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

DERRICK PHIPPS, et al.

Plaintiff,

v.

SHERIFF OF COOK COUNTY, and COOK COUNTY, ILLINOIS,

Defendants.

No. 07 C 3889

Judge Elaine Bucklo

JOINT REPLY IN SUPPORT OF DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

NOW COME Defendants, Sheriff of Cook County, by and through his attorneys, Querrey & Harrow, Ltd., and Cook County, by and through its attorney Anita Alvarez, State's Attorney of Cook County, and in reply to Plaintiffs' Response to Defendants' Motions for Summary Judgment, state as follows:

INTRODUCTION

Short on nouns and long on adjectives, Plaintiffs deride Defendants' Motions as "foolhardy," "bold," "frivolous," and even "irresponsible." Defendants concede defeat in the name calling contest—which they never entered—and turn once more to why Plaintiffs' case is incompatible with ADA fundamentals.

Defendants' Motions raised a plethora of arguments, two of which embody Plaintiffs' misconstruction of the ADA. First, Plaintiffs have not satisfied the ADA's physical injury requirement. Second, Plaintiffs sue under Title II for a Title III claim. Remarkably, these arguments do not elicit a single word from the Plaintiffs. This silence is the most notable aspect of the Response.

ARGUMENT

I. Plaintiffs' Response is Anything But.

The Summary Judgment Motions and Response are like ships passing in the night. Vast swaths of Defendants' Motions go untouched. Plaintiffs' refusal to address Defendants' contentions exemplifies why summary judgment is proper.

The Plaintiffs' truncated approach is manifested in the Response's opening line. Plaintiffs claim Defendants have asserted "three erroneous legal theories." (Resp. at 1). In actuality, Defendants have set forth nine distinct contentions. In the next sentence, Plaintiffs contend the "*ne plus ultra* of defendants' arguments is the claim that the Court should defer" to the Sheriff's discretion. (Resp. at 1). Plaintiffs' own citation belies this claim. Correctional discretion is, as Plaintiffs cite, not raised by the Sheriff until the waning pages of his Motion. (Sheriff's Mot. at 12). Hardly the preeminent stature Plaintiffs bestow upon it.

Plaintiffs' incompleteness transcends these two sentences. While Plaintiffs' opening contentions are quickly dispatched, it is what Plaintiffs disregard that is of critical import. Plaintiffs ignore the following arguments of the Defendants:

1. Plaintiffs' case is premised on Title III, not Title II. (County's Mot. at 6).
2. Plaintiffs have not alleged a physical injury and are thus barred by the PLRA. (Sheriff's Mot. at 5).
3. Any physical injury sustained is *de minimis* and thus not cognizable. (Sheriff's Mot. at 6).
4. A jail is not a public entity under Title II. (Sheriff's Mot. at 10).
5. The RTU predates the inception of the ADA. (County's Mot. at 10).
6. The *Duran* consent decree bars Plaintiffs' case. (County's Mot. at 12).

7. Plaintiffs are not entitled to the relief sought. (County's Mot. at 11).

A response's *raison d'être* is refuting the initial argument. But a position cannot be refuted if it is not addressed. Plaintiffs' failure to respond guts their case.

Defendants do not highlight Plaintiffs' omissions to score debating points. The consequences of Plaintiffs' silence are severe. The Seventh Circuit concluded a plaintiff abandoned a claim after failing to respond to defendant's argument in a motion for summary judgment in *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562 n.2 (7th Cir. 1996). A district court reached a similar conclusion in *Johnson v. Saville*, 2008 U.S. Dist. LEXIS 82935 *20 (N.D. Ill. 2009). The court found the plaintiff failed to make any arguments concerning a point, and "accordingly abandoned any such arguments." *See also Myatt v. Chicago*, 1991 U.S. Dist. LEXIS 7056, *26 (N.D. Ill. 1991) ("the plaintiff appears to concede this argument since it is not addressed in his response brief"); *Combined Counties Police Ass'n v. Evanston*, 1991 U.S. Dist. LEXIS 7996, *4 (N.D. Ill. 1991) (same). Per established precedent, Plaintiffs have conceded the issues they have abandoned. Because the abandoned arguments involve elements of the underlying claim, summary judgment is warranted.

II. Plaintiffs' Single Paragraph Does Not Dispel the Reality That No Intentional Discrimination Exists.

Even if the Court finds Plaintiffs' concessions do not sink their case, Defendants still prevail. Plaintiffs have not established intentional discrimination, an ADA requirement.

The County's Summary Judgment Motion devoted significant attention to Plaintiffs' failure to establish intentional discrimination. (County's Mot. at 8-12). The argument spanned 5 pages and cited 16 cases. To this, Plaintiffs respond with a brief paragraph containing one case.

The Sheriff will not rehash the case law cited in the opening Motion, other than to note "acts of negligence do not come within the ambit of the ADA." *Foley v. City of Lafayette*, 359 F.3d 925, 931 (7th Cir. 2004). Plaintiffs address none of Defendants' 16 cases or their holdings. Rather than point to evidence of intentional discrimination, they quibble about the standard of proof. For support, they cite one inapposite case, *Wisconsin Community Services v. City of Milwaukee*, 465 F.3d 737 (7th Cir. 2006) (en banc).

Plaintiffs' reliance on *Wisconsin Community* is plagued by factual and legal distinctions. In *Wisconsin Community*, a provider of treatment to the mentally ill sued under Title II. It sought an injunction ordering the City of Milwaukee to issue a zoning permit that would enable it to move its clinic. The Seventh Circuit described "the legal question before us [as] whether … a city must modify its zoning standards to prevent them from discriminating against the disabled." *Id.* at 746. The "but for" standard trumpeted by Plaintiffs was thus referenced in the context of the provider's request to modify a zoning ordinance. *Id.* at 754. *Wisconsin Community* did not discuss the ADA intentional discrimination test of *Washington v. Indiana High School Athletic Ass'n*, 181 F.3d 840, 846 (7th Cir. 1999). As such, Plaintiffs' reliance on *Wisconsin Community* is misplaced.

In sum, to allege a cause of action under Title II, a plaintiff must allege the defendant intended to discriminate because of the plaintiff's disability. *Dabrowski v. Nelson*, 2007 U.S. Dist. LEXIS 62444, *7 (N.D. Ind. 2007). *See also May v. Sheahan*, 1999 U.S. Dist. LEXIS 11347, *3 (N.D. Ill. 1999) ("Plaintiff must allege . . . he was denied benefits or discriminated against because of his disability."). These cases establish Plaintiffs have misread the standard for intentional discrimination. More importantly, they have not shown intentional discrimination. Thus, Plaintiffs cannot survive summary judgment.

III. Plaintiffs' Efforts to Downplay Deference to Correctional Officials and the Penological Interests of Safety and Security Contravene Precedent.

Plaintiffs attack Defendants' case law concerning deference to correctional officials. They argue the cases are offered in lieu of references to the record. (Resp. at 4). This is incorrect; the cases supplement the Sheriff's policies prohibiting contraband. They further demonstrate that because of security, correctional deference is a *sine qua non* of a suit against a jail. *See Bell v. Wolfish*, 441 U.S. 520, 559 (1979) ("A detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence.").

Unable to refute the premise of correctional deference, Plaintiffs lob various objections at Defendants' case law. (Resp. at 4). Their impact is minimal. Plaintiffs first attack *Miller v. King*, 384 F.3d 1248 (11th Cir. 2004), vacated by 449 F.3d 1149 (11th Cir. 2006). Plaintiffs are correct, *Miller* has been vacated, which the Sheriff neglected to mention. (Sheriff's Mot. at 12). This oversight does not change the fact that *Miller* was vacated on other grounds, namely, whether Title II abrogated state sovereign immunity. *Miller*, 449 F.3d at 1150, citing *United States v. Georgia*, 546 U.S. 151 (2006). The Sheriff cited *Miller* not for its holding, but a general proposition regarding penological interests. Thus, the language of *Miller* referenced by the Sheriff is still pertinent. This is evinced by recent decisions citing the opinion: *Wiesman v. Hill*, 2009 U.S. Dist. LEXIS 55974, *8 (D. Mass. 2009); *Young v. Green*, 2008 U.S. Dist. LEXIS 90870, *11 (D. Mass. 2008); *Garcia v. United States*, 2008 U.S. Dist. LEXIS 10672, *9 (E.D. Ky. 2008).

Plaintiffs next cite "defendants' inexplicable reliance on the district court's summary judgment decision in *Arreola v. Choudry*." (Resp. at 4). The court in *Arreola* denied cross

motions for summary judgment. 2007 U.S. Dist. LEXIS 8701 (N.D. Ill. 2007). While the court did not find outright for the *Arreola* defendant, the court's rejection of the inmate's summary judgment motion is telling because the jail raised the same security argument made here. Moreover, the basis behind the policy of prohibiting crutches–security–did not trouble the court, it was that correctional officers determined whether crutches were needed. *Id.* at *17. *Arreola* is instructive because it did not reject the security rationale behind the policy barring crutches.

Plaintiffs also criticize Defendants' reading of *Johnson v. Snyder*, 444 F.3d 579 (7th Cir. 2006), because it "makes little sense." (Resp. at 5). Plaintiffs take umbrage with Defendants' comment that the *Johnson* court found it "permissible to confiscate [the crutches] while an inmate was in the general population." (Resp. at 5, quoting Sheriff's Mot. at 13). Plaintiffs criticize Defendants' interpretation despite Plaintiffs' own summary of *Johnson* confirming Defendants' reading. Plaintiffs note that the *Johnson* plaintiff "asserted that various prison officials 'knew of his amputation … and with this knowledge refused to return his crutch.'" (Resp. at 5, quoting *Johnson* at 585). As the Seventh Circuit found the officials' actions permissible, Plaintiffs are betrayed by their own words.

Plaintiffs' efforts to downplay *Baribeau* and *Kiman* also fall flat. Plaintiffs offer only a conclusory laced response about *Baribeau v. City of Minneapolis*, 578 F.Supp. 2d 1201 (D. Minn. 2009). (Resp. at 6). It is ineffectual in light of the *Baribeau* court's reliance on the "discretion of prison officials" in upholding the jail's confiscation of a prosthetic leg. *Id.* at 1222. Plaintiffs relegate *Kiman v. N.H. Dep't. of Corr.*, 451 F.3d 274 (1st Cir. 2006), to a footnote. (Resp. at 5, n. 6). Plaintiffs do not address the penological interest aspect of the First Circuit's holding. Instead, they claim the decision "reflects a fact specific determination" – a litigant's last resort when attempting to distinguish a case. Thus, *Kiman* and *Baribeau* remain standing, and the

Court should follow their well reasoned logic that safety and security support precluding personal devices from the Jail.

Finally, Plaintiffs cite as support *Love v. Westville Correctional Center*, 103 F.3d 558 (7th Cir. 1996). *Love* is distinguishable on several grounds. First, procedural posture. *Love* was an appeal of a district court's granting of a motion for a new trial. *Id.* at 558. Second, factual. The inmate was "unable to use the prison's recreational facilities, its dining hall, the visitation facilities . . ." *Id.* at 558-59. Third, legal. The defendant in *Love* conceded that the ADA applied to the prison programs at issue. *Id.* at 559. The defendant could not overcome the jury's intentional discrimination finding because it failed to present direct evidence at trial. However, the court noted that "security concerns, safety concerns, and administrative exigencies would all be important considerations." *Id.* at 561.

Plaintiffs misconstrue the concept of deference to correctional officials. It is a legal principle, but Plaintiffs turn it into a factual determination. The Court should reject this maneuver. Correctional deference is an integral factor in correctional suits. *See Bell v. Wolfish*, 441 U.S. 520 (1979). The importance of Defendants' interest is clear: "central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves." *Pell v. Procunier*, 417 U.S. 817, 823 (1974). As the Seventh Circuit explained, *Bell v. Wolfish* "emphasized what is the animating theme of the Court's prison jurisprudence for the last twenty years: the requirement that judges respect hard choices made by prison administrators." *Johnson v. Phelan*, 69 F.3d 144, 145 (7th Cir. 1995). *Bell*'s elevation of institutional security undermines Plaintiffs' contentions.

A policy permitting entry of personal devices into the Jail would be ripe for abuse. Plaintiffs claim "it is difficult to fathom how providing wheelchair bound detainees with ADA

accessible toilets, lavatories, or showers could result in the creation of 'weapons.'" (Resp. at 4, n. 5). This is a straw man. It is not accessibility itself; it is the personal devices that Plaintiffs seek in using the toilet and lavatory. Defendants will have to address the consequences of contraband floating into the general population. It is indisputable that correctional inhabitants have a penchant for transforming inherently innocuous items into weapons. While it may be cynical to conclude that personal devices used by wheelchair bound detainees will meet a similar fate, this view is grounded in reality.

IV. Plaintiffs' Novel Reading of the ADA Subsumes Title III into Title II, and Thus Cannot Stand.

Title III of the ADA applies to privately owned facilities. It mandates the removal of physical barriers. Title II of the ADA applies to public entities. It only pertains to the accessibility of programs, services, and activities. Given that CCDOC and Cermak are owned and operated by a public entity, it is Title II, rather than Title III, that applies. Yet, Plaintiffs' claims sound in Title III. Plaintiffs employ the simplest technique to deal with this argument: ignore it completely. Title III is never referenced in the Response.

The contentions Plaintiffs do make are unavailing. Plaintiffs cite regulations summarized in *Pierce v. County of Orange*, 526 F.3d 1190 (9th Cir. 2008). (Resp. at 7-9). The lengthy discussion of *Pierce* supports Defendants' position. The Ninth Circuit's remarks mirror the Title II Technical Assistance Manual, which Defendants have emphasized from the outset. Ultimately, the Jail is a public entity without public access. Plaintiffs' failure to grasp this fact forecloses their case.

Plaintiffs also cite *Purcell v. Horn*, 1998 WL 10236, *9 (E.D. Pa. 1998), for the proposition that 28 C.F.R. § 35.135 "does not apply to custodial situations." (Resp. at 10, n. 9).

Plaintiffs' reading is incorrect. *Purcell* never stated the regulation is *per se* inapplicable. Plaintiffs' placement of *Purcell* in a footnote reflects their confidence in it. The factual and legal distinctions of *Purcell* erode its utility here. In sum, the isolated instance of *Purcell* does not give Plaintiffs license to claim 28 C.F.R. § 35.135 "does not apply to custodial situations."

Additionally, Plaintiffs cite *Schmidt v. Odell*, 64 F.Supp. 2d 1014 (D. Kan. 1999), for the proposition that a basic service of the jail included the toilet and shower. (Resp. at 7). Plaintiffs' reading is incorrect. *Schmidt* concerned defendant's failure to provide the plaintiff with a wheelchair when he was transported to and from the jail. Wheelchairs were available, but the jailers refused to allow him one. They also failed to provide him with a shower chair. Summary judgment on plaintiff's Eight Amendment claim was denied because the delay in providing a shower chair and making him take a shower on his knees was an unnecessary infliction of pain. Plaintiffs' attempt to invoke Eighth Amendment standards in a Title II ADA setting is misplaced.

Plaintiffs' case law aside, their strategy is simple: pluck portions of the Defendants' arguments and mischaracterize them. For example, according to Plaintiffs, Defendants contend an accessible lavatory, toilet, or shower is a "personal device" under the ADA. This misstates Defendants' position. Defendants assert that a public entity is not required to provide a disabled individual with "personal devices" *i.e.* wheelchairs, eyeglasses or hearing aids, or services of a personal nature like assistance in eating, toileting, or dressing. 28 C.F.R. §35.135. Additionally, Plaintiffs define a personal device using sources outside the definitions used by Congress—*i.e.* a cell phone or iPod. (Resp. at 11). Defendants have never claimed that ADA accessible lavatory, toilet, shower controls, and grab bars are personal devices. The Court should reject Plaintiffs' distortions and consider Defendants' positions unadulterated. In doing so, summary judgment becomes apparent.

V. Defendants Did Not Disregard Rule 36 Admissions.

Plaintiffs' argument that Defendants disregard Rule 36 admissions is erroneous. Plaintiffs claim the Defendants admitted that the RTU and Cermak did not have ADA accessible toilet facilities. This is untrue. The Sheriff denied that the toilet seat height measurements were less than 17 inches or more than 19 inches above the floor. *See* Dkt. No. 177, pgs. 17, 21, 24. At no time did the Sheriff ever admit that the toilet facilities were not ADA accessible. Nevertheless, Plaintiffs attempt to take the measurements and absence of grab bars and argue that the Sheriff admitted the Jail is not ADA compliant. The Court should reject this attempt and find the Rule 36 admissions were not disregarded.

VI. The Rehabilitation Act Does Not Apply to Either Defendant.

A. The County Does Not Meet the Definition of an "Entity."

A plaintiff seeking relief under the Rehabilitation Act must bring forward affirmative evidence that the program or activity from which he was excluded "itself received or was directly benefited by federal financial assistance." *Doyle v. Univ. of Ala.*, 680 F.2d 1323, 1327 (11th Cir. 1982). Section 504 of the Rehabilitation Act of 1973, codified as *29 U.S.C.A. § 794,* prohibits discrimination against otherwise qualified disabled persons under any program or activity receiving federal financial assistance. In *Bentley v. Cleveland County Bd. of County Com'rs,* 41 F.3d 600, (10th Cir. 1994), the court determined that Congress intended the definition of a "program or activity" to extend to entire units of a state or local government, as long as there is a sufficient nexus between the federal assistance and the discriminatory practice. Plaintiffs' brief argument fails to demonstrate a nexus exists between any federal assistance and the alleged discriminatory practice.

B. The Sheriff Receives No Federal Funds.

The Rehabilitation Act does not apply to the Sheriff for a simple reason. As Plaintiffs point out, the Rehabilitation Act applies to "organizations" and "entities." (Resp. at 13). The Sheriff is neither. He is an independently elected officer. This distinction eviscerates Plaintiffs' Rehabilitation Act claim.

The office of county sheriff is created by article VII of the Illinois Constitution. Ill. Const. 1970, art. VII, § 4(c). A sheriff is an independently elected county officer and is not an employee of the county in which the sheriff serves. *Id.*; *Carver v. Sheriff of LaSalle County*, 203 Ill. 2d 497, 512 (2003); *Moy v. County of Cook,* 159 Ill. 2d 519, 530 (1994). The office of the sheriff has no authority to levy taxes or establish a budget and thus has no funds with which to finance its expenses. *Carver*, 203 Ill. 2d at 516. *See also* 55 ILCS 5/4-6003; 55 ILCS 5/5-1106. Instead, the office of the sheriff is financed by public funds appropriated to it by the county board. *Id.*

These principles are indisputable. They prove the Sheriff has not received federal funds, for the simple reason that he cannot. As Plaintiffs do not show to the contrary, their Rehabilitation Act claim fails as a matter of law.

CONCLUSION

Defendants have laid out a litany of reasons why summary judgment is proper. Plaintiffs have not dissuaded the Court otherwise. They distort Title II, ignore ADA requirements, and succumb to the PLRA. Such deficiencies engender summary judgment.

WHEREFORE, the Sheriff of Cook County and Cook County respectfully request the Court grant their Motions for Summary Judgment and any other relief the Court deems just.

Respectfully submitted,

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