Duffy v. Riveland

# UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

SEAN G. DUFFY, et al.,		)	
	Plaintiffs,	) ) N	io. C92-1596R
v.		)	
CHASE RIVELAND, et al	ıl.,	)	
	Defendants.	)	
		)	
		j	

# MEMORANDUM IN SUPPORT OF MOTION FOR ORDER APPROVING SETTLEMENT OF CLASS ACTION

(Note on motion calendar: September 11, 1998)

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#### I. INTRODUCTION

Pursuant to Fed. R. Civ. P. 23(e), the named plaintiffs -- Sean Duffy and Charles Atkins -- move the Court for an Order approving the class action settlement agreement in this matter. A proposed order approving the settlement, to which all parties have stipulated, is filed herewith, along with a proposed order that addresses the issues set forth below.

#### II. BACKGROUND

This action arises out of the ongoing failure of officials of the Washington Department of Corrections (DOC) to accommodate the special needs of deaf and hearing-impaired prisoners. Plaintiffs brought this action to redress DOC's failure under (i) the Americans with Disabilities Act of 1990 (ADA), (ii) the Rehabilitation Act of 1973, (iii) 42 U.S.C. § 1983, and (iv) RCW 2.42.120. Feldman Decl. ¶ 2 (filed herewith).

After substantial discovery, dispositive motions, and a Ninth Circuit appeal (involving plaintiff Duffy), the parties executed a proposed settlement agreement resolving all of the plaintiffs' claims. The settlement agreement and related documents were submitted to the Court in early June 1998. The parties requested that the Court provisionally approve the proposed settlement and direct notice to all putative class members. The Court did so by Order dated June 8, 1998. Feldman Decl. ¶ 3.

Pursuant to the Court's Order, notice of the proposed settlement was (i) distributed to all known deaf and hearing-impaired prisoners in DOC institutions, and (ii) posted in prominent locations in DOC institutions throughout the state. Members of the proposed class were instructed that any objections to the proposed settlement should be mailed to the Court on or before August 1, 1998. Feldman Decl. ¶ 4.

In order to give those persons additional time to respond, the parties subsequently agreed, and the Court ordered, that any objections to the proposed settlement agreement would be considered timely if mailed before August 15, 1998. On August 20 -- five days after the August 15 deadline -- counsel for plaintiffs reviewed the Court file to determine whether any

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such objections had been submitted. Feldman Decl. ¶ 5. We found that seven prisoners had submitted such "objections" (Feldman Decl. ¶ 6), each of which is addressed in Section III.B.2 below.

### III. DISCUSSION

A. Under Fed. R. Civ. P. 23(e), The Proposed Settlement Should Be Approved If It Is Fundamentally Fair, Adequate, And Reasonable.

Rule 23(e) provides in relevant part: "A class action shall not be dismissed or compromised without approval of the court . . . ." Fed. R. Civ. P. 23(e). Although the rule "is silent respecting the standard by which a proposed settlement is to be evaluated, the universally applied standard is whether the settlement is fundamentally fair, adequate and reasonable." Officers for Justice v. Civil Service Commission, 688 F.2d 615, 625 (9th Cir. 1982).

The Officers for Justice court also discussed the procedure for addressing objections to a proposed settlement. After recognizing that class members must receive adequate notice (a requirement that has clearly been satisfied here), the Officers for Justice court stated:

[E]ach objection must be made part of the record; those members raising substantial objections must be afforded an opportunity to be heard with the assistance of privately retained counsel if so desired, and a reasoned response by the court on the record; and objections without substance and which are frivolous require only a statement on the record of the reasons for so considering the objection.

<u>Id.</u> at 624. Again, we address the objections filed in this matter in Section III.B.2 below, after first discussing the nature and scope of the proposed settlement agreement.

Rule 23(e) continues: "and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Fed. R. Civ. P. 23(e). This clause has clearly been satisfied, as the parties have given notice to the proposed class in the manner set forth in the Court's June 8 order provisionally approving the proposed settlement and directing notice to all putative class members. Feldman Decl. ¶ 4.

# B. The Proposed Settlement Is Fundamentally Fair, Adequate, And Reasonable.

1. The Proposed Settlement Agreement Provides Broad And Significant Relief To Deaf And Hearing-Impaired Prisoners In Washington.

The settlement agreement in this matter (Exhibit 1, attached hereto) resolves plaintiffs' claims for injunctive relief. By separate agreement, the parties also resolved Mr. Duffy's claims for monetary damages. In all respects, the relief is fair, adequate, and reasonable. Feldman Decl. ¶ 7 (incorporating by reference Sections III.B.1.a-c below).

## a. Injunctive Relief.

The settlement agreement obligates defendants to implement a new policy -- DOC Policy 490.050 -- a copy of which is attached to the settlement agreement. Defendants also must provide certain documents to plaintiffs' counsel so that we may monitor their compliance. If necessary, the Agreement "may be enforced by appropriate motion in this Court . . . . " Settlement Agreement at 4.

DOC Policy 490.050 is substantial. With regard to interpreters, the policy requires that DOC provide "certified interpreters" to deaf prisoners at all major disciplinary hearings and "qualified interpreters" at many other prison programs and activities. DOC Policy at 3,

7. The policy also sets forth certain requirements that must be satisfied before a person may be considered a "qualified interpreter." <u>Id.</u> at 2. In particular, "qualified interpreter" is defined as follows:

[A] sign language interpreter who: 1) is approved in writing by a certified interpreter as able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary; and 2) promises in writing to abide by the Registry of Interpreters for the Deaf (R.I.D.) code of ethics for sign language interpreters. A qualified interpreter may only be approved by a certified interpreter. A certified interpreter is also a qualified interpreter.

DOC Policy at 2 (emphasis added). The monitoring provisions in the settlement agreement (discussed elsewhere) allow plaintiffs' counsel to ensure compliance with this important provision.

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Although Mr. Duffy originally filed his lawsuit because defendants failed to provide adequate interpreters at prison hearings, the DOC policy does much more than simply resolve that dispute. It establishes a procedure for identification of both deaf and hearing-impaired prisoners, requires that defendants provide a broad range of auxiliary aids and services to such prisoners (such as hearing aids and tele-typewriters), and creates a grievance procedure if such services are not properly made available. <u>E.g.</u>, <u>id.</u> at 2-6, 10.

The agreement is not, however, one-sided. Defendants in this matter have repeatedly argued that federal law allows prison officials substantial flexibility in managing prison facilities. In response to this argument, the DOC policy gives appropriate weight to safety and security concerns that may arise in the prison environment. <u>E.g.</u>, <u>id.</u> at 5. This lawsuit could not have been settled without recognizing these concerns. After much discussion and debate, appropriate language was drafted on this point. Feldman Decl. ¶ 8.

# b. Monetary Relief.

Claims for monetary relief were not pursued on behalf of putative class members and are not resolved or compromised in any way by the settlement agreement. With regard to Mr. Duffy, defendants agreed to pay and he agreed to accept \$6,000. Because the class settlement does not include damages, Rule 23(e) does not apply. In any event, the settlement agreement (leaving claims for monetary relief by putative class members undisturbed and resolving Mr. Duffy's claims for a total of \$6,000) -- easily satisfies the legal standard set out in Officers for Justice.

# c. Attorney Fees And Costs.

Applicable federal law allows plaintiffs to recover their reasonable attorney fees and costs. See 29 U.S.C § 794a(b); 42 U.S.C. § 12205; 42 U.S.C. § 1988. Although plaintiffs' fees and costs totaled more than \$400,000 at the time of settlement discussions, defendants agreed to pay and plaintiffs' counsel agreed to accept \$150,000 -- less than 40 percent of the amount requested -- for those services. The undersigned counsel submit that the parties'

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agreement on this issue is "fair, adequate and reasonable," as required by Officers for Justice, 688 F.2d at 625. Feldman Decl. ¶ 9.

## 2. The Objections To the Proposed Settlement Agreement Lack Substance.

As explained in plaintiffs' supporting memoranda regarding class certification, we believe that there are over 100 deaf and hearing-impaired prisoners in Washington.

Nevertheless, the Court file in this matter (as of August 20, 1998) contained objections of only eight prisoners, some of whom are not deaf or hearing-impaired.<sup>2</sup> Two other prisoners -- Clayton Gerlach and Walter Steele -- filed documents supporting the proposed settlement agreement (Exhibits 3-4, attached hereto). Feldman Decl. ¶ 6. We respond to the objections briefly below.<sup>3</sup>

## a. Efren Lopez Gamboa

Although Mr. Gamboa is apparently not a putative class member, he asserts that "certified" (as opposed to "qualified") interpreters must be provided at disciplinary hearings. Gamboa Objection at 1-2 (Exhibit 5, attached hereto). DOC Policy 490.050 similarly provides: "During major disciplinary hearings, certified interpreters must provide assistance to [deaf] offenders." DOC Policy at 7. Mr. Gamboa's point therefore has already been addressed.

Mr. Gamboa also claims that the term "certified" is essential to ensure that DOC employs competent interpreters. Gamboa Objection at 2. As explained above (on page 3), the DOC policy addresses this competence issue in two ways: (1) by requiring "certified" interpreters at disciplinary hearings, and (2) providing a clear definition of a "qualified"

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<sup>&</sup>lt;sup>2</sup> David Beauchamp, for example, specifically notes in his letter to the Court: "My disability is that I'm in a wheelchair." Beauchamp Letter at 1 (Exhibit 2, attached hereto).

<sup>&</sup>lt;sup>3</sup> Copies of this memorandum and related pleadings were served on each prisoner who filed an objection to the proposed settlement (in addition to counsel of record). However, in order to protect each prisoner's privacy, we did not send any prisoner copies of another prisoner's objections. Feldman Decl. ¶ 6.

interpreter." Contrary to Mr. Gamboa's concern, DOC <u>cannot</u> in its sole discretion designate a person as a "qualified interpreter."

## b. George Rocky Manos

Mr. Manos claims that the proposed settlement agreement does not include prisoners who become disabled during their incarceration. Manos Petition at 4 (Exhibit 6, attached hereto). Mr. Manos is incorrect. A disabled offender is any offender "who has a severe disability," including a hearing impairment, regardless of when that disability may develop. DOC Policy at 1.

Mr. Manos notes that the United States Supreme Court has held that the ADA applies to state prisons and that DOC has not complied with that statute. Manos Petition at 3-4. The proposed settlement agreement requires DOC to comply with the ADA (as well as other federal and state statutes) by implementing DOC Policy 490.050.

Finally, Mr. Manos complains that DOC routinely ignores its own procedures. Manos Petition at 4-5. As noted above, the proposed settlement agreement allows plaintiffs' counsel to monitor and, if necessary, enforce DOC Policy 490.050. Settlement Agreement at 4. As noted in the declaration of counsel filed herewith, the undersigned counsel will seek appropriate relief if DOC fails to comply with this policy. Feldman Decl. ¶ 10.

### c. Dana H. Leger

Mr. Leger cannot hear without a hearing aid, which he does not have. Leger Motion at 1-2 (Exhibit 7, attached hereto). DOC Policy 490.050 includes hearing aids in the list of auxiliary aids and services that must be provided to hearing-impaired prisoners. <u>E.g.</u>, DOC Policy at 1 (definition of "Assistive Device").

Mr. Leger complains that "it seems only the attorneys make out by collecting \$150,000." Leger Motion at 3. As explained above (on pages 4-5) and in the declaration of counsel filed herewith (at paragraph 9), (i) federal law authorizes recovery of attorney fees and

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costs in this matter, and (ii) plaintiffs' counsel accepted far less attorney fees than they had expended at the time of settlement discussions in this matter.

Finally, Mr. Leger suggests that "the problems are not fixed when they continue to go on, and the handicapped are so blatantly discriminated against by staff." Leger Motion at 4. Again, the proposed settlement agreement attempts to resolve this issue by preventing such discrimination in the future.

#### d. William D. Smith

Mr. Smith asks that the Court "[r]ecognize that there are more older and aging prisoners . . . and that the prison system must address our impaired hearing problems." Smith Letter at 4 (Exhibit 8, attached hereto). Although the proposed settlement does not say anything about "older and aging prisoners," it does apply to prisoners who are hearing-impaired. DOC Policy at 2. Neither age discrimination nor access to veteran benefits (Smith Letter at 5) are at issue here.

Mr. Smith also refers to difficulty hearing orders of prison staff and announcements to the general prison population. Smith Letter at 3. DOC Policy 490.050 addresses this issue in a section entitled "General Identification and Notification." DOC Policy at 5. That Section includes (i) ID cards to help prison staff identify deaf and hearing-impaired prisoners, (ii) procedures "to instruct staff to contact hearing-impaired offenders using effective means of communication," and (iii) "[v]isual alerting devices . . . if feasible." Id.5

#### e. Bennett Titus

Mr. Titus wrote three separate letters to the Court. In his July 16 and July 23 letters, he complains that the proposed settlement does not included "closed caption movie videos."

Titus July 16 Letter at 1 and July 23 Letter at 1-2 (Exhibit 9, attached hereto). In fact, DOC

<sup>&</sup>lt;sup>4</sup> Mr. Leger also complains about a number of other problems, such as over-crowding. We will not respond to those complaints, as they are not at issue in this litigation.

<sup>&</sup>lt;sup>5</sup> Mr. Smith also complains about plaintiffs' recovery of attorney fees. Smith Letter at 1. That issue is addressed on pages 4-7 above.

Policy 490.050 obligates DOC to provide "[a]uxiliary aids which are reasonable, effective, and appropriate," including "captioned television/video text displays." DOC Policy at 3. In dealing with prisoner requests for such services, the policy adds: "The method, auxiliary aid, or service requested by the disabled offender will be given substantial consideration . . . ."

Id. at 1.

Next, Mr. Titus complains about access to telephone services.<sup>6</sup> Titus July 21 Letter at 1 (also part of Exhibit 9) and July 23 letter at 3-4. DOC Policy 490.050 includes teletypewriters (TTYs) in the list of auxiliary aids and services that must be provided to hearing-impaired prisoners. E.g., DOC Policy at 3 (addressing "Effective Communications"). In fact, Section XIII of the policy is devoted entirely to "Telephone Use." DOC Policy at 7. Once again, Mr. Titus' complaint -- like those discussed above -- has already been addressed.

## g. Earl J. Sweeten

Mr. Sweeten asserts that DOC routinely transfers disabled prisoners to inappropriate facilities, including Airway Heights Corrections Center. Sweeten Letter at 1 (Exhibit 11, attached hereto). DOC Policy 490.050 addresses this issue by stating that prisoners "shall not be precluded from assignment to a minimum facility, pre-release, or work release based solely upon their disabilities." DOC Policy at 9; see also id. at 5 (prisoners "shall be placed in a facility consistent with [their] safety and security needs").

### IV. CONCLUSION

For all of the above reasons, the Court should approve the proposed class action settlement agreement in this matter and sign the orders filed herewith. The agreement is

<sup>&</sup>lt;sup>6</sup> Mr. Chapman -- who appears to have submitted to the Court a series of summaries of past grievances and grievance responses (Exhibit 10, attached hereto) -- similarly complains about access to telephone services.

<sup>&</sup>lt;sup>7</sup> Mr. Sweeten also complains that DOC routinely ignores its own procedures. Sweeten Letter at 1-3. This problem is addressed on page 6 above.

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fundamentally fair, adequate, and reasonable and deals appropriately with each of the objections that have been submitted in this matter.

DATED this 21st day of August, 1998.

Respectfully submitted,

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