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UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON AT TACOMA

RICKEY PERALEZ, on behalf of himself and others similarly situated,)	
)	NO. C06-5625 JKA
Plaintiff,)	
)	PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT
v.)	
)	Note on Motion Calendar:
)	December 21, 2007
THE WASHINGTON DEPARTMENT OF CORRECTIONS, HAROLD CLARKE, DOUGLAS WADDINGTON, BELINDA STEWART, KEVIN SHANAHAN, JEAN STEWART, and JOHN DOES 1-20, employees and officials of the Washington Department of Corrections and/or Stafford Creek Corrections Center,)	
)	
Defendants.)	

I. INTRODUCTION

Plaintiff Rickey Peralez, as representative of the certified class, respectfully submits this motion for partial summary judgment. This motion seeks a ruling that the Washington Department of Corrections' practice of scoring offenders according to a numerical profiling system known as

1 PULHESDXT—and then using that score to exclude offenders from the DOC’s work release
2 program—violates Title II of the Americans with Disabilities Act and the Rehabilitation Act of 1973.

3
4 The PULHESDXT system, as described in this motion, is one of several DOC practices that
5 unlawfully excludes disabled offenders from work release. Because the PULHESDXT system
6 presents a discreet issue that can be resolved as a matter of law, an order of partial summary
7 judgment should be entered at this stage, leaving other DOC practices for later resolution.

8 II. SUMMARY

9
10 This is a class action on behalf of current and former disabled offenders of the DOC who were
11 unlawfully denied participation in an important DOC program known as “work release.” The class
12 representative, Rickey Peralez, is a former DOC offender. Mr. Peralez suffers from a painful,
13 degenerative bone condition.¹ As a result of this physical impairment and the pain it causes him, Mr.
14 Peralez has substantial difficulty standing for long periods of time, bending, squatting, and
15 performing other major life activities.² He often uses a cane, a walker, or a wheelchair to get
16 around.³ After being repeatedly denied the right to participate in the DOC’s work release program
17 because of his disability,⁴ Mr. Peralez filed this action under Title II of the Americans with
18 Disabilities Act, Section 504 of the Rehabilitation Act, and 42 U.S.C. § 1983 (based on the violation
19 of his rights under the Equal Protection Clause).
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22 This case was certified as a class action on August 10, 2007 after extensive briefing and oral
23 argument.⁵ The Court defined the class as “all disabled inmates of the Washington Department of
24 Corrections who, since October 30, 2003, have been partially or wholly denied participation in the
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26 ¹ See June 6, 2007 Declaration of Rickey Peralez (Dkt. 19) ¶ 3.

27 ² *Id.*

28 ³ *Id.*

⁴ See generally Peralez Decl. ¶¶ 3-28.

⁵ See August 10, 2007 Order Granting Plaintiff’s Motion for Class Certification (Dkt. 33).

1 DOC work release program because of a disability, and whose claim is limited to no more than 180
2 days of lost wages.”

3 In the months before and after the class was certified, class counsel conducted extensive
4 discovery. The discovery was aimed at learning more about the DOC’s work release referral
5 methods, as well as finding out how the DOC classifies and treats offenders with special physical,
6 sensory, and/or mental health needs.⁶ Class counsel issued requests for production of documents,
7 interrogatories, and requests for admission.⁷ Key DOC personnel were deposed including the DOC's
8 Chief of Classification and the heads of several work release facilities.⁸ After an order compelling
9 the production of documents, the DOC produced “work release denial forms” and “legal face sheets”
10 for thousands of former inmates, policies and directives, and other materials.⁹

11 The discovery has uncovered an institutionalized practice of illegal discrimination against
12 disabled offenders who are otherwise qualified for work release. One of several ways in which the
13 DOC has carried out this practice is its long use of an encoded profiling system known as
14 PULHESDXT. The PULHESDXT system, which has effectively swept up and screened out
15 numerous disabled offenders, is the subject of this motion. As set forth below, the manner in which
16 the DOC has used the system is plainly unlawful.

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20 **III. FACTS**

21 **A. The DOC’s Work Release Program**

22 The DOC is a state agency that operates a vast network of prisons and other programs and
23 services throughout Washington. At any given time, the DOC houses around 18,000 people in
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27 ⁶ Declaration of Edwin S. Budge ¶ 2 (submitted herewith) (hereinafter “Budge Decl.”).

28 ⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

1 prisons and other facilities.¹⁰ About 1500 offenders are admitted and discharged from the system
2 each month.¹¹ Over 70,000 people have served time in DOC institutions in the past four years.¹²

3
4 The DOC does not just incarcerate offenders. It also operates various programs and services
5 designed to benefit offenders and assist them with re-entry into society. Among these is a program
6 known as “work release.” The DOC has published detailed descriptions of its work release program,
7 lauding work release as a “vital component” of transitioning from incarceration to freedom—a
8 “bridge between prison and life outside of prison.”¹³ In a nutshell, the program allows offenders to
9 transfer from their prison cell to one of fifteen community-based residential facilities where they
10 serve out the final 180 days of their sentences working in the community.
11

12 As described by the DOC, work release offenders live in minimum security conditions that
13 are far more desirable than prison. They obtain employment within the community—and thereby
14 earn real money in real jobs—while finishing their sentences. They receive financial aid and other
15 assistance, guidance, and counseling. They come and go from the facility in order to report to and
16 return from work. Offenders can visit with family members, go on outings with loved ones, and even
17 visit their homes. They participate in educational programs, drug and alcohol programs, and other
18 outside social programs to facilitate their re-integration into society. They can also get a substantial
19 head start on a new life by obtaining important papers (like identification), lining up a place to live on
20 their release, visiting public service agencies and seeking social assistance, purchasing clothing and
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24 ¹⁰ June 14, 2007 Declaration of Erik J. Heipt (Dkt. 20) (hereinafter “June 14 Heipt Decl.”), Ex. A (Defendants’
25 Response to Interrogatory No. 4).

26 ¹¹ *Id.*

27 ¹² *Id.*

28 ¹³ For a descriptive overview of the DOC’s work release program (as summarized in the balance of this section),
see June 14, 2007 Heipt Decl., (Dkt. 20) Ex. B (DOC Work Release Overview, *Peralez* Prod. Nos. 03050001-
33). See also *id.*, Ex. F (containing information from the DOC’s website on the work release program); Phillips
Dep., 17:18-28:25; 32:9-36:13 (attached as Exhibit 1 to accompanying Budge Decl.); Musselwhite Dep., 46:16-
60:5 (attached as Exhibit 2 to accompanying Budge Decl.).

1 other necessities, and otherwise preparing for living as free citizens. Unlike prison (where medical
2 access is tightly-controlled by prison officials), work release participants can visit doctors of their
3 choosing, other medical providers, physical therapists, dentists, mental health professionals, and
4 others whenever necessary.¹⁴ Family members and others can assist residents with coordinating and
5 arranging transportation for any needed medical treatment.¹⁵ Participants can visit pharmacies, freely
6 fill medical prescriptions, and arrange to take necessary medications while at work release.¹⁶

7
8 The primary benefit of the program (and the reason it is called “work” release) is the ability it
9 gives offenders to find employment and earn an income during the last months of their sentences.
10 Participating in work release does not just give offenders the hope of finding a job—it is a
11 requirement.¹⁷ Work release facilities have personnel and services dedicated to helping inmates find
12 jobs.¹⁸ Work release offenders have training opportunities at local colleges, universities and
13 vocational schools and can take full advantage of a wide range of job counseling and development
14 assistance.¹⁹ Many employers actively seek to hire work release offenders, and the majority of work
15 release offenders find employment soon after coming to work release.²⁰ Offenders’ paychecks are
16 deposited into a DOC trust account.²¹ When they are released, work release offenders are provided
17 with a check for their accumulated earnings.²² Over the past four years, offenders have collectively
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24 ¹⁴ See generally Phillips Dep., 9:20-17:17; Musselwhite Dep., 55:25-58:6.

25 ¹⁵ *Id.*

26 ¹⁶ *Id.*

27 ¹⁷ June 14 Heipt Decl., Ex. A (Defendants’ Response to Interrogatory No. 3).

28 ¹⁸ Phillips Dep., 17:18-21:13; Musselwhite Dep., 46:16-49:12.

¹⁹ June 14 Heipt Decl., Ex. B (*Peralez* Prod. Nos. 03050002-16).

²⁰ *Id.*, Ex. B (*Peralez* Prod. No. 03050030).

²¹ Phillips Dep., 23:12-24:4.; Musselwhite Dep., 49:11-16.

²² Phillips Dep., 24:5-11.

1 earned millions of dollars in work release—in the year 2005 *alone*, work release participants earned
2 \$4.7 million in free-market wages.²³

3
4 The very reason the program is in place is to address the problem of recidivism. Inmates who
5 participate in work release are more likely to successfully function outside of prison and not re-
6 offend.²⁴ The program benefits not only inmates but also society as a whole.²⁵ In short, work release
7 affords eligible offenders numerous advantages, financial and otherwise, over offenders who are not
8 permitted to participate in the program. In the three years before this case was filed, the DOC
9 transferred over 7,500 offenders to work release.²⁶ Unfortunately, as discussed below, numerous
10 disabled offenders have been excluded from this beneficial program pursuant to an unlawfully-
11 applied profiling system known as PULHESDXT.
12

13 **B. The DOC's PULHESDXT System**

14 **1. General Nature of the System**

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16 When offenders are first admitted to prison, the intake process takes approximately four
17 weeks.²⁷ During this time, every offender receives a full-scale series of physical and mental
18 assessments.²⁸ DOC personnel conduct a battery of tests and examinations, assessing each inmate's
19 physical, mental, and sensory functioning.²⁹ Based on these assessments, each offender receives a
20 numerical score.³⁰ The score is given according to a system known by the acronym,
21 "PULHESDXT."³¹ According to the DOC's Chief of Classification, "PULHESDXT is a system used
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23 ²³ June 14 Heipt Decl., Ex. B (*Peralez* Prod. No. 03050032).

24 ²⁴ *Id.* (*Peralez* Prod. No. 03050001).

25 ²⁵ See generally June 14 Heipt Decl., Ex. B (DOC Work Release Overview, *Peralez* Prod. Nos. 03050001-33). See
26 also *id.*, Ex. F (containing information from the DOC's website on the work release program).

27 ²⁶ Heipt Decl., Ex. A (Defendants' Response to Interrogatory No. 3).

28 ²⁷ June 25, 2007 Declaration of DOC Classification Chief Jean Stewart (Dkt. 24-11) ¶ 3.

29 ²⁸ *Id.*

30 ²⁹ *Id.*

31 ³⁰ *Id.*

32 ³¹ *Id.*; see also Defendants' Response to Request for Admission No. 1 (Exhibit 3 to Budge Decl.).

1 by our health services staff to assign a functional level to various aspects of the offender's body
2 functioning."³² The individual's PULHESDXT score is recorded, entered into the DOC computer
3 system, and thereafter becomes an integral and primary part of every offender's DOC record that is
4 routinely viewed by the DOC's classification staff.³³ The PULHESDXT system appears to be unique
5 to the Washington DOC; no other correctional institution in the nation is known to use the system.³⁴
6

7 Under the system, the DOC assigns each offender a numerical rating on a scale of 1 through 4
8 according to their functional capacity in nine broad categories making up the PULHESDXT
9 acronym:³⁵
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11 P – Physical Capability

12 U – Upper Extremities

13 L – Lower Extremities

14 H – Hearing

15 E – Vision

16 S – Mental Functioning

17 D – Dental

18 X – Overall Functional Capacity

19 T – Transportation Demand
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22 The DOC's Chief of Classification acknowledges that the "PULHES[DXT] codes scores profile the
23 inmate according to a very broad functional assessment."³⁶ As discussed in more detail below, a
24 profile of "1" or "2" in any one of these categories indicates that the individual has no significant
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26 ³² Stewart Decl. ¶ 3, ll. 17-18.

27 ³³ Defendants' Response to October 16 Request for Admissions Nos. 8, 9.

28 ³⁴ Defendants' Response to October 16, 2007 Interrogatory No. 11 (attached as Exhibit 5 to Budge Decl.).

³⁵ *Id.*, Ex. 1 (*Peralez* Prod. Nos. 04010027-40). In some categories offenders can also be given a "5" to reflect unique conditions such as pregnancy.

³⁶ Stewart Dep., 159:22-25.

1 limitation in that area. In contrast, a profile containing a "3" or "4" means that the offender has a
2 significant functional limitation in that category.

3
4 An offender's PULHESDXT score becomes a prominent part of his or her computerized DOC
5 record, available for DOC staff members to see at any time.³⁷ The PULHESDXT scores are written
6 in shorthand so that a number appears directly under each letter of the PULHESDXT acronym.³⁸

7 Thus, an offender who has no limitations would have a score that looks like this:

P	U	L	H	E	S	D	X	T
1	1	1	1	1	1	1	1	1

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11 In contrast, an offender with significant limitations to his or her upper extremities, eyesight, and
12 overall physical functioning might have a score that looks something like this:

P	U	L	H	E	S	D	X	T
3	3	1	1	3	1	1	3	1

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17 Rickey Peralez, the class representative, has a degenerative bone disease, is largely confined to a
18 wheelchair, generally cannot walk up or down stairs, and is clearly "disabled" under any legally-
19 recognized definition of the term. His *actual* PULHESDXT score at the DOC was as follows:³⁹

P	U	L	H	E	S	D	X	T
3	2	3	1	1	1	2	3	1

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27 ³⁷ Response to October 16 Request for Admission No. 9
³⁸ See, e.g., Stewart Decl., Ex. 3 (PULHESDXT score for Rickey Peralez).
28 ³⁹ *Id.*

1 Mr. Peralez's score was intended to reflect the fact that he had significant limitations to the
2 functioning of his lower extremities, as well as significant limitations to his overall physical
3 functioning.

4 **2. The PULHESDXT System is a Generalized "Profiling" System**

5
6 The DOC has published materials in which it repeatedly acknowledges that the PULHESDXT
7 system is, by definition and practice, a "profiling system."⁴⁰ According to these written DOC
8 standards: "The basic purpose of the [PULHESDXT] profile is to provide an index to overall
9 functional capacity."⁴¹ Importantly, while the PULHESDXT score is purposely designed to profile
10 inmates according to their capacity in different areas of human functioning, the score by itself does
11 not provide any *specific* information about an offender's condition.⁴² Although PULHESDXT scores
12 "are viewed routinely" by DOC staff, the staff "does not know the offender's specific medical
13 condition."⁴³ The score is designed to convey a broad-brush picture of whether the inmate has
14 significant physical, sensory, and/or mental limitations.⁴⁴ Yet it is not possible, by looking at an
15 offender's numbers alone, to know what particular physical, mental, and/or sensory condition he or
16 she has, what the true nature and practical effect of any limitation actually is, whether and how the
17 condition can be accommodated, whether the condition is temporary or permanent, whether the
18 condition is the result of injury, disease or defect, whether the condition is correctable, or anything
19 else about why the offender has a certain PULHESDXT score.⁴⁵ As discussed in more detail below,
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24 ⁴⁰ Stewart Decl., Ex. 1 (*Peralez* Prod. Nos. 04010027-40). See also Stewart Dep., 159:22-25 (attached as Exhibit 4
25 to Budge Decl.) (agreeing that "the PULHES[DXT] codes scores profile the inmate according to a very broad
26 functional assessment.").

27 ⁴¹ Stewart Decl., Ex. 1 (*Peralez* Prod. No. 04010027).

28 ⁴² See Stewart Decl. ¶ 3, ll. 18-19; Ex. 1 (*Peralez* Prod. Nos. 04010027-40); Musselwhite Dep., 96:18-25;
Skipworth Dep., 51: 8-11.

⁴³ Stewart Decl. ¶ 3, ll. 18-20.

⁴⁴ *Id.*, Ex. 1 (*Peralez* Prod. Nos. 04010027-40).

⁴⁵ *Id.* See also Musselwhite Dep., 96:18-25; Skipworth Dep., 51:8-11.

1 DOC staff, including classification staff, have free access to offenders' PULHESDXT scores but
2 have no access to medical files that would give specific information about an offender's condition.⁴⁶

3 Thus, anyone reviewing the score will generally know nothing about an offender's condition except:
4 (1) whether he or she has a limitation; (2) whether the limitation is significant (on a scale of one
5 through four); and (3) whether the limitation is physical, mental or sensory and above the waist or
6 below the waist. (The only apparent exception is pregnancy, which is specifically indicated by a
7 score of P-5).⁴⁷

8
9 In definition and in practice, the PULHESDXT score is simply a profile—the roughest
10 silhouette of an offender's functional capability. The DOC's own written policies concede that the
11 method is a "profiling system" because it is just that—a shorthand sketch containing no particularized
12 information about the individual. For example, someone with the score of "3" on his or her "P"
13 factor could have anything from heart disease to a birth defect to chronic asthma to degenerative bone
14 condition to an amputated foot or any other significant physical limitation. Similarly, an individual
15 with a score of "3" on his or her "S" factor has a significantly limiting mental condition that could be
16 anything from any kind of mental illness to mental retardation to complications from a stroke to an
17 infinite number of other compromising mental conditions. The same is true for the other categories.
18 Offenders are so broadly profiled under the PULHESDXT system that their score reveals the
19 existence and general severity of limitations but otherwise tells nothing about offenders as
20 individuals.
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26 ⁴⁶ Stewart Decl. ¶ 6, ll. 5-6 (Staff "does not have access to the medical files due to health confidentiality laws and
27 policies.")

28 ⁴⁷ Stewart Decl., Ex. 1 (*Perez* Prod. No. 04010033).

1 **3. Disabled Offenders Will Receive a PULHESDXT Profile of “3” or More in at Least**
2 **One Category**

3 Under the ADA and Rehabilitation Act, a person is legally “disabled” if he or she (a) has a
4 physical or mental impairment that substantially limits one or more of the major life activities of such
5 individual; (b) has a record of such impairment; or (c) is regarded as having such impairment. 42
6 U.S.C. § 12102 (2) (A)-(C). Although the DOC claims that it does not track the number of disabled
7 offenders in its institutions, it is beyond dispute that many DOC offenders are disabled. According to
8 a nationwide study released in 2001 by the United States Department of Justice, Bureau of Justice
9 Statistics, nearly 12% of all inmates confined in state prisons have physical disabilities.⁴⁸ Many more
10 have vision impairments, hearing impairments, and other compromising conditions.⁴⁹ The State of
11 Washington is no different.
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14 Under the DOC’s PULHESDXT system, a score of “1” indicates that the offender is “normal”
15 and has no limitation.⁵⁰ A score of “2” indicates that there is a limitation that is not considered
16 significant.⁵¹ However, when the DOC believes, based on its evaluations, that an offender has a
17 limitation that substantially limits his or her functioning in that area, it will assign a score of “3” or
18 “4.”⁵² For example, Rickey Peralez, the class representative, whose debilitating bone disease
19 generally confined him to a wheelchair, received scores of “3” in three categories.⁵³
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21 The DOC’s written materials provide examples about what is indicated by a score of “3.” In
22 the category of “lower extremities,” for instance, a score of “3” is given to anyone with “defects or
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25 ⁴⁸ June 14 Heipt Decl., Ex. L.

26 ⁴⁹ *Id.*

27 ⁵⁰ Stewart Decl., Ex. 1 (*Peralez* Prod. Nos. 04010033-40).

28 ⁵¹ *Id.*

⁵² *Id.*

⁵³ Stewart Decl., Ex. 3.

1 impairments which interfere with full function requiring significant restriction of use.”⁵⁴ Someone
2 with “moderate organic systemic disease” will receive a score of “3” in the “P” category.⁵⁵ In the
3 area of “upper extremities,” a person with “limited functional adjustment” and/or “defects causing
4 moderate interference with functioning” will receive a score of “3.”⁵⁶ Someone with “total loss of
5 hearing in one ear and moderate loss in the other” will receive a score of “3” in the “H” or hearing
6 category.⁵⁷ A person with “unilateral blindness,” “tunnel vision,” or other significant vision
7 limitations will receive a score of “3” in the “E” or eyesight category.⁵⁸ Someone with “moderate
8 mental retardation” or a mental health disorder causing “impairment in adaptive functioning” will
9 receive a score of “3” in the “S” category.⁵⁹ Indeed, while scores of “3” indicate that a person has
10 significant restrictions in that functional category (as in the case of the class representative, Rickey
11 Peralez), scores of “4” are generally reserved for situations where a person is considered wholly
12 incapacitated in that area—for example, total paralysis, complete blindness or deafness, or a mental
13 disorder requiring long-term confinement in a mental health unit.⁶⁰

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17 The PULHESDXT system is not designed for the express purpose of determining who is
18 legally disabled and who is not. A score of “3” or more does not automatically mean that an offender
19 is disabled. However, PULHESDXT is designed and carried out in such a way that any person who
20 is disabled under the ADA definition—e.g., any person who has a “physical or mental impairment
21 that substantially limits one or more major life activity”—will necessarily receive a score of “3” or
22 higher. In other words, so long as the offender is “disabled” under the ADA’s definition, he or she

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25 ⁵⁴ Stewart Decl., Ex. 1 (*Peralez* Prod. No. 04010034) (emphasis in original).

26 ⁵⁵ *Id.* (*Peralez* Prod. No. 04010033).

27 ⁵⁶ *Id.* (*Peralez* Prod. No. 04010034).

28 ⁵⁷ *Id.*

⁵⁸ *Id.* (*Peralez* Prod. No. 04010035).

⁵⁹ *Id.*

⁶⁰ *Id.* (*Peralez* Prod. Nos 04010033-37).

1 clearly meets the criteria necessary to receive at least a "3" under the PULHESDXT system. *Only*
2 *non-disabled offenders will receive PULHESDXT scores of "1" or "2."*

3
4 As stated, a PULHESDXT score of "3" or higher does not, in and of itself, mean that an
5 offender is disabled under the ADA. It is possible, for example, that an offender could have a broken
6 leg or a severe but temporary illness that does not qualify as a "disability" under the ADA. In that
7 event, an offender could theoretically be given a temporary score of "3" that would be adjusted to a
8 "1" when the offender recovers. However, while a person can have a "3" and not be disabled, the
9 converse is *not* true—any offender who *is* legally disabled will automatically receive a score of "3"
10 or more. This fact gets to the heart of why the DOC's system is unlawful, so it bears repeating:
11 Unless there is an individualized error in the DOC's evaluation process, *every legally disabled*
12 *offender will receive a score of "3" or higher on his or her PULHESDXT score.* The effect of the
13 PULHESDXT system is to sweep up and tag with a "3" or higher any offender who happens to be
14 disabled under the ADA.
15

16
17 The DOC, by assessing and scoring all offenders according to a numerical profiling system,
18 has cast a wide net with fine holes. As significant as the net itself, however, is what happens to
19 people caught in it. As discussed below, the DOC has had an institutionalized practice of
20 systematically denying work release to offenders with scores of "3" or more on the PULHESDXT
21 scale. The effect of this has been to screen out, wholesale, large numbers of otherwise qualified
22 disabled offenders from this highly desirable and beneficial program.
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1 **C. The DOC's Has Had an Institutionalized Policy and Practice of Systematically**
2 **Excluding Offenders from Work Release Because of Their PULHESDXT Profile**

3 **1. The DOC's Process of Considering Offenders for Transfer to Work Release**

4 Each DOC offender is assigned to a classification counselor, who among many other
5 responsibilities, periodically meets with offenders and initiates transfer requests within the DOC
6 system.⁶¹ Work release is available to offenders who are within six months of their release date.⁶²
7 As an offender's release date nears, the counselor initiates a meeting with the offender.⁶³ The
8 offender and counselor discuss work release and, if the offender desires to transfer there, decide
9 which of the DOC's fifteen work release facilities the offender should apply to. Because one goal is
10 continued employment, offenders are expected to apply to a work release facility in the area where
11 they will eventually be released.⁶⁴ Offenders can be rejected if they apply to a work release facility
12 outside their expected release area.⁶⁵

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15 If the offender desires to transfer to work release, as most do, the counselor submits
16 something called a work release "transfer order request."⁶⁶ The request is filled out by the counselor
17 on his or her computer.⁶⁷ The transfer request is then electronically forwarded to the desired work
18 release facility.⁶⁸ At each work release facility, the DOC has assigned personnel who review transfer
19 requests and decide whether to grant or deny them.⁶⁹ Before ruling on a transfer request, the
20 responsible work release staff member first reviews the offender's PULHESDXT score.⁷⁰ The work
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24 ⁶¹ Response to October 16 Request for Admission No. 14.

⁶² Stewart Dep., 72:15-74:20.

⁶³ *Id.*

⁶⁴ Stewart Dep., 77:2-78:6.

⁶⁵ *Id.*, 78:2-6.

⁶⁶ *Id.*, 78:7-15.

⁶⁷ *Id.*, 79:3-80:8.

⁶⁸ *Id.*, 80:11-17

⁶⁹ *Id.*, 80:18-23

⁷⁰ Musselwhite Dep., 22:13-23.

1 release staff member has access to the offender's PULHESDXT score and other electronic
2 information but has no access to the offender's actual medical files.⁷¹

3
4 If the offender's transfer request is accepted, the inmate is placed on a list and transferred to
5 that work release facility when a spot becomes available.⁷² In contrast, if the offender's transfer
6 request is denied, the work release facility fills out a special form called a work release denial form.⁷³
7 Whenever a work release facility denies an offender's transfer request, the facility is required to
8 completely and accurately record all reasons for the denial on the form.⁷⁴

9
10 When a work release facility denies a transfer request, the work release denial form
11 (containing the reason for the denial) is forwarded to the DOC's Classification Unit in Olympia.⁷⁵
12 The DOC's Chief of Classification, by herself or with members of a committee known as the
13 Headquarters Community Screening Committee ("HCSC"), later reviews each denial form and either
14 upholds the denial or overrules the denial.⁷⁶ The DOC's review is limited in scope—according to the
15 Chief of Classification, work release denials are not reviewed *de novo*; they are typically reviewed
16 simply to determine whether the stated reason for the denial comports with DOC policy.⁷⁷ If a work
17 release denial is upheld, the offender serves out the balance of his or her sentence in prison and is not
18 permitted to go to work release.
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25 ⁷¹ Stewart Decl. ¶ 6, ll. 5-6.

26 ⁷² Stewart Dep., 91:3-22.

27 ⁷³ *Id.*, 91:23-92:9.

28 ⁷⁴ *Id.*, 93:3-18; *see also*, Phillips Dep., 46:8-21.

⁷⁵ Stewart Dep., 92:6-93:2.

⁷⁶ *Id.*, 92:4-93:2; 97:4-10.

⁷⁷ *Id.*, 97:4-18.

1 **2. The DOC's Policy of Excluding Offenders with PULHESDXT Scores of "3" or More**

2 **a. Work Release Denial Forms Show Offenders Were Consistently Denied Work**
3 **Release Because Their PULHESDXT Scores Were "3" or More**

4 In order to understand the DOC's practices, class counsel sought copies of all work release
5 denial forms from October 30, 2003.⁷⁸ After a motion to compel was granted, the DOC produced the
6 forms.⁷⁹ The DOC produced well over 2000 work release denial forms for the period of October
7 2003 to August 2007.⁸⁰ In addition, the DOC was required to produce documents called "legal face
8 sheets," which are computer printouts showing the offenders' PULHESDXT scores and history with
9 the DOC.⁸¹ The legal face sheets summarize any rulings on work release transfer requests.⁸²

10 Class counsel reviewed each work release denial form and categorized the materials.⁸³ The
11 results were astounding. In situation after situation, the reason for the work release denial could not
12 have been clearer—offenders were denied work release simply because their PULHESDXT scores
13 met or exceeded "3." Here are a mere fifteen examples, with the actual denial language in quotes:

- 14 • C.W.'s request to transfer to Bellingham Work Release: "Offender is ineligible due to P-3
15 PULHES code."⁸⁴
- 16 • F.H.'s request to transfer to Reynolds Work Release: "L/3 makes person ineligible."⁸⁵
- 17 • K.C.'s request to transfer to Eleanor Chase Work Release: "Denied due to having a P-3
18 designation."⁸⁶
- 19 • J.M.'s request to transfer to Bellingham Work Release: "PULHES codes P-3; offender is
20 ineligible for Work Release due to physical barriers indicated by codes."⁸⁷

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23 ⁷⁸ Budge Decl. ¶ 9.

24 ⁷⁹ *Id.*

25 ⁸⁰ *Id.*

26 ⁸¹ *Id.*

27 ⁸² *Id.*

28 ⁸³ *Id.*

⁸⁴ *Id.*, Ex. 7.

⁸⁵ *Id.*, Ex. 8.

⁸⁶ *Id.*, Ex. 9.

⁸⁷ *Id.*, Ex. 10.

- 1 • B.H.'s request to transfer to Bellingham Work Release: "PULHES codes P-3, S-3, X-3; offender is ineligible per DT 25 0 716."⁸⁸
- 2
- 3 • R.B.'s request to transfer to Reynolds Work Release: "Person is not medically fit for work
- 4 release with a P-3, X-3 and D-3. Deny."⁸⁹
- 5
- 6 • D.R.'s request to transfer to Bellingham Work Release: "PULHES codes P-3, L-3."⁹⁰
- 7
- 8 • E.S.'s request to transfer to Seattle Area Work Release: "PULHES Code E-3 precludes
- 9 WR."⁹¹
- 10
- 11 • B.R.'s request to transfer to Bellingham Work Release: "Offender ineligible due to PULHES
- 12 code S-3."⁹²
- 13
- 14 • J.G.'s request to transfer to Tri Cities Work Release: "Denied. [Offender] has a L-code of 3
- 15 on the PULHESDXT codes. TCWR accepts codes of 2 or less, unless negotiated otherwise.
- 16 [Offender's] code could not be negotiated."⁹³
- 17
- 18 • M.B.'s request to transfer to Bellingham Work Release: "PULHES code S-3; offender is
- 19 ineligible for Work Release due to mental health."⁹⁴
- 20
- 21 • J.S.'s request to transfer to Bellingham Work Release: "PULHES code S-3; ineligible per DT
- 22 25 0 716."⁹⁵
- 23
- 24 • J.W.'s request to transfer to Bellingham Work Release: "PULHES code S-3, mental health.
- 25 Inappropriate for work release per DT 25. Presents significant barrier to success."⁹⁶
- 26
- 27 • B.E.'s request to transfer to Bellingham Work Release: "PULHES codes P-3 and S-4;
- 28 offender is ineligible for Work Release."⁹⁷
- D.R.'s request to transfer to Eleanor Chase Work Release: "PULHES scores poor,"
- "PULHES not OK," "PULHES scores should never be referred."⁹⁸

⁸⁸ *Id.*, Ex. 11.

⁸⁹ *Id.*, Ex. 12.

⁹⁰ *Id.*, Ex. 13.

⁹¹ *Id.*, Ex. 14.

⁹² *Id.*, Ex. 15.

⁹³ *Id.*, Ex. 16.

⁹⁴ *Id.*, Ex. 17.

⁹⁵ *Id.*, Ex. 18.

⁹⁶ *Id.*, Ex. 19.

⁹⁷ *Id.*, Ex. 20.

⁹⁸ *Id.*, Ex. 21.

1 Legal face sheets revealed that in the above cases, the work release denial was upheld by the DOC's
2 Classification Unit in Olympia and the offender did not go to work release.⁹⁹ Indeed, counsel's
3 review of the work release denial forms revealed numerous other occasions where work release was
4 denied because of the offender's PULHESDXT score.¹⁰⁰ It is not yet known which of these many
5 offenders are disabled under the ADA, and discovery is pending on this and other issues. However,
6 any offenders who were disabled and who were denied because of their PULHESDXT scores should,
7 as discussed below, be entitled to summary judgment.
8

9
10 **b. Deposition Testimony Revealed a Centralized Policy of Denying Work
11 Release to Offenders Based on Their PULHESDXT Scores**

12 Deposition testimony confirmed that the DOC had a centralized practice of excluding
13 offenders based on their PULHESDXT scores. For example, class counsel deposed Sandra
14 Musselwhite, who is currently the head of two large DOC work release facilities and who has headed
15 other DOC work release facilities over the years.¹⁰¹ Ms. Musselwhite, who has long been responsible
16 for ruling on work release transfer requests, testified that there had long been a "blanket prohibition"
17 on individuals coming to work release who had PULHESDXT scores of "3" or above.¹⁰² Ms.
18 Musselwhite testified that the policy of denying work release to offenders with "3" or more was
19 centralized—"it was the way you do business all over the state."¹⁰³ According to Ms. Musselwhite,
20 the blanket prohibition on accepting offenders with 3 or higher has since changed (she did not know
21 when the change occurred), but offenders with a "4" on any aspect of their PULHESDXT scores are
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26 ⁹⁹ *Id.*, Exs. 22-36.

¹⁰⁰ Budge Decl. ¶ 9.

27 ¹⁰¹ Musselwhite Dep., 5:12-8:3.

¹⁰² *Id.*, 88:13-17; 101:15-20.

28 ¹⁰³ *Id.*, 90:4-14.

1 *still* categorically prohibited from transferring to work release,¹⁰⁴ even though there is no legitimate
2 reason to prohibit the blind, deaf, or mobility-impaired from seeking employment.

3 Other deposition testimony confirmed the DOC's centralized practice of denying work release
4 to offenders because of PULHESDXT scores. Class counsel had noticed that work release denial
5 forms sometimes referenced a code called "DT-25" when denying offenders based on their
6 PULHESDXT score.¹⁰⁵ In some situations, denial forms stated that PULHESDXT scores made
7 offenders "inappropriate" or "inelligible" for work release "per DT-25."¹⁰⁶ Yet the code did not
8 appear to be part of any publicly-available DOC Policy Directive.¹⁰⁷ After reviewing the work
9 release denial forms, class counsel scheduled the deposition of the DOC's Chief of Classification,
10 Jean Stewart, and questioned her about the "DT-25" code.
11

12 In her deposition, Ms. Stewart admitted that the DOC's system of screening out offenders
13 from work release based on their PULHESDXT score was much more than just the sum of individual
14 choices by particular work release facilities. Ms. Stewart explained that every work release facility
15 had been assigned a "DT-25 Profile" by Olympia officials.¹⁰⁸ The DT-25 profile set specific
16 PULHESDXT scores that would be accepted at each of the work release facilities.¹⁰⁹ Ms. Stewart
17 explained that when any classification counselor filled out a computerized work release transfer
18 request, the computer automatically compared the individual offender's PULHESDXT score to the
19 work release facility's DT-25 profile.¹¹⁰ If the offender's PULHESDXT score did not match the
20 facility's DT-25 profile, the computer was programmed to mechanically generate an "ERROR" or
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25 ¹⁰⁴ *Id.*, 15:23-16:8.

26 ¹⁰⁵ Budge Decl., ¶ 11.

27 ¹⁰⁶ *Id.*

28 ¹⁰⁷ *Id.*

¹⁰⁸ Stewart Dep., 155:11-25.

¹⁰⁹ *Id.*, 155:22-25.

¹¹⁰ *Id.*, 155:13-156:2

1 "CONFLICT" message and would not send the transfer request to the work release facility without
2 being manually overridden.¹¹¹ As a practical matter, this likely resulted in the indiscriminate
3 exclusion of numerous offenders based on their PULHESDXT scores alone—before any human
4 being even considered the transfer request.¹¹² Ms. Stewart also testified that although the DT-25
5 system had been in place for years, it had been changed *one month before her deposition date* after a
6 meeting by top DOC officers.¹¹³ She testified that in the month before her deposition, "I reset all of
7 the PULHES[DXT] codes for the work release facilities to five, so no conflict messages will be
8 received by anyone entering a transfer order request [to] a work release facility."¹¹⁴
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11 Regardless of the number of work release offenders who were rejected based on their
12 PULHESDXT scores, or the manner or method by which the rejection took place (i.e., human or
13 computer), the DOC's system of rejecting offenders based on their PULHESDXT scores is clearly
14 unlawful as described below. Disabled offenders who were excluded from work release because of
15 their PULHESDXT scores should be entitled to judgment as a matter of law.
16

17 IV. LEGAL ANALYSIS

18 The Court is familiar with the summary judgment standard. Under Fed. R. Civ. P. 56,
19 summary judgment should be granted where there is no genuine issue of material fact and the moving
20

21 ¹¹¹ *Id.*, 156:14-158:4.

22 ¹¹² Ms. Stewart acknowledged that some (if not all) of the DT-25 profiles were set up so as to generate a "conflict"
23 for offenders who tried to transfer to work release if they had PULHESDXT scores of "3" or higher. Stewart
24 Dep., 168:15-169:15.

25 ¹¹³ Stewart Dep., 164:13-166:22.

26 ¹¹⁴ *Id.*, 164:23-165:1. Further discovery may have to be directed at determining which offenders were excluded
27 from work release based on a computerized rejection of their PULHESDXT scores. Clearly, however, since the
28 computer had been set to generate an automatic "ERROR" message where the offender's PULHESDXT score
exceeded the maximum programmed threshold, the many work release denial forms (such as the fifteen cited
above) may be only a fraction of the total offenders who were denied because of their PULHESDXT scores.
These written work release denials appear to represent only those offenders whose classification counselors
manually overrode the pre-programmed DT-25 profile and caused the work release transfer request to be
forwarded for human consideration despite the offender's PULHESDXT score.

1 party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The
2 legal analysis in this case is straightforward. The undisputed facts show that the DOC's use of
3 PULHESDXT scores as a basis for excluding offenders from work release screens out disabled
4 offenders from enjoying the same services, programs, or activities available to those without
5 disabilities, in violation of Title II of the ADA and § 504 of the Rehabilitation Act of 1973.

7 **A. Title II of the Americans with Disabilities Act**

8 Title II of the ADA provides as follows:

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10 Subject to the provisions of this title, no qualified individual with a disability shall, by
11 reason of such disability, be excluded from participation in or be denied the benefits of
12 the services, programs, or activities of a public entity, or be subjected to
13 discrimination by any such entity.

14 42 U.S.C. § 12132. This law “constitutes a general prohibition against discrimination by public
15 entities.” *Bay Area Addiction Research and Treatment, Inc. (BAART) v. City of Antioch*, 179 F.3d
16 725, 730 (9th Cir. 1999). The statute “must be construed broadly in order to effectively implement
17 the ADA’s fundamental purpose of providing a clear and comprehensive national mandate for the
18 elimination of discrimination against individuals with disabilities.” *Barden v. City of Sacramento*,
19 292 F.3d 1073, 1077 (9th Cir. 2002) (internal quotation marks and alteration omitted).

20 As an operator of prisons and affiliated public programs and services, the DOC must comply
21 with Title II of the ADA. For nearly a decade, the Supreme Court has held that state prisons fall
22 squarely within the ADA’s statutory definition of a “public entity” and that prison “services,
23 programs, or activities” are within the statute’s ambit. *See Pennsylvania Dep’t of Corr. v. Yeskey*,
24 524 U.S. 206, 210 (1998). Dozens of cases since *Yeskey* have similarly held.

25
26 This case involves a policy that is generally applied to all offenders—excluding them from
27 work release if their PULHESDXT codes meet or exceed a certain pre-determined threshold—but
28

1 which has the obvious effect of disadvantaging disabled offenders. The Ninth Circuit has “repeatedly
2 recognized that facially neutral policies may violate the ADA when such policies unduly burden
3 disabled persons.” *McGary v. City of Portland*, 386 F.3d 1259, 1265 (9th Cir. 2004). The Ninth
4 Circuit has further held that a disabled person need not prove that his or her disability was the “sole”
5 or “but for” cause of the discrimination, and that disabled individuals may recover under the ADA
6 even if another lawful reason partially-motivated the adverse action. *Head v. Glacier Northwest,*
7 *Inc.*, 413 F.3d 1053, 1063-68 (9th Cir. 2005).

9
10 When reviewing cases similar to the present one, the Ninth Circuit has often turned to
11 Department of Justice regulations implementing Title II’s prohibition against discrimination.
12 According to the Ninth Circuit, these “legislative regulations” are expressly authorized by Congress
13 and should generally be given “controlling weight.” *BAART*, 179 F.3d at 733, n. 11. The regulations
14 at issue here are contained at 28 C.F.R. Part 35. According to 28 C.F.R. § 35.130(b)(3)(i), public
15 entities “may not, directly or through contractual or other arrangements, utilize criteria or methods of
16 administration [t]hat *have the effect* of subjecting qualified individuals with disabilities to
17 discrimination on the basis of disability.”¹¹⁵ The regulations further mandate:

19 A public entity shall not impose or apply *eligibility criteria that screen out or tend to*
20 *screen out an individual with a disability or any class of individuals with disabilities*
21 *from fully and equally enjoying any service, program or activity, unless such criteria*
22 *can be shown to be necessary for the provision of the eservice, program, or activity*
being offered.

23 28 C.F.R. § 35.130(b)(8) (emphasis added). Clearly, the use of PULHESDXT scores as a criterion
24 for determining eligibility for the DOC’s work release program has the “effect” of discriminating
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26 ¹¹⁵ (Emphasis added.) Under Title II of the ADA, a qualified person with a disability is simply “an individual with
27 a disability who, with or without reasonable modifications to rules, policies or practices, removal of architectural
28 barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of
services or the participation in programs or activities provided by the public entity.” 42 U.S.C. § 12132(2). *See also*
Crowder v. Kitagawa, 81 F.3d 1480, 1483 (9th Cir. 1996).

1 against disabled offenders and “screens out or tends to screen out” disabled offenders thereby directly
2 violating the ADA’s mandate against discrimination in services, programs, or activities of a public
3 entity.¹¹⁶

4
5 **B. Section 504 of the Rehabilitation Act of 1973**

6 Section 504 of the Rehabilitation Act is codified at 29 U.S.C. § 794(a). The statute provides
7 in pertinent part as follows:

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

11 For all intents and purposes, the legal analysis under § 504 of the Rehabilitation Act is identical to
12 that under Title II of the ADA. According to the Ninth Circuit, the two laws must be interpreted
13 consistently “because there is no significant difference in the analysis of rights and obligations
14 created by the two Acts.” *Vison v. Thomas*, 288 F.3d 1145, 1152, n. 7 (9th Cir. 2002). *See also*
15 *Bragdon v. Abbott*, 524 U.S. 624 (1998) (holding that Title II of the ADA and § 504 of the
16 Rehabilitation Act must be interpreted consistently).

17
18 The Washington DOC has received more than \$30 million in federal financial assistance since
19 2003.¹¹⁷ As a recipient of such funding, it is subject to § 504’s prohibition against disability
20 discrimination. The same acts that violate Title II of the ADA violate the Rehabilitation Act as a
21 matter of law.
22

23
24 ¹¹⁶ The regulations further prohibit public entities from denying “a qualified individual with a disability the
25 opportunity to participate in or benefit from” services offered to others (28 C.F.R. § 35.130(b)(9)) and generally mandate
26 “reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid
27 discrimination on the basis of disability.” 28 C.F.R. § 35.130(b)(7). Moreover, the regulations require the DOC to “make
28 available to applicants, participants . . . and other interested persons information regarding the provisions of [the
regulations] . . . and [their] applicability to the services, programs or activities of the public entity . . . to apprise such
persons of the protections against discrimination assured them by the [ADA] and [the regulations].” 28 C.F.R. § 35.106.
There is no evidence that the DOC complied with this legal requirement.

¹¹⁷ June 14 Heipt Decl., Ex. A (Response to Interrogatory No. 16).

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V. CONCLUSION

The Court should rule that the DOC's practice of scoring offenders according to the PULHESDXT system—and then using that score as a basis for excluding offenders from the DOC's work release program—violates Title II of the Americans with Disabilities Act and the Rehabilitation Act of 1973 such that legally disabled offenders within the defined class who were subjected to this practice should be entitled to judgment as a matter of law. For the foregoing reasons, an order of partial summary judgment should be entered. A proposed order is submitted herewith.

DATED this 29th day of November, 2007.



Edwin S. Budge, WSBA # 24182
Erik J. Heipt, WSBA # 28113
Of Budge & Heipt, PLLC
Attorneys for Plaintiff and the Class