UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

WILFRED GUY	*	**CIVIL ACTION**
	*	
	*	**NO. 18-223-BAJ-RLB**
VERSUS	*	
	*	**JUDGE BRIAN A. JACKSON**
	*	
JAMES LEBLANC, in his official capacity, ET AL	*	**MAGISTRATE JUDGE RICHARD L. BOURGEOIS, JR**

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MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

MAY IT PLEASE THE COURT:

Moving defendants, the State of Louisiana through the Department of Public Safety & Corrections and Secretary James LeBlanc, in his official capacity (collectively, "DPS&C"),[1] respectfully urges this Honorable Court to grant summary judgment in their favor because the evidence before the Court shows that there are no genuine issues of material fact as to essential elements of Plaintiff's claims against it.

I. STATEMENT OF THE CASE

Wilfred Guy ("Plaintiff") brings the instant action against DPS&C under Title II of the Americans with Disabilities Act ("ADA") and §504 of the Rehabilitation Act ("Rehabilitation Act").[2] At all times pertinent herein, Plaintiff has been an offender with the DPS&C, and housed at Louisiana State Penitentiary ("LSP").[3] Plaintiff has a hearing impairment, which requires the use of an amplification device.[4] Currently, he uses a "pocket talker," which amplifies sound.[5] This

[1] Because defendant LeBlanc is sued in his official capacity, the suit against him is effectively against the State of Louisiana. For ease of use, this memorandum will refer to the defendants, collectively, as "DPS&C" or "defendant."
[2] R. Doc. 1.
[3] Plaintiff has been incarcerated at LSP since 1987. Exhibit 1, 8:23-25.
[4] *See* Exhibit 4. DPS&C does not contest, for the purposes of this motion, that Plaintiff has a "disability" under the meaning of the ADA and the Rehabilitation Act.
[5] *Id.*

case stems from the alleged discrimination of Plaintiff, because of his hearing impairment, during his incarceration at LSP, and chiefly advances the following claims:

a) Access to the "Teletypewriter" (TTY) Phone

Plaintiff alleges that, due to his hearing impairment, he has been denied access to LSP's TTY machine,[6] despite a notification stating that TTY machines are "available free of charge to people who are deaf or hearing impaired."[7] He alleges that, despite knowledge of Plaintiff's impairments, a 2010 memorandum was posted on the door of the TTY room, which did not list Plaintiff as an offender eligible to use the TTY Phone.[8]

b) Plaintiff's Duty Status

On September 6, 2012, after lodging complaints regarding the dangers of field work, Plaintiff was provided with a duty restriction that stated "Regular duty with restrictions, out of field, no kitchen, no sports, no hobbycraft, no rodeo x permanent."[9] The "out of field" and "no kitchen" restriction excluded Plaintiff from working on field lines and in the kitchen, respectively. The "no sports" restriction prevents Plaintiff from participation in contact sports at LSP.[10] The "no hobbycraft" restriction, as written, prevents Plaintiff from participation in hobbycraft activities. The "no rodeo" restrictions prevents Plaintiff from actively participating in the LSP rodeo, such as riding horses or bulls.[11]

[6] As described in Plaintiff's *Complaint*, a TTY telephone provides an alternative method to which to communicate using a telephone. R. Doc. 1, ¶5 fn. 1.
[7] R. Doc. 1, ¶16.
[8] *Id*, ¶17.
[9] Exhibit 1, 36:18-39:7; *See Also* R. Doc. 18-10.
[10] Exhibit 2, 59:3-13.
[11] Exhibit 2, 62:2-8.

In July 2015, Plaintiff was issued another duty status, with the only substantive change being "away from machinery" in lieu of "no kitchen."[12] The "no sports, no hobbycraft, no rodeo" restriction remained unchanged.[13]

As a result of the foregoing, Plaintiff alleges that he has been denied participation in these recreational events in contravention of the ADA and the Rehabilitation Act.

c) Denial of Incentive Pay

Following the issuance of his duty status in 2012, Plaintiff alleges that he has been unlawfully denied incentive paying jobs, which are required by Louisiana law. Plaintiff alleges that there are many paying jobs that he was able to work at LSP, but was not allowed to because of his hearing impairment.[14] In May 2017, Plaintiff was given a job as a janitor at LSP's mattress factory.[15] In 2018, Plaintiff was provided a job as a walk orderly, a paying job he claims is appropriate to his disability.[16] Thus, Plaintiff's claims centers on the lack of incentive pay preceding these jobs.

II. LAW AND ARGUMENT

DPS&C is entitled to judgment as a matter of law, as there exists no genuine issue of material fact as to material elements of Plaintiff's claim against it. For the reasons discussed in greater detail below, DPS&C asserts that: (1) certain claims arising and accruing prior to July 12, 2016 have prescribed, (2) Plaintiff cannot prove as a matter of law that DPS&C unlawfully discriminated against him following July 12, 2016, (3) Plaintiff is not entitled to compensatory damages under the ADA, as he cannot show the existence of a qualifying physical injury under

[12] Exhibit 3, p. 2.
[13] *Id.*
[14] R. Doc. 1, ¶19.
[15] Exhibit 2, 140:13:20; Exhibit 9.
[16] Exhibit 1, 34:2-9; R. Doc. 1, ¶51.

the Prison Litigation Reform Act ("PLRA"), and (4) that Plaintiff is not entitled to injunctive relief.

DPS&C satisfies its initial responsibility in moving for summary judgment by informing the Court of the basis for their motion through the attached *Statement of Undisputed Facts* and the attached exhibits. The attached exhibits are as follows:

Exhibit 1:	Deposition of Wilfred Guy;
Exhibit 2:	30(b)(6) Deposition of DPS&C;
Exhibit 3:	Duty Statuses of Wilfred Guy (September 2012 and July 2015);
Exhibit 4:	Audiologist Report for Wilfred Guy;
Exhibit 5:	LSP ARP No. 2017-0576;
Exhibit 6:	Conduct Report of Wilfred Guy;
Exhibit 7:	Inmate Location Sheet;
Exhibit 8:	Incentive Pay Reports;
Exhibit 9:	Job Boards;
Exhibit 10:	Call Log of Wilfred Guy;
Exhibit 11:	LSP Directive #13.063;
Exhibit 12:	Plaintiff's Responses to Interrogatories.

The Law on the ADA and Rehabilitation Act

The ADA is a federal anti-discrimination statute designed to "provide a clear and comprehensive nation mandate for the elimination of discrimination against individuals with disabilities." Similarly, the Rehabilitation Act was enacted to "to ensure that handicapped individuals are not denied jobs or other benefits because prejudiced attitudes or ignorance of others."[17] The language in the ADA expressly provides that "the remedies, procedures, and rights" available under the Rehab Act are also accessible under the ADA.[18] Thus, "jurisprudence interpreting either section is applicable to both." Accordingly, "the rights and remedies afforded plaintiffs under Title II of the ADA are almost entirely duplicative of those provided under § 504 of the Rehabilitation Act."[19] "The only material difference between the two provisions lies in their

[17] *Brennan v. Stewart*, 834 F.2d 1248, 1259 (5th Cir. 1988)
[18] *Delano-Pyle v. Victoria County.*, 302 F.3d 567, 574 (5th Cir. 2002)(quoting 42 U.S.C. §12133).
[19] *Bennett-Nelson v. Louisiana Bd. of Regents*, 431 F.3d 448, 454 (5th Cir. 2005) (citing *Pace v. Bogalusa City School Bd.*, 403 F.3d 272, 287–88 (5th Cir. 2005)).

respective causation requirements."[20] "Section 504 of the Rehabilitation Act provides that '[n]o otherwise qualified individual with a disability in the United States . . . 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 . . . .'" [21] "By contrast, under Title II of the ADA, 'discrimination need not be the sole reason" for the exclusion of or denial of benefits to the plaintiff.'"[22]

Title II of the ADA provides that "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."[23] By "recognizing that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the states to take reasonable measures to remove architectural and other barriers to accessibility."[24] To state a claim under Title II, a plaintiff must allege (1) that he has a qualifying disability; (2) that he is being denied the benefits of services, programs, or activities for which the public entity is responsible, or is otherwise discriminated against by the public entity; and (3) that such discrimination is by reason of his disability.[25]

Title II does not require States to employ any and all means to make services accessible to persons with disabilities.[26] It only requires that there be "reasonable modifications" that would not fundamentally alter the nature of the service provided.[27] Nonetheless, "the ADA provides for

[20] *Id.* (citing *Pace*, 403 F.3d at 288).
[21] *Id.* (citing 29 U.S.C. § 794(a)).
[22] *Id.* (citing *Soledad v. U.S. Dept. of Treasury*, 304 F.3d 500, 503–04 (5th Cir. 2002)).
[23] 42 U.S.C. § 12132.
[24] *Tennessee v. Lane*, 541 U.S. 509, 531 (2004)
[25] *Garrett v. Thaler*, 560 Fed. Appx. 375, 382 (5th Cir. 2014)(unpublished)(quoting *Hale v. King*, 642 F.3d 492, 499 (5th Cir. 2011)).
[26] *Tennessee v. Lane*, 541 U.S. at 531-532.
[27] *Id.*

reasonable accommodation, not preferred accommodation."[28] The key inquiry in accommodation cases is whether the existing accommodations provide effective and meaningful access to the program.[29] As the appendix to the implementing regulations of the ADA states: "The public entity shall honor the choice [of the individual with a disability] unless it can demonstrate that another effective means of communication exists[.]"[30]

Analysis

a) Prescription

Plaintiff's claims arising prior to July 12, 2016 have prescribed, as they accrued more than one year prior to the filing of the instant lawsuit.

"With respect to ADA claims, federal law borrows the applicable limitations period from state law."[31] Under Louisiana Code of Civil Procedure article 3492, "delictual actions are subject to a liberative prescription of one year." Therefore, the ADA is subject to a one year prescriptive period.[32]

Although the applicable prescriptive period for §1983 claims is determined by state law, federal law determines when a cause of action under §1983 accrues for the purposes of prescription.[33] As the Fifth Circuit has stated, "under federal law, the [limitations] period begins to run 'the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured.'"[34] This analysis encompasses two elements: (1) the existence of the injury; and (2) causation, that is, the connection between the injury and defendant's

[28] *Arce v. La. State,* 226 F. Supp.3d 643 (E.D. La. 12/22/2016)(internal citations omitted).
[29] *See Wells v. Thaler,* 460 Fed. Appx. 303 (5th Cir. 2012)(unpublished)(internal citations omitted).
[30] 28 C.F.R. 35 App. A.
[31] *Reeves v. LeBlanc,* 2016 U.S. Dist. LEXIS 27955, *5-6 (M.D. La. 2/8/2016)(citing *Frame v. Arlington,* 657 F.3d 215, 237 (5th Cir. 2011)), *Rep't Adopted,* 2016 U.S. Dist. LEXIS 27699 (M.D. La. 2/8/2016).
[32] *Reeves,* 2016 U.S. Dist. at *5-6.
[33] *Wallace v. Kato,* 549 U.S. 384, 388 (2007).
[34] *Piotrowski v. City of Houston,* 51 F.3d 512, 516 (5th Cir. 1995), *citing Russell v. Board of Trustees,* 968 F.2d 489, 493 (5th Cir. 1992).

actions.[35] Additionally, a plaintiff need not have actual knowledge if the circumstances would lead a reasonable person to investigate further.[36] In the specific context of the ADA, "an injury occurs (and a complete and present cause of action arises) under Title II when a disabled individual has sufficient information to know that he has been denied the benefits of a service, program, or activity of a public entity."[37]

The Prescriptive Date for Plaintiff's Claims is July 10, 2016

Plaintiff filed the instant lawsuit on March 6, 2018.[38] Given Louisiana's one year prescriptive period, Plaintiff's claims generally would have a prescriptive date of March 6, 2017. However, Plaintiff filed ARP No. LSP 2017-0576 (exhibit 5) on March 8, 2017, which began a suspension period for prescription.[39] A second step response to this ARP was issued on October 15, 2017, and Plaintiff received notice of same on October 31, 2017.[40] As suspension of prescription ended on October 31, 2017 (the date that Plaintiff was delivered notice of the second step response), the filing of this ARP resulted in a suspension of 237 days. Adding the 237-day suspension period to March 6, 2017, this results in a prescriptive date of July 12, 2016.

Plaintiff's "No Sports, No Hobbycraft, No Rodeo" Claims Have Prescribed

Plaintiff's claims relating to his "no sports, no hobbycraft, no rodeo" duty status claims have long prescribed, and are barred. As Plaintiff admits in his deposition, he was provided a permanent duty status of "regular duty with restrictions: no field, away from machinery, no sports,

[35] *Id; Newman v. Coffin*, 464 Fed. Appx. 359, 362 (5th Cir. 2012).
[36] *Piotrwoski* at 516, *citing Jensen v. Snellings*, 841 F.2d 600, 606 (5th Cir. 1988).
[37] *Frame v. City of Arlington*, 657 F.3d at 238.
[38] R. Doc. 1.
[39] Louisiana Revised Statute §15:1172(E).
[40] Exhibit 5, p. 22.

no hobbycraft, no rodeo" in September 2012.[41] Plaintiff also admits that he was aware of this duty status during this time frame,[42] and testified that the duty status was mailed to him.[43]

The record reflects that Plaintiff's duty status of "no sports, no hobbycraft, no rodeo" has not changed. In 2015, Plaintiff was issued a second permanent duty status, replacing "no kitchen" with "away from machinery."[44] As of May 2017, Plaintiff was noted to have a duty status of "regular duty with restrictions: out of field, no kitchen, away from machinery, no sports, no hobbycraft, no rodeo x permanent."[45]

As such, it is clear that Plaintiff knew well before the prescriptive date in this case that he was being denied access to sports, hobbycraft, and the rodeo, and thus his cause of action regarding same accrued at this time. Because Plaintiff's claims in this regard have prescribed, they should be dismissed with prejudice.

Plaintiff's Episodic Discrimination Claims Arising Prior to July 12, 2016 are Prescribed

In his *Complaint,* Plaintiff alleges a litany of various events occurring in 2014, 2015, and the early part of 2016. These allegations include writing a letter to former warden Burl Cain regarding use of the ADA telephone, his placement in solitary confinement in December 2014 (and ultimate release in April 2016), the replacing of his hearing aid with a "pocket-talker" in 2015, and the denial of jobs prior to 2016.[46]

To the extent that Plaintiff seeks to recover for these events in this litigation, or for any cause of action that may have arose prior to July 12, 2016, Plaintiff's claims are barred, and should be dismissed with prejudice.

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[41] Exhibit 1, 37:19-22.
[42] *See* Exhibit 1, 38:20-39:7; 42:17-21.
[43] *Id*, 42:12-16.
[44] Exhibit 3, p. 2.
[45] Exhibit 9, p. 4.
[46] R. Doc. 1, ¶23-37.

b) Prima Facie Case – ADA and Rehabilitation Act

In his *Complaint,* Plaintiff sets forth three primary bases for an alleged ADA violation: (1) that he was unlawfully denied access to the TTY Phone, (2) that he was denied a job due to his disability, and (3) that he was denied access to sports, hobbycraft, and the rodeo because of his disability. Each of these claims fails as a matter of law.

TTY Phone Claim

In October 2016, Plaintiff was sent to Dr. Sherry Mouton, an audiologist in Lafayette, Louisiana, who conducted an examination of Mr. Guy.[47] Dr. Mouton found that Plaintiff had a hearing impairment involving neural involvement, which is difficult to treat.[48] However, Dr. Mouton noted "that Patient currently utilizes a pocket talker, of which he appears to have great benefit from, as he responded appropriately to 100% of questions during history taking portion of visit."[49] Dr. Mouton also noted that Plaintiff specifically inquired about the TTY telephone.[50] However, Dr. Mouton noted that "a recommendation is not being made at this time for a TTY telephone. An amplified telephone will be sufficient as long as there is little to no ambient noise present during telephone calls."[51]

This finding by Dr. Mouton is supported by the summary judgment record. Tracy Falgout, the ADA coordinator at LSP, testified that Plaintiff has not met the criteria for use of the TTY phone, which is hearing loss that keeps him from utilizing a telephone with an amplified headset or receiver.[52] A review of Plaintiff's call log at LSP confirms that he frequently utilizes the regular telephone, and that he frequently communicates using the regular telephone for 15 minutes at a

[47] Exhibit 4.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] Exhibit 2, 44:7-10.

time.[53] Plaintiff himself admitted during his deposition that he can communicate using the regular wall telephone.[54]

Additionally, the summary judgment record shows that Plaintiff's motivation for using the TTY machine is not because he cannot utilize the regular telephone, but because he is charged for the regular telephone. Falgout testified that during a conversation with Mr. Guy, Mr. Guy informed him that the TTY phone was less expensive than the normal telephone.[55] Mr. Guy, reiterated this in his deposition:

> Q: So are you unable to use the wall phone?
>
> A: I've got to – yes, sir. I got to spend money on there. I got to go to the store and put minutes on the wall phone.
>
> Q: Okay. And how much do minutes cost for the wall phone?
>
> A: A dollar a minute. I got to put like $10 or either – whatever amount. I got to kind of like stretch the money when I get it. I put like $10 sometimes, $5, whatever I can put.[56]

When asked about how often he talks on the phone, Plaintiff also testified that "I want to talk on there every day, but I can't" because "I got to wait until my cousin send me a little money to where I can be able to put money on the phone."[57] Plaintiff's call log shows that, from February 2014 to July 2018, Plaintiff was charged approximately $193.88 for using the regular telephone.[58] In contrast, Plaintiff testified, the TTY telephone is free of charge.[59]

The above demonstrates that DPS&C has not unlawfully discriminated against Mr. Guy by not providing him access to the TTY phone. The summary judgment evidence establishes that Mr.

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[53] The column "duration" is in seconds.
[54] Exhibit 1, 28:14-16; 30:1-5.
[55] Exhibit 2, 46:2-13.
[56] Exhibit 1, 20:22-21:6.
[57] *Id*, 24:6-9.
[58] Exhibit 10. This total amount results from a total minute time of 895.95 minutes. P. 55.
[59] Exhibit 1, 24:10-15.

Guy did not meet LSP's criteria for using the TTY phone, and shows that he can sufficiently communicate using regular telephones. Additionally, the free cost of the TTY phone is not a valid reason for Mr. Guy to qualify for use of the TTY phone. While Plaintiff's contention in this litigation is that he should have been provided access to the TTY telephone simply because he has a hearing impairment,[60] the record shows that Plaintiff can communicate using the regular wall telephone, and use of the TTY phone was not recommended by Dr. Mouton. Accordingly, summary judgment should issue for defendant on this claim.

Denial of Incentive Pay Claim

In 2012, Plaintiff began making complaints regarding the dangers of the field line he was assigned to at LSP.[61] As a result, he was issued a permanent duty status stating "regular duty with restrictions: no field, no kitchen, no sports, no hobbycraft, no rodeo."[62] Following the issuance of this duty status, however, Plaintiff alleges that he has been denied incentive pay jobs, despite the fact that he is able to work a number of appropriate jobs at LSP. Plaintiff relies on Louisiana Revised Statute §15:832(A), which provides that "the department shall provide employment opportunities and vocational training for all inmates, regardless of gender, consistent with available resources, physical custody, and appropriate classification criteria."

The summary judgment record reflects that, following the issuance of Plaintiff's duty status in 2012, Plaintiff *was* assigned to a formal job at times when he was not in housing areas without jobs, such as administrative segregation, the treatment center, or in extended lockdown areas.[63] Also importantly, the summary judgment record reflects that Plaintiff was issued disciplinary violations on occasions following 2012, some of which sentenced Plaintiff to a "working

[60] Exhibit 1, 30:1-5.
[61] *Id*, 38:23-39:7.
[62] *Id;* Exhibit 3, p. 1.
[63] Exhibit 7; Exhibit 8; *See also* Exhibit 2, 157:18-159:11.

cellblock."[64] Amber Vittorio, the classification manager at LSP, testified that assignment to these "working cellblocks" automatically resulted in a field line job assignment,[65] which Plaintiff was unable to work due to his duty status.

Indeed, the summary judgment evidence shows that significant lapses in Plaintiff's pay were due to his disciplinary sentences and classification decisions of the Department. For instance, in October 2015, Plaintiff received a disciplinary violation and was sentenced to "out camp – WCB," which indicated that Plaintiff was sentenced to the working cell block.[66] Again, offenders housed at a working cell block are automatically assigned to the field.[67] However, because Plaintiff was assigned the permanent duty status of "no field" (a duty status that Plaintiff does not contest), he was not forced to perform field work.[68] Nonetheless, the record reflects that Plaintiff still occasionally received incentive pay in late 2016/early 2017.[69]

The summary judgment record thus shows that Plaintiff's housing/job assignment was frequently intertwined with the imposition of discipline, as well as LSP's classification of Plaintiff, which is an enumerated exception to Louisiana Revised Statute §15:832(A). Additionally, it was Plaintiff's obligation to request a job change.[70] However, the record indicates that Plaintiff did not submit a job change request to LSP's classification department.[71] While Plaintiff did file an ARP in March 2017 complaining of a lack of a paying job,[72] the record reflects that in May 2017, LSP staff requested Plaintiff for a janitorial position in the mattress factory due to staffing being below

[64] Exhibit 6.
[65] Exhibit 1, 145:6-15.
[66] Exhibit 6, p. 3.
[67] Exhibit 2, 154:9-17.
[68] Exhibit 1, 59:19-22.
[69] Exhibit 8.
[70] Exhibit 2, 164:25-165:18. The testimony of Amber Vittorio indicates that LSP offenders are provided an annual assessment every year, which includes the ability to obtain a job request form. 169:18-170:14. However, this process may be further restricted by the offenders' housing unit, which limits the potential jobs available. 173:9-174:8.
[71] *Id*, 164:5-11.
[72] Exhibit 5.

quota.[73] Plaintiff held this job from March 2017 until January 2018, when he was assigned to an orderly position at Main Prison, Cypress 1 housing unit. Plaintiff has also obtained trusty status.[74] Since Plaintiff's assignment to the mattress factory (and subsequently the Cypress Unit), Plaintiff has received regular incentive pay.[75]

Because "the classification of inmates is a matter left to the broad general discretion of prison officials,"[76] and because Plaintiff has no general right to his classification,[77] Plaintiff cannot meet his burden of showing an ADA violation simply because he was classified into housing dormitories where he could not receive incentive pay. This is especially true, as is the case here, the record reflects that Plaintiff's disciplinary history influenced his housing/classification, and where he failed to request a job/custody change. For these reasons, Plaintiff's "denial of incentive pay" claims should be dismissed.

"No Sports" Claim[78]

The enforcement regulations of the ADA states that "a public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities. However, the public entity must ensure that its safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities."[79] Furthermore, 28 C.F.R. §35.139(a) states that "[t]his part does not require a public entity to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others." Here, the summary judgment

[73] Exhibit 2, 161:4-11; 163:2-15; Exhibit 9, p. 3.
[74] Exhibit 2, 159:12-13.
[75] Exhibit 7; Exhibit 8, pp. 6-7.
[76] *Tasby v. Cain*, 2017 U.S. Dist. LEXIS 159933, *32 (M.D. La. 9/12/2017)
[77] *See Wilkerson v. Stalder*, 329 F.3d 431, 436 (5th Cir. 2003)(internal citations omitted).
[78] Again, defendant contends that this claim has fully prescribed, as a permanent duty status containing the "no sports, no hobby craft, no rodeo" issued in 2012. The below argument is offered only in the alternative.
[79] 28 C.F.R. §35.130.

record establishes that Plaintiff's participation in his desired contact sports (football and softball/baseball)[80] presents a risk of both himself and the safety of the institution.

LSP Directive No. 13.063 states that "offenders assigned restrictive duty will not be allowed to participate in sports and/or recreational activities, *unless specified by the treating health care provider*."[81] Dr. Randy Lavespere, the medical director at LSP, testified that the considerations into whether an offender can participate in sports "boils down to what is safe for the institution, and what is safe for the offender."[82] In this case, Dr. Lavespere testified to his opinion that safety concerns preclude Plaintiff from working the in the field, working with machinery, from playing contact sports, and the rodeo.[83]

Dr. Lavespere testified that he has similar concerns with Plaintiff playing contact sports at LSP.[84] He testified that Plaintiff's ability to hear during such events places him at an increased risk of injury.[85] Dr. Lavespere espoused a similar safety concern with regard to field work and machinery, testifying that "I didn't want him around all that field work where say he couldn't hear anybody swinging a swing blade, or he would be working around lawnmowers or tractors, so I took him out of the field away from machinery."[86]

Significantly in this case, Plaintiff himself does not contest the issuance of a "no field" and "no machinery" duty restriction on similar grounds. Plaintiff testified that in 2012, he wrote a number of letters and complaints that field work was too dangerous.[87] Specifically, Plaintiff testified that his hearing impairment prevented him from sufficiently hearing potential dangers in

[80] *See* Exhibit 1, 46:25-47:1; Exhibit 12, p. 4.
[81] Exhibit 11 p. 3.
[82] Exhibit 2, 58:17-20.
[83] *Id*, 68:3-69:7.
[84] *Id*, 59:17-60:10.
[85] *Id.;* 69:23-2
[86] *Id*, 68:19-23.
[87] *Id*, 40:12-20.

the field.[88] Plaintiff also testified to his belief that he cannot work around machinery.[89] However, these are the exact concerns enumerated by Dr. Lavespere, not only in regard to field and machinery risks, but also in regard to the "no sports" restriction.[90] For this reason, Plaintiff's cannot show that Dr. Lavespere's determination with regard to contact sports is without basis, and his "no sports" claim fails.

"No Hobbycraft" Claim[91]

First, defendants note that Plaintiff does not wish to participate in certain hobbycraft activities, such as wood working, due to the danger involved.[92] Instead, he testified that he would be interested in hobbycraft activities such as leather working or painting.[93] For this reason alone, Plaintiff's blanket challenge to the restriction is without merit.

Second, the summary judgment evidence reflects that Plaintiff is not categorically precluded from engaging in certain hobby shop activities such as leather working. Although LSP policy generally requires that "offenders assigned restrictive duty will not be allow to participate in sports and/or recreational activities," Dr. Lavespere testified that he would potentially allow Plaintiff to engage in certain hobbycraft activities such as leather-working, jewelry making, and painting upon request to him.[94] Dr. Lavespere testified that he makes such concessions "all the time."[95] Such a decision is still grounded in safety/security concerns, however. Dr. Lavespere testified that upon request, he would "pull his chart, see where he is at, make sure he is capable of

[88] Exhibit 1, 40:6-41:8.
[89] *See Id*, 46:9-14.
[90] Exhibit 2, 68:70:10-15; 83:21-84:11.
[91] Again, defendant contends that this claim has fully prescribed, as a permanent duty status containing the "no sports, no hobby craft, no rodeo" issued in 2012. The below argument is offered only in the alternative.
[92] Exhibit 1, 75:8-17; 86:15-87:5.
[93] *Id*, 87:6-9.
[94] Exhibit 2, 67:23-68:2.
[95] *Id*, 61:11-23.

doing what he is doing, and I will give him hobbycraft."[96] As such, Plaintiff's categorical challenge of his "no hobbycraft" restriction is without merit, and should be dismissed.

For these reasons, the summary judgment evidence shows that Plaintiff cannot meet his burden of showing the "no hobbycraft" restriction is in violation of the ADA. There is no genuine issue of material fact that safety concerns bar Plaintiff's participation in dangerous hobbycraft activities such as wood working. Additionally, LSP policy allows for medical providers to craft exemptions from the general rule of "no recreational activities" for offenders with duty statuses. Although subject to review, Dr. Lavespere's testimony made it clear that he would likely allow Plaintiff access to certain aspects of hobbycraft.

Plaintiff's "no hobbycraft" claims should be dismissed.

"No Rodeo" Claim[97]

Dr. Lavespere and Tracy Falgout both testified that "no rodeo" pertains to actual participation in the LSP rodeo, i.e. "riding the bull."[98] Plaintiff expressly testified that he has no interest in such participation with the rodeo, but did testify that he wishes to sell hobbycraft items at the LSP Rodeo.[99] As Dr. Lavespere testified, Plaintiff's duty status does not prevent him from attending, selling hobby shop items, or visiting with family.[100] Plaintiff's "no rodeo" claims should be dismissed.

c) Compensatory Damages

The Prison Litigation Reform Act ("PLRA") provides that "no Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or

[96] *Id*, 80:23-5.
[97] Again, defendant contends that this claim has fully prescribed, as a permanent duty status containing the "no sports, no hobby craft, no rodeo" issued in 2012. The below argument is offered only in the alternative.
[98] Exhibit 2, 88:21-89:4.
[99] Exhibit 1, 58:8-19.
[100] *Id*, 88:21-89:4.

emotional injury suffered while in custody without a prior showing of physical injury."[101] The application of this provision turns on the relief sought by a prisoner, and it prevents prisoners from seeking compensatory damages for violations of federal law where no physical injury is alleged.[102] This statute, by its own terms, expressly applies to "any federal civil action", including the ADA or the Rehabilitation Act. [103] Thus, prior to recovering compensatory damages in this litigation, Plaintiff must show that he has suffered a physical injury due to the alleged discrimination of defendant.[104]

Here, Plaintiff cannot meet the physical injury requirement of 42 U.S.C. §1997e(e). Plaintiff levies no allegations in his *Complaint* that he has been physically injured due to the alleged discrimination of Defendant.[105] Furthermore, the summary judgment record establishes that Plaintiff has not been physically injured due to any alleged discrimination. For instance, despite Plaintiff's testimony that that the machinery in the mattress factory posed a danger to him, he expressly testified during his deposition that he was not physically injured by such machinery.[106] Additionally, while Plaintiff alleges in his *Complaint* that he issuance of a pocket-talker has placed him at an increased risk of harm, Plaintiff testified that he has never been physically injured by other offenders due to his pocket-talker.[107] Moreover, Plaintiff asserts no claims that he was physically injured due to his duty status, the denial of access to the TTY

[101] 42 U.S.C. § 1997e(e).
[102] *See Geiger v. Jowers*, 404 F.3d 371, 375 (5th Cir. 2005) (per curium).
[103] 42 U.S.C. §1997e(a); *See Also Atomanczyk v. Tex Dep't of Crim. Justice,* No. H-17-0719, 2018 U.S. Dist. LEXIS 106351, * (S.D. Tex. 6/6/2018)(internal citations omitted);
[104] *See Edler v. Hockley County Comm'rs Court,* 589 Fed. Appx. 664, 671 (5th Cir. 2014)("The district court did not abuse its discretion by dismissing Edler's claim of discrimination under the ADA. Edler has not alleged any physical injury from discrimination, so he cannot recover compensatory damages[.]").
[105] The only claim of physical injury advanced by Plaintiff is a conclusory statement that he suffered physical effects from solitary confinement, where he was placed due to retaliation. R. Doc. 1, ¶25 and ¶35. In addition to there being no retaliation claims currently before the court, any claim related to these events have prescribed.
[106] Exhibit 1, 72:18-20.
[107] *Id*, 75:4-7.

machine, the denial of access to sports, hobbycraft, the rodeo, or otherwise because of alleged discrimination.[108]

Because Plaintiff cannot succeed in his burden of showing that he has suffered a qualifying physical injury as a result of alleged discrimination, Plaintiff's claims for compensatory damages are barred, and should be dismissed with prejudice.

d) Injunctive Relief

Plaintiff seeks a permanent injunction against DPS&C and requests that this Court enter an injunction enjoining DPS&C to promulgate various policies, procedures, and practices.[109]

Legal Standard

In order to obtain an permanent injunction, a party is required to demonstrate that 1) that the party has suffered irreparable injury; 2) that the remedies available at law, such as monetary damages, are inadequate to compensate for that injury; 3) that considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and 4) that the public interest would not be disserved by a permanent injunction.[110]

As discussed below, Plaintiff cannot meet critical elements of the injunctive relief analysis.

Analysis

Regarding Plaintiff's claims regarding the TTY machine, the summary judgment evidence establishes that injunctive relief should not issue. As discussed above, Dr. Sherry Mouton did not recommend access to the TTY telephone. Furthermore, the record reflects that Plaintiff can (and has) communicated using the regular amplified wall telephone, but objects to being charged for

[108] R. Doc. 1.
[109] *Id*, ¶86.
[110] *eBay, Inc., et al v. Merchexhange, L.L.C.,* 547 U.S. 388 (2006); *See also Weinberger v. Romero-Barcelo*¸456 U.S. 305, 311-313 (1982); *Amoco Production Co. v. Gambell,* 480 U.S. 531, 542 (1987).

using same. Plaintiff has failed in his burden of showing irreparable injury, and Plaintiff's claims for injunctive relief on this issue should be dismissed

In regard to Plaintiff's claims regarding sports, the evidence establishes that injunctive relief is not warranted. As discussed above, LSP has enumerated a legitimate safety concern surrounding Plaintiff's ability to play sports. Furthermore, Plaintiff testified that in 2016, he was involved in a van accident that left him with a neck and back injury.[111] Plaintiff testified that he was still in pain, and admitted during his deposition that he did not think that he can play contact sports with those injuries.[112] Although Plaintiff indicated a hope that he will recover from these ailments, Plaintiff admitted during his deposition that he did not know if he would recover.[113] For these reasons, Plaintiff is not entitled to a permanent injunction in this litigation.

Plaintiff's claims for injunctive relief related to his "no hobbycraft" duty status likewise fail. The summary judgment record shows that the decision to allow Plaintiff participation in certain hobbycraft activities is at the discretion of the medical provider of LSP, in accordance with LSP policy. Dr. Lavespere, the medical director at LSP, testified that legitimate safety concerns prevent Plaintiff from more dangerous activities such as wood working, but that he would consider allowing Plaintiff to participate in certain hobbycraft activities upon review of his chart. Therefore, the issuance of an injunction mandating that Plaintiff be allowed to participate in hobbycraft would disserve the public interest in this case, as it would undermine the institution's ability to determine, manage, and preserve the safety and security of the institution.

[111] Exhibit 1, 68:21-71:1.
[112] *Id*, 71:11-14.
[113] *Id*, 89:24-11.

Plaintiff's "no rodeo" claims similarly fail. As discussed above, Plaintiff does not wish to "ride the bull" in the LSP Rodeo, and the summary judgment evidence shows that Plaintiff is permitted to attend the rodeo. Injunctive relief should not issue on this claim.

Finally, Plaintiff is not entitled to injunctive relief on his job claims. As discussed above, the record reflects that Plaintiff has received incentive pay since May 2017, and has obtained trusty status. While Plaintiff may lose incentive pay in the future should he receive discipline, there is no indication that DPS&C will deny Plaintiff incentive pay simply because he has a hearing impairment. As a such, Plaintiff contentions to the contrary are speculative, and should be dismissed.

Plaintiff's claims for injunctive relief should be dismissed.

III. CONCLUSION

For the reasons discussed above, DPS&C's motion for summary judgment should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of June, 2019, the foregoing was filed electronically with the Clerk of Court by using the CM/ECF system. Notice of this filing will be sent to all parties who participate in electronic filing by operation of the court's electronic filing system.

/s/ *James G. Evans*
James G. Evans