this dispute on summary judgment and accept, for the purposes of their present motion, defendants' contention that the lavatories in Rooms 3215 and 3243 are ADA compliant.

A combination toilet-lavatory is found in most of the rooms in Cermak Hospital and is not ADA compliant because it fails to allow forward approach from a wheelchair. The lavatories in the RTU were similarly deficient: Defendants' expert concedes that the lavatories in the RTU did not comply with the ADA. (Plaintiffs' Rule 56 Statement, ¶20.) Defendants' expert also agreed that correcting this problem would not have involved any undue financial expense. (Plaintiffs' Rule 56 Statement, ¶30.)

Defendants modified the lavatories in Division 2 during the pendency of this case in an attempt to create two wheelchair accessible lavatories. (Plaintiffs' Rule 56 Statement, 34.) These lavatories failed to provide enough knee space for a wheel chair bound detainee. (Plaintiffs' Rule 56 Statement, ¶33.) Defendants installed two handicap accessible sinks in March of 2009. (Plaintiffs' Rule 56 Statement, ¶34.) The handicap accessible sink is on the right in the photograph below:



Plaintiff's Exhibit _

C. Showers

To be wheelchair accessible, the shower nozzle and controls must be not more than 48 inches above the floor. (Plaintiffs' Rule 56 Statement, ¶18.) None of the showers at the Cook County Jail meet these standards. (Plaintiffs' Rule 56 Statement, ¶27. Detainees are forced to shower in their wheelchairs because the jail does not have appropriate shower chairs. (Plaintiffs' Rule 56 Statement, ¶55.) Showering in a wheelchair is likely to damage the wheelchair and doesn't allow the detainee to "reach underneath" and clean all parts of his body. (Plaintiffs' Rule 56 Statement, ¶36.)

D. Defendants Have Not Adopted "Other Curative Methods"

In *Pierce v. County of Orange*, 526 F.3d 1190 (9th Cir. 2008), the Ninth Circuit held that the structural deficiencies in a detention facility would not

violate the ADA if the facility employed “reasonable alternative methods” to avoid discriminating against the disabled. Although the Seventh Circuit has not considered this issue, the record is plain in this case that defendants fail to employ any “reasonable alternative methods.”

Defendants do not require correctional officers or medical personnel to assist wheelchair bound detainees in using the toilet. (Plaintiffs’ Rule 56 Statement, ¶59.) Nor do defendants require staff to assist wheelchair bound detainees in using the non-handicap accessible sinks. (Plaintiffs’ Rule 56 Statement, ¶64) Finally, defendants do not require staff to assist wheelchair bound detainees to transfer from their wheelchair to a shower chair.

Defendants cannot plausibly maintain that each of the wheelchair bound detainees at the jail can be housed in the two “ADA compatible” rooms in Cermak Hospital. First, defendants have assigned some wheelchair bound detainees to the dormitories in the RTU and subsequently to Division II. Second, wheelchair bound detainees are not afforded any priority for assignment into these two rooms; the Sheriff makes room assignments on a “space available” basis, without regard to accessibility. (Plaintiffs’ Rule 56 Statement, ¶25.)

IV. Complying with the Rehabilitation Act and the ADA Would Not Impose any “Undue Burden”

In *Love v. Westville Correctional Center*, 103 F.3d 558 (7th Cir. 1996), the Seventh Circuit held that ADA violations at a prison are not actionable if, “taking the prison context into account, no *reasonable* accommodations were possible.” *Id.* at 561 (emphasis in original). The Court made plain that this rule did not permit a financial defense: “If Westville means that reasonable accommodations existed, but it did not want to spend the money to implement them, this argument is inconsistent with the premise of the ADA.” *Id.* The record in this case leaves no doubt that reasonable accommodations were possible.

1. Intake: Defendants could long ago have provided an ADA compliant toilet in the receiving area, and instructed correctional officers and medical personnel to assist wheelchair bound detainees in getting to the toilet.

2. Room Assignment at Cermak: Defendants could have required that wheelchair bound detainees receive a priority in placement into one the two purportedly “ADA” rooms.

3. Toilets in the “ADA” rooms at Cermak: Defendants could have installed grab bars of appropriate length in the “ADA” rooms at Cermak.

4. Lavatories in the “ADA” rooms at Cermak: Defendants could have modified the floor layout to provide for sufficient approach room to the lavatory.

5. The “ADA” shower in Cermak: Defendants could have installed an ADA compatible shower chair.

6. The RTU: Defendants could have installed accessible toilets with grab bars, accessible sinks, and added an ADA compatible shower chair.

7. Division 2: Defendants could have installed appropriate grab bars, removed a toilet to allow access to the ADA accessible toilet, and (as they did after plaintiffs’ expert inspected Division 2), installed ADA accessible sinks.

V. Conclusion

For the reasons above stated, the Court should enter summary judgment on liability in favor of the plaintiff class.

/s/ Kenneth N. Flaxman

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of July, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Jamie M. Sheehan, Ass't State's Atty, 50 W Washington St, Room 500, Chicago, IL 60602-0000, and Daniel F. Gallagher, Querrey & Harrow, 175 W Jackson Blvd Ste 1600, Chicago, IL 60604-2827, and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants: none.

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