

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

JEREMY JOSEPH DURRENBERGER,
Plaintiff,

v.

**TEXAS DEPARTMENT OF
CRIMINAL JUSTICE,**
Defendant.

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CIVIL ACTION NO. 4:09-CV-00786

**DEFENDANT, THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE'S,
MOTION FOR SUMMARY JUDGMENT**

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CIVIL ACTION NO. 4:09-CV-00786

**DEFENDANT, THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE'S,
MOTION FOR SUMMARY JUDGMENT**

TO THE UNITED STATES DISTRICT JUDGE SIM LAKE:

Pursuant to Rule 56 of the FEDERAL RULES OF CIVIL PROCEDURE, the Defendant, The Texas Department of Criminal Justice (TDCJ), by and through counsel, the Texas Attorney General submits this, its Motion for Summary Judgment:

NATURE AND STAGE OF PROCEEDINGS

Plaintiff, Durrenberger, has filed a discrimination suit against the Texas Department of Criminal Justice (TDCJ). Durrenberger was a visitor at the Hughes Unit of TDCJ. He sues pursuant to the ADA Amendments Act of 2008, Title II, the Rehabilitation Act of 1973 and Texas state statutes alleging a hearing disability and claiming TDCJ did not make accommodations during his visits with an inmate. Plaintiff has amended his original complaint once. Title 42 U.S.C. § 12131-12133; Title 29 U.S.C. §504. Defendants have answered asserting their Eleventh Amendment and sovereign immunity. Initial disclosures have been traded. Discovery is complete. Trial (jury) is scheduled in January 2011.

STATEMENT OF FACTS

In the Spring of 2009, Inmate Bryson began serving a sentence at TDCJ for an aggravated assault on the Plaintiff in this case, Jeremy Durrenberger. **(Appendix pg. 2 ¶ #4)** While Inmate Bryson was serving his time at the Hughes prison unit, he and Durrenberger visited several times. **(Appendix pg. 22)** Durrenberger has a hearing impairment and claims the visits, which occurred in a partitioned glass booth with phones for the visitor and for the inmate were difficult because it was noisy. **(Appendix pg. 2 ¶ #3 & ¶ #4 & pg. 5)** Durrenberger asked that he be accommodated with a contact visit. **(Appendix pg. 2 ¶ #4)** His request was denied because by policy contact visits are limited to family members. **(Appendix pgs. 1-2 ¶ #3)** In the contact visits which occur in the same room as the phone booth visits, the inmates sit at tables across from their visitors. **(Appendix pgs. 6, 7)** Contact visits are limited because they present an increased risk of assault or passing of contraband. **(Appendix pgs. 1-2 ¶ #3-4)** This is of particular concern where there is already a history of violence as with Inmate Bryson and Durrenberger. **(Appendix pg. 2 ¶ #4 & pg. 5)** These two individuals are not related.

All the visits, both contact and phone booth occur in the same large concrete room which holds about a 100 people. **(Appendix pgs. 1-2 ¶ #3 & pg. 7)** The correctional officers try to keep the noise level down by walking the room and by cautioning the crowd and sometimes individuals to keep the noise level low. **(Appendix pg. 2 ¶ #3 & pg. 7)** Durrenberger was given a couple of contact visits though it was against policy. **(Appendix pg. 2 ¶ #4 & pg. 5 & pg. 22)** He was also allowed to use the end phone booth which was thought to be less noisy. **(Appendix pg. 2 ¶ #4 & pg. 6)** He was not given the end booth on each demand because the booths are assigned randomly to prevent contraband drops. **(Appendix pg. 2 ¶ #3)** Durrenberger did not bring any hearing prosthetic devices with him and has not used any in the past. **(Appendix pg. 2 ¶ #4 & pg. 21)** He did not

request that Inmate be given pen and paper to use in the phone booth though these are available. **(Appendix pg. 2 ¶#4 & pg. 6)** Beyond the weekly visitation, Inmate Bryson and Durrenberger can communicate by letter and by use of the day room phone, where the inmate can place a call to freeworld individuals. **(Appendix pg. 2 ¶#4)**

STANDARD OF REVIEW AND STATEMENT OF THE ISSUES

Rule 56 of the FEDERAL RULES OF CIVIL PROCEDURE provides summary judgment shall be granted if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Neither party may rest on pleadings or conclusions to demonstrate the absence or existence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2552 (1986). A fact is material if the resolution of the fact would affect the outcome of the case under governing law.

Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2510 (1986). A material fact is genuine if a reasonable fact finder could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986). The Court reviews the record taken as a whole and draws all reasonable inferences in favor of the nonmoving party. *Reeves v. Sanderson Plumbing Prods.*, 120 S.Ct. 2097, 2110 (2000); *Matsushita Electric Industrial Co., v. Zenith Radio Corp.*, 106 S.Ct. 1348, 1356 (1986).

ISSUE: Whether TDCJ is entitled to Eleventh Amendment immunity to Durrenberger’s ADA and RA claims.

ISSUE: Whether Durrenberger is a qualified individual with a disability and whether TDCJ reasonably accommodated his disability.

SUMMARY OF THE ARGUMENT

TDCJ asserts it is entitled to Eleventh Amendment immunity to Durrenberger’s ADA and RA claims because the accommodations imposed by the ADA are incongruent with any wrong

committed and particularly in proportion to the security concerns of a prison setting. In relation to the RA, TDCJ asserts Durrenberger has not established TDCJ's receipt of federal funds is related to Hughes Unit visitation facilities. TDCJ further asserts it is entitled to sovereign immunity to Durrenberger's claims against it under state statutes. Lastly, TDCJ asserts Durrenberger is not a qualified individual with a disability and that it provided reasonable accommodation.

ARGUMENT AND AUTHORITY

I. Eleventh Amendment immunity precludes Durrenberger's ADA and RA claims against TDCJ.

The Eleventh Amendment of the United States Constitution bars damage suits in federal court against a state unless 1) the state, itself, waives its immunity or 2) the United States Congress by valid unequivocal legislation overrides the states' Eleventh Amendment. [*Kimel v. Florida Board of Regents*](#), 120 S.Ct. 631, 640 & 644 (2000). In the ADA, § 12202 Congress expressed an unequivocal desire to abrogate the states' sovereign immunity. Title 42 U.S.C. § 12202. Congressional desire however, cannot be substantiated unless joined with the valid authority provided in §5 of the Fourteenth Amendment. [*Seminole Tribe of Fla. v. Florida*](#), 116 S.Ct. 1114, 1125 (1996). For example, despite the unequivocal desire of Congress to waive immunity in the ADA, Title I of the ADA, has been determined to not abrogate the states' immunity. [*Board of Trustees of the University of Alabama v. Garrett*](#), 121 S.Ct. 955 (2001). Further, the Congressional attempt to override the Eleventh Amendment in Title II of the ADA has been limited to the application of fundamental rights, such as, failure to accommodate the disabled in access to the courts or conduct that actually violates the Fourteenth Amendment. [*Tennessee v. Lane*](#), 124 S.Ct. 1978, 1993-1994 (2004); [*United States v. Georgia*](#), 126 S.Ct. 877, 882 (2006). To determine if legislation against a state is within the parameters of the §5 enforcement powers of the Fourteenth Amendment courts weigh the legislated

remedy with the misconduct.¹ City of Boerne v. P. F. Flores, , 117 S.Ct. 2157, (1997). Because this case is in a prison setting, the traditional deference provided state administration of prisons should be factored into the *City of Boerne* congruence and proportionality paradigm. Overton v. Bazzetta, 123 S.Ct. 2162, 2167, 2169 (2003)(Freedom of association protected in the First Amendment is among the rights least compatible with incarceration.) See also: Chase v. Baskerville, 508 F.Supp.2d 492 (E.D. Va. 2007)

Eleventh Amendment also precludes federal jurisdiction against the states under state statutes. Perez v. Region 20 Education Services Center, 307 F. 3d 318, 332 (5th Cir. 2002; Walker v. Texas, Office of the Attorney General, 217 F.Supp. 2d 776 (E.D. Tex. 779-780).

Durrenberger seeks to alter prison visitation procedures imposing the reasonable accommodation standard of the ADA and thereby requiring auxiliary listening devices or contact visits for himself as a hearing impaired individual. TDCJ asserts the ADA standard is not consistent with the state's interest in providing a secure facility while at the same time maximizing visitation privileges. TDCJ asserts imposition of ADA accommodations without deference to prison security is beyond §5 enforcement powers afforded Congress under the Fourteenth Amendment.

In this case, Durrenberger seeks to accommodate his hearing impairment with a contact visit or an auxiliary hearing device. TDCJ allows for contact visits only with family. **(Appendix pg. 1 ¶#3)** Durrenberger is not related to the individual he was visiting. Contact visits are restricted to family because such visits necessitate increased vigilance for contraband and personal safety requiring more security personnel. **(Appendix pg. 1 ¶#3)** Durrenberger sought a contact visit with an inmate

¹ Arguably a more restrictive liability standard would be implicated since the disabled are not a suspect class under the Equal Protection Clause, however, defendant does not address this test since plaintiff fails the less restrictive congruency and proportionality test. Tennessee v. Lane, , 124 S.Ct. 1978, 1994 (2004) citing City of Cleburne, Texas v. Cleburne Living Center, 105 S.Ct. 3249, 3257-3258 (1985).

who is serving time for a violent assault on Durrenberger. **(Appendix pg. 2 ¶#4 & pg. 5)** The fact that Durrenberger was not family and the inmate had previously assaulted Durrenberger increases the possibility of another attack dictating denial of a contact visit. **(Appendix pg. 2 ¶#4)** Prison officials are charged not just with the safety of the inmates but with the safety of staff and other visiting public. **(Appendix pg. 1 ¶#2 & ¶#3)** TDCJ therefore asserts a contact visit accommodation is inconsistent with its primary duty of security. TDCJ provides for visitation through a glass panel with a phone extension. **(Appendix pg. 1-2 ¶#3-4)** The phone booth serves as an accommodation because it isolates the conversation between the inmate and visitor. **(Appendix pg. 2 ¶#3)** And, on occasion, security officials permitted Durrenberger to visit in a quieter booth near the end though they did not guarantee this accommodation. **(Appendix pg. 2 ¶#4 & pg. 6 & pg. 22)** The end booth was not promised for each visit because choosing booths other than randomly imposes more monitoring on security personnel. **(Appendix pgs. 1- 2 ¶#3)** For instance, use of the same booth by the same individual for each visit could aid in a contraband drop. **(Appendix pg. 2 ¶#3)** Also, beyond visits, TDCJ provides for communication outside of the prison by letter and on occasion by phone calls by the inmate from the dayroom. **(Appendix pg. 2 ¶#4)** Lastly, were TDCJ to provide an auxiliary device, beyond the monetary expense of the device it would need to be at each unit where Durrenberger visited along with record of the necessary exception requiring a further diversion of resources. Durrenberger did not bring an auxiliary device with him. **(Appendix pg. 15)** Individuals who have hearing aids are allowed to use the aids at visitation. **(Appendix pg. 2 ¶#4)**

In summary, the paradox in this case, is the broad statutorily imposed ADA obligation of accommodation to all disabled individuals and the limited constitutional obligations imposed on state prison operations. TDCJ asserts it is entitled to Eleventh immunity because the accommodations Durrenberger seeks to impose by the ADA are incongruent with legitimate penological interests of prison visitation restrictions.

II. Durrenberger is not a qualified individual with a disability under the ADAAA or RA and reasonable accommodation is available for Durrenberger's disability.

Title II of the ADA and the RA² provide that no qualified individual with a disability shall by reason of such disability be excluded from participation in or denied the benefits of the services, programs, or activities of a public entity. Title 42 U.S.C. § 12132. The term disability is defined as a physical impairment that substantially limits one or more of the major life activities of the individual. Title 42 U.S.C. §12102 (2) (A). Existence of an impairment does not equal a disability absent a substantial limit on a major life activity. The determination is made on a case by case basis. Albertson's Inc. v. Kirkingburg, 119 S. Ct. 2162, 2169(1999) An individual qualifies as an individual with a disability, if with or without reasonable accommodation such individual meets the essential eligibility requirements for receipt of services or participation in programs or activities provided by a public entity. Title 42 U.S.C. § 12131 (2). The sufficiency of an accommodation does not demand action beyond the realm of reason. U. S. Airways, Inc. v. Barnett, 122 S.Ct. 1516, 1522-1523 (2002); Tennessee v. Lane, 124 S.Ct. 1978, 1993 (2004)(Title II does not require States to employ any and all means to make services accessible to the disabled, it does not require States to compromise essential eligibility criteria)

In this case, Durrenberger claims a hearing impairment during visitation and wants to be accommodated by a contact visit. Visitation is inherently noisy as friends and family meet with inmates for a limited time once a week. **(Appendix pg. 2 ¶#2 & pg. 6)** TDCJ asserts that the average person also experiences hearing difficulties during visits, thus, Durrenberger has not demonstrated he is disabled. Further, Durrenberger is not a qualified individual for a contact visit

² The RA and the ADA are judged under the same legal standards. Kemp v. Holder, 610 F.3d 231, 234 (5th Cir. 2010). Though TDCJ is in receipt of federal funds which may serve as a consent to waive Eleventh Amendment immunity under the RA, federal funds are not expended in the Hughes Unit visitation program. **(Appendix pgs 2-3 #5)** TDCJ asserts in the issue before this court, Hughes Unit visitation, it maintains its immunity to both statutes. Pace v. Bogalusa City School Board, 403 F.3d 272, 278, 281 (5th Cir. 2005).

accommodation because he is not related to the individual inmate he is visiting and because he presents a unique threat to security because of the inmate's past assault on Durrenberger. (**Appendix pg. 1-2 ¶#3-4 & pg. 5**) Nor is he qualified to have a specific end booth assigned again because of the increased security threat of the booth being utilized as a contraband drop. (**Appendix pg. 1-2 ¶#3-4 & pg. 6**) Durrenberger also wants an accommodation by the installation of an auxiliary listening device. Notably Durrenberger admits he does not use an auxiliary listening device such as he is requesting TDCJ provide for him. (**Appendix pg. 21**) While 2008 amendments to the ADA prohibit consideration of corrective devices in determining if his impairment is a disability, it can be considered to evidence the reasonableness of TDCJ's accommodation. TDCJ should not be required to accommodate with a device Durrenberger himself has not seen to use in his daily life activities. Lastly, within the confines of prison security, TDCJ has accommodated Durrenberger with: 1) use of the direct phone connection through the glass, 2) with pen and paper if he so requested, and 3) by letters or calls from the inmate during dayroom hours. (**Appendix pg. 1-2 ¶#3-4**) TDCJ asserts Durrenberger is not a qualified disabled individual and that it has reasonably accommodated his impairment.

CONCLUSION

TDCJ moves the Court dismiss, Durrenbergers claims and enter judgment in their behalf based on their Eleventh Amendment and sovereign immunity and because Durrenberger has not demonstrated he is within the protection of the ADA or RA.

Respectfully submitted,

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NOTICE OF ELECTRONIC FILING

I, SUSAN E. WERNER, Assistant Attorney General of Texas, do hereby certify that I have electronically submitted for filing, a true and correct copy of the above an foregoing **Defendant, the Texas Department of Criminal Justice's, Motion for Summary Judgment** in accordance with the Electronic Case Files system of the Southern District of Texas, on this the 24th day of September 2010.

/s/ Susan E. Werner
SUSAN E. WERNER
Assistant Attorney General

CERTIFICATE OF SERVICE

I, SUSAN E. WERNER, Assistant Attorney General of Texas, does certify that a true and correct copy of **Defendant, the Texas Department of Criminal Justice's, Motion for Summary Judgment** has been served by placing same in the United States Postal Service, postage prepaid, certified return receipt requested, on this 24th day of September 2010, addressed to:

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***Via CM/RRR 7010 1060 0000 3698 5253
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/s/ Susan E. Werner
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