

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

JEREMY JOSEPH DURRENBERGER,

Plaintiff

v.

TEXAS DEPARTMENT OF  
CRIMINAL JUSTICE,

Defendant

§  
§  
§  
§  
§  
§  
§  
§  
§  
§

CIVIL ACTION NO. 4:09-CV-00786

**PLAINTIFF JEREMY DURRENBERGER'S MOTION FOR SUMMARY  
JUDGMENT AGAINST TDCJ**

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

STATEMENT OF CASE: TDCJ’S FACILITY DOES NOT PROVIDE  
ACCOMMODATIONS FOR PEOPLE WITH HEARING DISABILITIES ..... 1

SUMMARY OF ARGUMENT: TDCJ’S FAILURE TO ACCOMMODATE MR.  
DURRENBERGER VIOLATES FEDERAL AND STATE DISABILITY LAWS ..... 1

STATEMENT OF UNDISPUTED FACTS ..... 3

ARGUMENT & AUTHORITIES ..... 6

    A. Mr. Durrenberger has a “Disability” Under the ADA and Rehabilitation Act..... 7

    B. TDCJ’s Visitation Program is a Service that Cannot be Denied to Mr. Durrenberger  
    by Reason of Disability ..... 8

    C. TDCJ Intentionally Discriminated Against Mr. Durrenberger by Reason of Disability  
    and is Liable for Damages ..... 9

    D. Mr. Durrenberger Faces a Real Threat that TDCJ Will Continue to Refuse Him  
    Accommodations and is Entitled to Injunctive Relief..... 12

    E. TDCJ is in Violation of Chapter 121 of the Texas Human Resources Code ..... 13

ATTORNEYS' FEES..... 14

CONCLUSION..... 14

CERTIFICATE OF SERVICE ..... 16

**TABLE OF AUTHORITIES**

**Cases**

*Aikins v. St. Helena Hosp.*, 843 F. Supp. 1329 (N.D. Cal. 1994) ..... 8, 9  
*Badgley v. Law Sch. Admission Council, Inc.*, No. CIV.A. 4:99CV-0103-M, 2000 WL 33225418  
(N.D. Tex. 2000)..... 14  
*Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-507 (1959)..... 12  
*Benavides v. Laredo Med. Ctr.*, No. L-08-105, 2009 WL 1755004 (S.D. Tex. June 18, 2009)... 12  
*Bennett-Nelson v. Louisiana Board of Regents*, 431 F.3d 448, 455 (5th Cir. 2005) ..... 7  
*Calmes v. U.S.*, 926 F.Supp. 582, 591 (N.D. Tex. 1996)..... 12  
*City of L.A. v. Lyons*, 461 U.S. 95, 111, 103 S.Ct. 1660 (1983)..... 12  
*Condrey v. SunTrust Bank of Ga.*, 429 F.3d 556, 562 (5th Cir. 2005) ..... 6  
*Delano-Pyle v. Victoria County, Tex.*, 302 F.3d 567 (5<sup>th</sup> Cir. 2002)..... 8, 10, 11  
*Hamilton v. Segue Software, Inc.*, 232 F.3d 473, 477 (5th Cir. 2000)..... 6  
*Lara v. Cinemark USA, Inc.*, No. EP-97-CA-502-H, 1999 WL 305108 (W.D. Tex. 1999)..... 13  
*Lighbourn v. County of El Paso, Tex.*, 118 F.3d 421, 428 (5th Cir. 1997)..... 6  
*Niece v. Fitzner*, 922 F. Supp. 1208 (E.D. Mich. 1996) ..... 8, 9  
*Rothschild v. Grottenthaler*, 907 F.2d 286 (2d Cir. 1990)..... 8  
*Salinas v. City of New Braunfels*, 557 F. Supp. 2d 777 (W.D. Tex. 2008)..... 8, 10  
*Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 336 (5th Cir. 2009)..... 6  
*Standard Oil Co. v. Lopeno Gas Co.*, 240 F.2d 504, 509-510 (5th Cir. 1957)..... 12

**Statutes**

28 C.F.R. § 35.104 ..... 2  
28 C.F.R. § 35.160 ..... 2  
29 U.S.C. § 705(20) ..... 1, 7  
29 U.S.C. § 794 (2004) ..... 1, 2  
29 U.S.C. § 794(a) (2004)..... 9, 14  
29 U.S.C. § 794(a) (2006)..... 7  
42 U.S.C. § 12102..... 1, 7  
42 U.S.C. § 12131 ..... 1  
42 U.S.C. § 12133..... 7  
42 U.S.C. §12132..... 9  
Tex. Hum. Res. Code Ann. 121.001 (Vernon 2004) ..... 1, 3, 13  
Tex. Hum. Res. Code Ann. § 121.004(b) ..... 12, 14

**Rules**

Fed. R. Civ. P. 56(c) ..... 6

**PLAINTIFF JEREMY DURRENBERGER'S MOTION FOR SUMMARY  
JUDGMENT AGAINST TDCJ**

Plaintiff Jeremy Durrenberger asks the Court to render summary judgment against Defendant Texas Department of Criminal Justice (TDCJ) pursuant to Federal Rule of Civil Procedure 56, and conduct a hearing on appropriate relief.

**STATEMENT OF CASE: TDCJ'S FACILITY DOES NOT PROVIDE ACCOMMODATIONS  
FOR PEOPLE WITH HEARING DISABILITIES**

Mr. Durrenberger sued TDCJ for its failure to accommodate him, an individual with a hearing disability, so that he may participate in the inmate visitation program at TDCJ's Alfred Hughes Unit facility in Gatesville, Texas.

Mr. Durrenberger asserts TDCJ is in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2004), Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, and Chapter 121 of the Texas Human Resources Code, Tex. Hum. Res. Code Ann. 121.001 (Vernon 2004).

TDCJ has limited Mr. Durrenberger's ability to equally use its facilities, in violation of the law. Mr. Durrenberger therefore seeks declaratory and injunctive relief, damages, attorneys' fees, and costs.

**SUMMARY OF ARGUMENT: TDCJ'S FAILURE TO ACCOMMODATE MR.  
DURRENBERGER VIOLATES FEDERAL AND STATE DISABILITY LAWS**

Mr. Durrenberger is a person with a hearing impairment and qualifies as a person with a disability under 42 U.S.C. § 12102 and 29 U.S.C. § 705(20). TDCJ's facility does not provide accommodations for him, and other persons with hearing disabilities. The lack of accommodations denies Mr. Durrenberger the ability to participate in TDCJ's inmate visitation program. TDCJ's failure to provide accommodations is a violation of Section 504 of the

Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act, and Chapter 121 of the Texas Human Resources Code.

Mr. Durrenberger shows, given the lack of access to the programs of TDCJ's facility, TDCJ has failed to comply with the requirements of the Rehabilitation Act. *See* 29 U.S.C. § 794(a) (2004) ("No otherwise qualified individual with a disability...shall...be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by an Executive agency...").

TDCJ must provide Mr. Durrenberger with auxiliary aids and services pursuant to federal regulations implementing the Rehabilitation Act and ADA. "A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity. In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities." 28 C.F.R. § 35.160. "Auxiliary aids and services include[] [t]elephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids...or other effective methods of making aurally delivered materials available to individuals with hearing impairments." 28 C.F.R. § 35.104.

TDCJ must furnish Mr. Durrenberger with auxiliary aids and services so that he has an equal opportunity to participate in TDCJ's inmate visitation program. Pursuant to the implementing regulations, TDCJ must give primary consideration to Mr. Durrenberger's requests, and provide him with a hearing amplification device for the telephone or some other effective method to accommodate his hearing impairment.

TDCJ's failure to provide hearing accommodations so that Mr. Durrenberger may participate in the inmate visitation program is also in violation of Chapter 121 of the Texas Human Resources Code. *See* Tex. Hum. Res. Code Ann. 121.001 (Vernon 2004) ("The policy of the state is to encourage and enable persons with disabilities to participate fully in the social and economic life of the state, to achieve maximum personal independence, ... and to otherwise fully enjoy and use all public facilities available within the state").

This case has larger dimensions than relief for a single plaintiff because, once TDCJ implements the accommodations and makes its facilities accessible, all persons with hearing disabilities will benefit from TDCJ's compliance with state and federal law.

#### STATEMENT OF UNDISPUTED FACTS

Plaintiff Jeremy Durrenberger has significant hearing loss and has difficulty hearing when a speaker is not in close proximity to him or when there is background noise present.<sup>1</sup> Mr. Durrenberger's hearing disability makes certain accommodations necessary to allow him access to certain facilities, services, and programs of Defendant TDCJ, such as visiting his friend, a prisoner at TDCJ's facility.<sup>2</sup>

Mr. Durrenberger has received accommodations elsewhere in the past, including when he visited his friend in the Harris County Jail.<sup>3</sup> The jail placed Mr. Durrenberger and his friend in an attorney visit booth, a reasonable accommodation that enabled Mr. Durrenberger to hear his friend.<sup>4</sup> TDCJ has denied Mr. Durrenberger even this basic accommodation to allow him to properly communicate while visiting with his friend.<sup>5</sup>

---

<sup>1</sup> Exhibit B, Declaration of Durrenberger, para.3 ; Exhibit C, Letter from Audiologist Dr. Brandy Jacobson.

<sup>2</sup> Exhibit B, Declaration of Durrenberger, para. 7,8.

<sup>3</sup> *Id.*, para. 6.

<sup>4</sup> *Id.*, para. 6.

<sup>5</sup> Exhibit D, Deposition of Fred Tadlock, p. 20:24-25; 21:1-14.

On February 22, 2009, during visitation hours at TDCJ's Hughes unit facility, Mr. Durrenberger requested an accommodation for his hearing disability in order to communicate properly with his friend.<sup>6</sup> Four TDCJ officers at the facility denied him such accommodations.<sup>7</sup> They went so far as to tell him that he was not physically disabled, and the prison did not have to accommodate him.<sup>8</sup> One TDCJ officer commented the unit had wheelchair ramps and was therefore accessible to the physically disabled, and that a hearing impairment was not a physical disability.<sup>9</sup> Although the visit did take place, TDCJ's employees only allowed Mr. Durrenberger to speak with his friend through a plexiglass partition over a telephone receiver.<sup>10</sup> Mr. Durrenberger could not hear his friend through the telephone receiver, unlike the other visitors who did not have hearing disabilities.<sup>11</sup>

On February 23, 2009, Mr. Durrenberger contacted the warden's administrative assistant, and four other employees at TDCJ's headquarters in Huntsville, Texas.<sup>12</sup> Each TDCJ employee told him they were unaware of any requirements to accommodate people with hearing disabilities.<sup>13</sup>

On April 4, 2009, Mr. Durrenberger went again to the Hughes unit to visit his friend and requested an accommodation.<sup>14</sup> Mr. Durrenberger asked for a contact visit and also asked for a volume control device on for the telephone receiver.<sup>15</sup> Major Tadlock told him the only thing he

---

<sup>6</sup> Exhibit B, Declaration of Durrenberger, para. 8

<sup>7</sup> *Id.* para. 8

<sup>8</sup> *Id.* para. 8

<sup>9</sup> *Id.* para. 8

<sup>10</sup> Exhibit B, Declaration of Durrenberger, para. 9

<sup>11</sup> *Id.* para. 9. If a volume control device was used on the telephone receiver, that would have been another way to accommodate Mr. Durrenberger. *See* Exhibit E, Expert Report of Ron McAndrew, p. 4.

<sup>12</sup> Exhibit B, Declaration of Durrenberger, para. 10, 11.

<sup>13</sup> *Id.* para. 11.

<sup>14</sup> *Id.* para. 14.

<sup>15</sup> Exhibit D, Deposition of Fred Tadlock, p.10:13-25; 11:1-5.

could do was to put Mr. Durrenberger at the end of the visitation booths.<sup>16</sup> Mr. Durrenberger was once again unable to hear his friend, since this purported “accommodation” did nothing to eliminate the background noise in the visitation room<sup>17</sup> *Id.* The visitation room is large and loud, with concrete walls and floors, and can have up to 100 people talking inside.<sup>18</sup>

On at least two occasions when Mr. Durrenberger visited the Hughes Unit, TDCJ officers have allowed him to have “contact” visits with his friend.<sup>19</sup> During a “contact” visit, the visitor and prisoner are seated together in the visitation room, and are not placed in a visitation booth. These visits took place without any incident. Mr. Durrenberger was later told allowing him to have “contact” visits was an “accident.”<sup>20</sup> Nonetheless, because Mr. Durrenberger could easily communicate with his friend during these visits, this is a reasonable accommodation for his disability.

Mr. Durrenberger intended to make weekly visits to TDCJ’s facilities for the duration of his friend’s incarceration, but has stopped visiting his friend because TDCJ refused to allow them to actually communicate during their visits.<sup>21</sup>

TDCJ and its employees continue to intentionally discriminate against Mr. Durrenberger.<sup>22</sup> TDCJ refuses to accommodate his hearing disability.<sup>23</sup> TDCJ has no policies regarding accommodating visitors with hearing disabilities in visitation.<sup>24</sup> TDCJ’s “Offender

---

<sup>16</sup> Exhibit D, Deposition of Fred Tadlock, p. 11:13-22; 12:24-25; 13:1-5.

<sup>17</sup> Exhibit B, Declaration of Durrenberger, para. 14.

<sup>18</sup> Exhibit D, Deposition of Fred Tadlock, p.13:12-25, 14:1-2, 15:23-25, 16:1-4

<sup>19</sup> Exhibit B, Declaration of Durrenberger, paras. 13-15.

<sup>20</sup> *See id.*

<sup>21</sup> Exhibit B, Declaration of Durrenberger, para. 20.

<sup>22</sup> Exhibit B, Declaration of Durrenberger, para. 19, 20.

<sup>23</sup> *Id.* para. 19, 20.

<sup>24</sup> Exhibit E, Defendant TDCJ’s Response to Plaintiff Jeremy Durrenberger’s Interrogatory No. 3.



Visitation Plan” is completely silent on accommodations for people with disabilities.<sup>25</sup> As a result, Mr. Durrenberger is denied participation in TDCJ’s inmate visitation program.

TDCJ accepts federal financial assistance, requiring it to comply with the Rehabilitation Act.<sup>26</sup>

### ARGUMENT & AUTHORITIES

There are no disputed material fact issues in this case. The undisputed facts show a clear violation of Mr. Durrenberger's rights under the Rehabilitation Act, the Americans with Disabilities Act, and the Texas Human Resources Code.

“Summary judgment should be granted when the pleadings and the evidence demonstrate that no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law.” *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 336 (5th Cir. 2009), (citing Fed. R. Civ. P. 56(c); *Condrey v. SunTrust Bank of Ga.*, 429 F.3d 556, 562 (5th Cir. 2005)). “A fact is ‘material’ if its resolution in favor of one party might affect the outcome of the lawsuit under governing law.” *Id.* (citing *Hamilton v. Segue Software, Inc.*, 232 F.3d 473, 477 (5th Cir. 2000)). As there is no material dispute about the facts of this case, Mr. Durrenberger is entitled to summary judgment.

To establish discrimination under the ADA, a plaintiff must demonstrate: (1) that he is a qualified individual within the meaning of the ADA; (2) that he is being excluded from participation in, or being denied benefits of, services, programs, or activities for which the public entity is responsible, or is otherwise being discriminated against by the public entity; and (3) that such exclusion, denial of benefits, or discrimination is by reason of his disability. *Lightbourn v. County of El Paso, Tex.*, 118 F.3d 421, 428 (5th Cir. 1997). The Rehabilitation Act follows the

---

<sup>25</sup> Exhibit G, Offender Visitation Plan

<sup>26</sup> Exhibit A, Defendant TDCJ’s Response to Plaintiff Jeremy Durrenberger’s Request for Admission No. 6. *See* 29 U.S.C. § 794(a) (2006).

same standard, adding only the requirement that the entity also receive federal funding, as TDCJ does. *See* 42 U.S.C. § 12133 (“The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 shall be the remedies, procedures and rights this title provides to any person alleging discrimination on the basis of disability in violation of [Title II of the ADA]”); 29 U.S.C. § 794(a) (2006). Courts interpret the ADA and Rehabilitation Act under the same body of law. *See, e.g., Bennett-Nelson v. Louisiana Board of Regents*, 431 F.3d 448, 455 (5th Cir. 2005).

TDCJ’s intentional discrimination by reason of Mr. Durrenberger’s disability is a violation of these statutes as a matter of law, entitling him to summary judgment.

A. *Mr. Durrenberger has a “Disability” Under the ADA and Rehabilitation Act*

Mr. Durrenberger is a qualified individual with a disability under the ADA and Rehabilitation Act. “The term ‘disability’ means, with respect to an individual--- a physical or mental impairment that substantially limits one or more major life activities of such individual ... Major life activities include, but are not limited to...hearing...[and] communicating.” 42 U.S.C. § 12102. The Rehabilitation Act defines a person with a disability in the same way. “[T]he term individual with a disability means...any person who has a disability as defined in [the ADA] Section 12102 of Title 42.” 29 U.S.C. § 705(20).

Mr. Durrenberger has significant hearing loss.<sup>27</sup> He has difficulty hearing when he is not face to face with someone or if there is background noise present.<sup>28</sup> This impairment substantially limits his ability to hear and communicate.<sup>29</sup> Multiple courts have treated hearing disabled people as qualified individuals within the meaning of the ADA and Rehabilitation Act.

---

<sup>27</sup> Exhibit B, Declaration of Durrenberger, para. 3.

<sup>28</sup> *Id.* para. 3.

<sup>29</sup> *Id.* para. 3, 4.

*See, e.g., Delano-Pyle v. Victoria County, Tex.*, 302 F.3d 567 (5<sup>th</sup> Cir. 2002); *Salinas v. City of New Braunfels*, 557 F. Supp. 2d 777 (W.D. Tex. 2008); *Rothschild v. Grottenthaler*, 907 F.2d 286 (2d Cir. 1990); and *Aikins v. St. Helena Hosp.*, 843 F. Supp. 1329 (N.D. Cal. 1994).

*B. TDCJ's Visitation Program is a Service that Cannot be Denied to Mr. Durrenberger by Reason of Disability*

TDCJ's inmate visitation program qualifies as a service for purposes of the ADA and Rehabilitation Act. One court has considered the same circumstances of Mr. Durrenberger's case. The court held that a prison's provision of telephone access in visitation to prisoners was a "service" that was provided to persons who are not inmates and it could not be denied by reason of disability under the ADA. *Niece v. Fitzner*, 922 F. Supp. 1208 (E.D. Mich. 1996).

In *Niece*, a prisoner and his deaf fiancé brought suit under the ADA and Rehabilitation Act against the Michigan Department of Corrections and prison officials. *Id.* The only way Ms. Niece, who was deaf, could communicate with her fiancé the prisoner, was over the telephone through the use of a Telecommunications Device for the Deaf (TDD). *Id.* at 1212. The prison where her fiancé was incarcerated refused to accommodate them with the device, excluding Niece and her fiancé from participating in telephone communications. *Id.* After numerous complaints from Niece and her fiancé, the prison obtained the device but severely limited the inmate's access to it. *Id.* at 1214.

The court held Niece met the eligibility requirement for services under the prison regulations, as she was one of the inmate's designated visitors and had been allowed to visit him. *Id.* at 1217. The court also held that under the ADA, the prison had to make reasonable accommodations to provide for her disability. *Id.* at 1218.

In making its decision, the court relied on two similar cases. *See Rothschild*, 907 F.2d at 290 (holding that under the Rehabilitation Act, deaf parents of hearing school children are

“‘otherwise qualified’ for the parent-oriented activities incident to their children's education”).  
*See also, Aikins*, 843 F. Supp. at 1329 (holding that a hospital must provide a sign language interpreter to a deaf woman during her husband’s illness).

In the instant case, TDCJ provides a service through its inmate visitation program. Like the court held in *Niece*, Mr. Durrenberger qualifies to participate in this program because he is an inmate’s visitor and has been allowed to visit him. Like the deaf plaintiff in *Niece*, Mr. Durrenberger requires certain accommodations to be able to communicate with his friend during TDCJ’s visitation program.

TDCJ’s refusal to provide hearing accommodations is intentional discrimination by reason of Mr. Durrenberger’s disability. TDCJ is in violation of the ADA and Rehabilitation Act by refusing to provide reasonable accommodations to Mr. Durrenberger, like a hearing amplification device or contact visit, so that he may properly participate in visitation.

*C. TDCJ Intentionally Discriminated Against Mr. Durrenberger by Reason of Disability and is Liable for Damages*

TDCJ is in violation of law by intentionally discriminating against Mr. Durrenberger by reason of his disability. *See* 42 U.S.C. §12132 (“Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity”). *See also*, 29 U.S.C. § 794(a) (2004) (“No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, 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 or under any program or activity conducted by any Executive agency...”).

The Fifth Circuit has considered cases concerning discrimination involving the hearing disabled and has held that the discrimination must be intentional in order for a plaintiff to recover damages. To prevail on a claim for damages under Section 504 or the ADA, a plaintiff must prove that the discrimination was intentional; proof of deliberate indifference is not required. *Salinas*, 557 F. Supp. 2d at 781-82 (denying City's motion for summary judgment on the issue of whether the City intentionally discriminated against a deaf woman by failing to provide interpreter services while responding to her 911 call).

In *Delano-Pyle*, the Court held that the county violated the ADA and Rehabilitation Act when it failed to take into account a man's serious hearing impairment during the process of arresting him for driving while intoxicated. *Delano-Pyle*, 302 F.3d at 567. Though the arresting officer was aware of the man's serious hearing impairment, he proceeded to administer three sobriety tests without asking him what form of communication would be effective. *Id.* at 570. Because the man could not understand the officer, he was unable to follow the instructions for the field sobriety test and he was arrested. *Id.* at 570-71. The Court held that the county intentionally discriminated against the man because the officer knew of his hearing problem but refused to accommodate him with means of effective communication. *Id.* at 575-76.

The facts present in Mr. Durrenberger's case exceed the factual scenario in *Delano-Pyle*, establishing TDCJ's intentional discrimination. Mr. Durrenberger has a serious hearing impairment and requires accommodations to be able to effectively communicate with his friend during TDCJ's visitation program.<sup>30</sup> Mr. Durrenberger made his impairment known to TDCJ's employees at the Hughes unit.<sup>31</sup> TDCJ was fully aware of his hearing disability and inability to

---

<sup>30</sup> Exhibit B, Declaration of Durrenberger, para.3, 8.

<sup>31</sup> Exhibit D, Deposition of Fred Tadlock, p.9:7-25; 10:1-25; 21:15-25; 22:1-24; Exhibit H, Deposition of Dawn Grounds, p. 8-12.

communicate with his friend.<sup>32</sup> Not only did TDCJ's employees refuse to accommodate him, they told him outright that he was not disabled and that they did not have to accommodate him.<sup>33</sup> TDCJ intentionally discriminated against Mr. Durrenberger by reason of his disability because it was aware of his impairment and refused him accommodations. In *Delano-Pyle*, the defendant only refused the plaintiff accommodations on one occasion. In Mr. Durrenberger's case, TDCJ's employees refused him accommodations on several occasions and presently continue to refuse him the accommodations he is entitled to by law. By being aware of his hearing disability and continuing to deny Mr. Durrenberger reasonable accommodations, TDCJ intentionally discriminates against him and is liable for damages.

Mr. Durrenberger requests compensatory damages for reasonable travel expenses from his residence in New Caney, TX to the Hughes unit in Gatesville, TX including gas, mileage, and wear and tear on his vehicle, food, and lodging, for each of his visits to the Hughes Unit where he was not accommodated. Gatesville is 199 miles from New Caney, so Mr. Durrenberger travels 398 miles every time he visits his friend at the Hughes unit. At a reasonable reimbursement rate of 55 cents per mile for gas, mileage, and wear and tear on his vehicle, a reasonable allotment of \$30 for food and \$70 for lodging, Mr. Durrenberger requests compensatory damages of \$318.90 for each visit. Although he does not know exactly how many times he visited his friend at the Hughes unit, Mr. Durrenberger knows that it was at least seven times, but less than twenty times.<sup>34</sup> Therefore, damages should be between \$1532.30 (for seven visits) and \$6378.00 (for twenty visits). Mr. Durrenberger requests a hearing on the exact amount of damages.

---

<sup>32</sup> Exhibit D, Deposition of Fred Tadlock, p. 9:7-25; 10:1-25; 21:15-25; 22:1-24; Exhibit H, Deposition of Dawn Grounds, p. 8-12.

<sup>33</sup> Exhibit B, Declaration of Durrenberger, para. 8.

<sup>34</sup> Exhibit B, Declaration of Durrenberger, para. 19.

Mr. Durrenberger also requests damages in the amount of at least \$100 per violation of Chapter 121 by Defendant, pursuant to Tex. Hum. Res. Code Ann. § 121.004(b).

*D. Mr. Durrenberger Faces a Real Threat that TDCJ Will Continue to Refuse Him Accommodations and is Entitled to Injunctive Relief*

Due to TDCJ's past and continuing violations of the ADA and Rehabilitation Act, Mr. Durrenberger seeks an injunction permanently enjoining future violations. Typically a permanent injunction will be granted only after a trial. However, if there are no issues of material fact and all issues of law are correctly resolved, a permanent injunction is proper without a trial. *Standard Oil Co. v. Lopeno Gas Co.*, 240 F.2d 504, 509-510 (5th Cir. 1957).

The standard for a permanent injunction requires "the plaintiff must show the existence of a substantial threat of irreparable harm, that outweighs any harm the relief would accord to the defendants, that there is no adequate remedy at law, and that granting the injunction will not disserve the public interest." *Calmes v. U.S.*, 926 F.Supp. 582, 591 (N.D. Tex. 1996) (citing *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-507 (1959)).

In the Fifth Circuit, the *Lyons* standard is applied to claims for injunctive relief under the ADA. *Benavides v. Laredo Med. Ctr.*, No. L-08-105, 2009 WL 1755004 (S.D. Tex. June 18, 2009). A plaintiff seeking injunctive relief based on an alleged past wrong must show that there is a real or immediate threat that he will be wronged again. *City of L.A. v. Lyons*, 461 U.S. 95, 111, 103 S.Ct. 1660 (1983).

Mr. Durrenberger has suffered and continues to suffer irreparable injury from TDCJ's refusal to accommodate him, for which he has no adequate remedy at law. Not only has Mr. Durrenberger been denied reasonable accommodations for his hearing disability in the past, he is currently being denied such accommodations. TDCJ has never provided accommodations for Mr. Durrenberger and has made no indication that it will provide for him in the future. Mr.

Durrenberger intends to continue visiting his friend at TDCJ's facility. Mr. Durrenberger faces a real threat that TDCJ will continue to deny him the accommodations to do so. Therefore, he is entitled to injunctive relief.

The continuing threat of harm to Mr. Durrenberger is greater than any harm injunctive relief would cause TDCJ. While Mr. Durrenberger and other hearing disabled visitors risk continued violations of their rights, any expense to TDCJ will be *de minimis*. The purchase of an inexpensive amplification device for the two-way telephone in the non-contact visitation area would not interfere with the operation of the institution in any way or manner.<sup>35</sup> No-cost remedies exist as well, such as providing Mr. Durrenberger an attorney visit booth to speak with his friend, or allowing them to have a "contact" visit.

An issuance of a permanent injunction would not adversely affect the public interest and public policy. Once TDCJ implements the accommodations and makes its facilities accessible, all persons with hearing disabilities will benefit from TDCJ's compliance with state and federal law. Accordingly, the public interest would be protected, rather than adversely affected, by granting injunctive relief.

*E. TDCJ is in Violation of Chapter 121 of the Texas Human Resources Code*

TDCJ must provide Mr. Durrenberger with accommodations so that he may participate in state activities and fully use and enjoy its facilities. Tex. Hum. Res. Code Ann. 121.001 (Vernon 2004).

Texas courts have similarly held a public entity's failure to provide reasonable accommodations for people with disabilities is a violation of Chapter 121. *See Lara v. Cinemark USA, Inc.*, No. EP-97-CA-502-H, 1999 WL 305108 (W.D. Tex. 1999) (holding that a theater's failure to provide disabled patrons with equal access to movie viewing so that their experience

---

<sup>35</sup> Exhibit E, Expert Report of Ron McAndrew, p. 4.



equates that of the general public is a violation of Chapter 121) and *Badgley v. Law Sch. Admission Council, Inc.*, No. CIV.A. 4:99CV-0103-M, 2000 WL 33225418 (N.D. Tex. 2000) (holding that LSAC's failure to provide a reasonable testing accommodation to a visually impaired test-taker was a violation of Chapter 121).

TDCJ refuses to accommodate Mr. Durrenberger's hearing impairment so that he may fully enjoy and use its facility at the Hughes unit. By refusing Mr. Durrenberger accommodations, TDCJ is refusing equal access to its facility. Therefore, TDCJ is in violation of Chapter 121 of the Texas Human Resources Code and is liable for damages. Mr. Durrenberger is entitled to damages in the amount of at least \$100 per violation of Chapter 121 by Defendant, pursuant to Tex. Hum. Res. Code Ann. § 121.004(b). Mr. Durrenberger requests a hearing on the exact amount of this statutory penalty.

#### ATTORNEYS' FEES

To enforce his rights under the Rehabilitation Act, the Americans with Disabilities Act, and the Texas Human Resources Code, Mr. Durrenberger had to retain counsel and thus, is entitled to recover his attorneys' fees, costs, and expenses. Section 505(b) in the Rehabilitation Act provides that in an action or proceeding to enforce or charge a violation of a provision of this title, the prevailing party is allowed a reasonable attorneys' fee as part of the costs. 29 U.S.C. § 794(a) (2004). Mr. Durrenberger requests a hearing on the amount of an attorney's fees award.

#### CONCLUSION

Mr. Durrenberger can prove his case as a matter of law, as there are no facts in issue in this case. Mr. Durrenberger is a qualified person with a disability under the ADA and Rehabilitation Act. TDCJ has intentionally discriminated against Mr. Durrenberger by reason of his disability by refusing him accommodations to participate in its inmate visitation program.

TDCJ continues to discriminate against Mr. Durrenberger and makes no indication that it will provide him with accommodations in the future. Therefore, Mr. Durrenberger respectfully request this Court grant Summary Judgment against TDCJ on liability, and permanently enjoin TDCJ from preventing Mr. Durrenberger from having access to the services, facilities, programs and accommodations at TDCJ facilities. Mr. Durrenberger further requests the Court enter a declaratory judgment that TDCJ violated his rights under the ADA, Rehabilitation Act and Chapter 121.

Dated: September 24, 2010

Respectfully submitted,

/s/ Lauren Izzo

Lauren Izzo

State Bar No. 24065482

Scott Medlock

State Bar No. 24044783

Wayne Krause

State Bar No. 24032644

James C. Harrington

State Bar No. 09048500

TEXAS CIVIL RIGHTS PROJECT

1405 Montopolis Drive

Austin, Texas 78741-3438

(512) 474-5073 [phone]

(512) 474-0726 [fax]

ATTORNEYS FOR PLAINTIFF

**CERTIFICATE OF SERVICE**

A true copy this document was sent to Susan Werner, P.O. Box 1258, Austin, TX 78711-2548, (512) 495-9139, attorney for Defendant, via the Court's electronic filing system, on September 24, 2010.

/s/ Lauren Izzo  
Lauren Izzo