UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

WILFRED GUY,	)	
	)	CIVIL ACTION
Plaintiff,	)	
v.	)	No. 18-223-BAJ-RLB
	)	
JAMES LEBLANC, *et al*.,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff Wilfred Guy moves for partial summary judgment on his claims for injunctive relief and damages under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973.

Mr. Guy is an inmate at the Louisiana State Penitentiary, which is located in Angola, Louisiana. He has a neurological impairment that affects his ability to hear. Rather than accommodate his disability, the Department of Public Safety & Corrections subjected Mr. Guy to a set of policies and actions that directly – and in two cases facially – violate the ADA/RA:

- Mr. Guy was subject to an explicit, written DOC policy that excludes any inmate who is given a duty status from using the prison's hobbyshop. Generally, "no hobbyshop" is used as a *punishment* for Louisiana prisoners; but under DOC policy, it is automatically applied to any inmate with a disability that requires a duty status.

- Mr. Guy was subject to an explicit, written DOC policy that caps the pay for a certain class of disabled inmates – those who are given a "Limited Duty" status – to four cents per hour. Non-disabled inmates are not subject to the pay cap, and can make a dollar or more per hour.

- For periods of months at a time, Mr. Guy would be excluded from any paid work at all, solely because of his hearing impairment – even though Defendants concede he has always been able to do at least some of the jobs at Angola.

- Mr. Guy was explicitly given "no sports" and "no rodeo" duty statuses by reason of his impairment. This is evident because the DOC explicitly listed the "REASON" for the duty statuses as "HEARING IMPAIRMENT."

These DOC policies and actions are almost comically contrary to the mandates of the ADA and RA, which prohibit any "eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered." 28 CFR § 35.130(b)(8).

As is set forth below, the State of Louisiana is in violation of the ADA/RA and partial summary judgment should be entered in Mr. Guy's favor.

II. BACKGROUND

Louisiana law requires that the Department of Corrections "shall provide employment opportunities and vocational training for all inmates, regardless of gender, consistent with available resources, physical custody, and appropriate classification criteria." LA R.S. 15:832(A). Inmates are paid for this work, at rates ranging from $.02 per hour at the lowest, to $1.00 or more per hour at the upper end. *See* Ex. D (LSP Directive 19.001) at 2, 4.

Some inmates have physical limitations. Accordingly, DOC staff issue "duty statuses" to inmates to record and implement those limitations. As the Fifth Circuit explained, a "'duty status' is a written designation assigned by a prison medical doctor indicating an inmate's physical or mental ability to perform hard labor in accordance with his sentence. . . . Duty statuses may range from no duty (indicating a need for bed rest), to light duty or regular duty with restrictions, and finally to regular duty without restrictions (indicating the inmate is capable of performing any and all hard labor)." *Armant v. Stalder*, 287 Fed. Appx. 351, 352 n. 1 (5th Cir. 2008). Duty statuses can also restrict certain kinds of activities based on the inmate's physical limitations, such as "no

lifting more than 25 pounds" or "no standing for more than 30 minutes." Ex. C (DOC Policy HC-15) at 3. Inmates cannot refuse an assigned duty status. *Id*. at 2.

Some inmates may receive a "Limited Duty" duty status. "Limited Duty" is defined in Health Care Policy HC-15 as for those inmates who are "unable to perform full-time work or educational assignments due to health-related reasons." Ex. C (DOC Policy HC-15) at 4. These inmates, however, are subject to a pay cap. They "shall earn at a rate of no more than $0.04 per hour" unless "classified as Regular Duty with restrictions or those with a temporary Limited Duty status." Ex. D at 3.

Generally, duty statuses are supposed to be specific to an inmate's "health condition." Ex. C at 2. There are, however, exceptions. Per LSP Directive 9.036, any inmate "under medical care and/or treatment, requiring a duty status" is not allowed to use Angola's hobbyshop. Ex. B at 2. The hobbyshop is a program by which inmates can buy tools and raw materials and then paint or create woodwork, metalwork, leatherwork, and other forms of art for sale at the Angola Rodeo. Ex. A at 104-107. (The "hobbyshop" is the place where "hobby craft" takes place; the two terms are used interchangeably.)

And it is the common practice of LSP doctors to add a "no sports, no hobbycraft, no rodeo" clause to every medical duty status.[1] "No rodeo" means the inmate is not allowed to practice for or participate in Angola's twice-yearly rodeo. Ex. A at 15. "No sports" means the inmate is not allowed to participate in group sports like baseball, basketball, flag football, volleyball, and "pickle ball." See Ex. A at 71-72.

[1] *See, e.g., Hacker v. Cain*, 14-cv-63 (M.D. La. June 6, 2016) (inmate with cataracts had "no sports, no hobbycraft, no rodeo" added to duty status); *Reeves v. LeBlanc*, 13-cv-586 (M.D. La., Oct. 23, 2014) (inmate with flat feet had "no sports, no hobby craft, [and] no rodeo" added to duty status); *Adams v. Cain* 13-cv-530 (M.D. La., Jan. 26, 2016) (inmate with neck and back pain had "no sports, no hobby craft, [and] no rodeo" added to duty status).

III. MR. GUY'S COMPLAINT AND THE ISSUES RAISED IN THIS MOTION.

On August 7, 2017, Mr. Wilfred Guy filed suit under Title III of the Americans With Disability Act, 42 U.S. Code § 12181 ("ADA") and Section 504 of the Rehabilitation Act of 1973 ("RA"), 29 U.S.C. § 794.[2] Mr. Guy seeks injunctive relief, damages, and attorneys' fees/costs.

Mr. Guy sues the State of Louisiana, Department of Public Safety and Corrections and James LeBlanc, in his official capacity only (hereinafter "the State of Louisiana"). This motion is limited to the State of Louisiana's liability under the ADA/RA. Mr. Guy reserves for the trial on the merits the scope of the appropriate injunctive relief that should issue and the quantum of damages that should be awarded.

IV. LAW / ANALYSIS

Under the ADA and RA, covered entities must make reasonable accommodations to ensure that persons with disabilities can participate in "all aspects of society." *See* 42 U.S.C. 12101(a)(2). Failure to act affirmatively to accommodate needs of an individual with a disability violates the ADA and RA. As described herein, the State of Louisiana's policies exclude individuals with disabilities – including Mr. Guy – from participating in "all aspects" of the programs, services, and activities offered at the Louisiana State Penitentiary. Therefore, the Court should enter injunctive relief in favor of Mr. Guy.

Additionally, as is set forth below, the State of Louisiana had knowledge of Mr. Guy's disability, limitations, and needed accommodation, but nevertheless chose to deny his request for accommodation. This knowing denial of a request for accommodation constitutes "intentional discrimination" and entitles Mr. Guy to an award of damages.

[2] *See* R. Doc. 1.

A. The ADA/Rehabilitation Act Require Public Entities to Affirmatively Accommodate Persons with Disabilities. Failure to Act Axiomatically Gives Rise to Liability.

The ADA/§504 "are judged under the same legal standards, and the same remedies are available under both Acts."[3] "To show a violation of either statute, a plaintiff must prove '(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.' "[4] Thus, "[a]lthough[, for the purposes of this motion, Plaintiffs] focus primarily on Title II, [the] analysis is informed by the Rehabilitation Act, and [. . .] applies to both statutes."[5]

A public entity bears the burden of adequately accommodating the needs of an individual with a disability. In *Pierce v. D.C.*, by the District of Columbia Circuit explained that "the express prohibitions against disability-based discrimination in Section 504 and Title II include *an affirmative obligation* to make benefits, services, and programs accessible to disabled people" and that covered "entities may very well need to act affirmatively to modify, supplement, or tailor their programs and services to make them accessible to persons with disabilities."[6] More recently, in a Title II ADA/RA case involving inaccessible sidewalks, the Tenth Circuit explained that "[f]ailing to act in the face of an affirmative duty to do so axiomatically gives rise to liability."[7] Further, every day of inaction under the ADA "amounts to a new violation."[8]

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[3] *Kemp v. Holder*, 610 F.3d 231, 234 (5th Cir. 2010) (per curiam).
[4] *Miraglia v. Bd. of Supervisors of Louisiana State Museum*, 901 F.3d 565, 574 (5th Cir. 2018) (*quoting Hale v. King*, 642 F.3d 492, 499 (5th Cir.2011) (per curiam)).
[5] *Frame v. City of Arlington*, 657 F.3d 215, 224 (5th Cir. 2011) (en banc).
[6] 128 F. Supp. 3d 250, 266–67 (D.D.C. 2015), *reconsideration denied*, 146 F. Supp. 3d 197 (D.D.C. 2015) (italics original).
[7] *Hamer v. City of Trinidad*, No. 17-1456, 2019 WL 2120132, at *8 (10th Cir. May 15, 2019).
[8] *Id*.

In *PGA Tour, Inc. v. Martin*, the Supreme Court explained that to determine whether a specific modification for a particular person's disability would be reasonable, the public entity must make an individual inquiry under the circumstances.[9] The Fifth Circuit has likewise confirmed the necessity of an individualized inquiry, stating that the "Supreme Court cases consistently point to an individualized assessment mandated by the ADA under various sections of the Act."[10] In contrast to an individualized inquiry, rigid polices that are not subject to modification run afoul of reasonable modification requirement of the ADA.[11]

The ADA regulations effectuate the ADA's mandate that public entities make reasonable modifications to their programs and services to accommodate disabled persons.[12] Thus, whether an individual has experienced discrimination can be determined by whether the public entity has violated the applicable regulations for Title II of the ADA.[13] The applicable regulations at issue in this case are as follows:

- 28 CFR § 35.130(b)(7)(i) "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."

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[9] 532 U.S. 661, 688, 121 S.Ct. 1879 (2001)

[10] *Kapche v. City of San Antonio*, 304 F.3d 493, 499 (5th Cir. 2002).

[11] See, e.g., *Tamara v. El Camino Hosp.*, 964 F. Supp. 2d 1077, 1085 (N.D. Cal. 2013) (finding that failure to conduct an "individualized assessment" as to whether use of a service animal in a psychiatric ward based upon a general hospital policy was discrimination under the ADA); *Shultz By and Through Shultz v. Hemet Youth Pony League, Inc.*, 943 F.Supp. 1222, 1225 (C.D.Cal.1996) (finding illegal discrimination for failing to make an individualized assessment as to the specific danger of allowing an individual with cerebral palsy to compete in a lower age bracket regardless of the hypothetical dangers of allowing older, theoretically larger, and stronger children to compete with younger children).

[12] *Tennessee v. Lane*, 541 U.S. 509, 532 (2004).

[13] *See Frame*, 657 F.3d at 231 (finding that the Title II ADA regulations for sidewalks are enforceable because they are congruous with Title II's reasonable modification requirement); *Arce v. Louisiana*, No. CV 16-14003, 2017 WL 5619376, at *13 (E.D. La. Nov. 21, 2017) (J. Africk) (concluding that Attorney General's interpretation of Title II as embodied in 28 C.F.R. § 35:130(g) was reasonable and, therefore, privately enforceable).

- 28 CFR § 35.130(b)(8) "A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered."

- 28 CFR § 35.130(h) "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."

Clearly, rigid policies directly contravene the mandates of the ADA/RA. Eligibility criteria that screen out or even *tend to* screen out individuals with a disability are impermissible. And while a public entity can impose legitimate safety requirements, those requirements must be based on actual risks, not on speculation, stereotypes, or generalizations. These regulations are necessary to effectuate Congresses' purpose in passing the ADA, which was to ensure that individuals with disabilities have the ability to participate in "all aspects of society."[14]

B. Mr. Guy is a Qualified Individual with a Disability Because All Parties Agree He "Has a Hearing Impairment that Would Fall Under a Disability."

Determining whether a person has a "disability" under the ADA is not a restrictive inquiry. In 2008, the United States Congress passed the ADA Amendments Act of 2008 (ADAAA),[15] which ushered in significant amendments that widened the definition and coverage of "disability."[16] Congress specifically found that "[t]he definition of disability shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act."[17] The ADA now sets forth three ways to qualify as disabled: (1) "a physical or

[14] 42 U.S.C. 12101(a)(2) ("in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers")
[15] Pub.L. No. 110–325, 122 Stat. 3553 (2008).
[16] *See* 42 U.S.C. § 12102(4)(A).
[17] *Neely v. PSEG Texas, Ltd. Partnership,* 735 F.3d 242, 245 n.4 (5th Cir. 2013)

mental impairment that substantially limits one or more major life activities of [the] individual"; (2) a "record of such an impairment"; or (3) "being regarded as having such an impairment."[18]

Under the first test for disability, an individual has a disability if he or she "[has] a physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. § 12102(1)(A) (2012); see also 29 U.S.C. § 705(20) (2012). Hearing is a "major life activity". 42 U.S.C. § 12102(2)(A); 29 U.S.C. § 705(20)(B) (definition of "individual with a disability" pursuant to the Rehabilitation Act includes those who have a disability pursuant to 42 U.S.C. § 12102).

Here, there is no material dispute that Mr. Guy is hearing impaired and is substantially limited in the major life activity of hearing. That is because the DOC's 30(b)(6) witness (Medical Director Dr. Lavespere) testified that Wilfred Guy "has a hearing impairment that would fall under a disability." Ex. A at 97.[19] Mr. Guy also meets the "record of" test for a disability, as Defendants' records list him as "hearing impaired." Ex. E. And finally, he meets the "regarded as" test for disability, because Defendants' 30(b)(6) witness testified that "he is regarded here as a person with a disability." Ex. A at 98.

For all these reasons, Mr. Guy falls within the protections of the ADA and RA.

[18] 42 U.S.C. § 12102(1).

[19] *See also* Ex. I at RFA No. 2 ("admitted that Wilfred Guy has been diagnosed with a neurological impairment that affects his ability to hear."); RFA No. 4 (admitted that "Wilfred Guy has been identified as 'hearing impaired' since at least 2012."); Ex. K at 10 ("Offender Guy does have bilateral hearing loss."); Ex. A at 85-86 ("he does have some hearing loss . . . that puts him at an inherent risk" around machinery); Ex. H at Int. No. 1 ("Wilfred Guy has suffered from a hearing impairment while incarcerated at Angola which has affected his ability to hear in both ears, though he is not completely deaf.")

B. Defendants' Policy of "No Hobbycraft" for Any Inmate with a Duty Status Facially Violates the ADA/RA.

As described above, public entities "shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities" from programs or services.[20] Even if the screening is not a 100% bar, but only "diminish[es] an individual's chances of such participation," it violates the law. *Hahn ex rel. Barta v. Linn County, Ia*, 130 F.Supp.2d 1036, 1055 (N.D. Iowa, 2001).

Thus, when public entities have a blanket prohibition for a service that excludes disabled persons, federal law is "clearly" violated. *E.g., Stillwell v. Kansas City, Mo. Bd. of Police Com'rs*, 872 F. Supp. 682 (W.D. Mo., 1995) ("The issue is whether the Board's blanket prohibition on all one-handed license applicants constitutes 'discrimination.' Clearly it does."). Indeed, blanket prohibitions are contrary to the notion that covered entities must engage in a good faith interactive process with an individual with a disability about their needed accommodation(s).[21]

Here, Defendants have a blanket policy that screens out persons with disabilities. Per LSP Directive 9.036, ***any*** inmate "under medical care and/or treatment, requiring a duty status" is prohibited from using Angola's hobbyshop. Ex. B at 2. And thus, those inmates are shut out of an opportunity to earn income. *See* 22 LAC § 313(F)(7)(b) (describing process by which inmates can be paid for selling what they make in the hobbyshop).

The hobbyshop is so significant to prisoners that "loss of hobby craft" is listed in the Louisiana Administrative Code as a "high court" punishment. 22 LAC § 341 (K)(2)(c). Thus, as a

[20] 28 C.F.R. § 35.130(b)(8); *see also* 28 C.F.R., Appendix B to Part 35 (the ADA prohibits "the establishment of exclusive or segregative criteria that would bar individuals with disabilities from participation in services, benefits, or activities.")
[21] *E.E.O.C. v. Chevron Phillips Chem. Co., LP*, 570 F.3d 606, 621 (5th Cir. 2009).

result of the DOC's policy stated in Directive 9.036, any person with a disability who is given a duty status by a doctor is automatically subjected to an explicit *punishment*.

Nor do Defendants make modifications to their no-hobbycraft policy even if an inmate requests an accommodation. If a doctor applies the no-hobbycraft policy and gives an inmate with a disability a "no hobbycraft" duty status, the DOC's ADA coordinator will not even *consider* changing it. As Angola's ADA coordinator Tracy Falgout testified as one of the DOC's Rule 30(b)(6) representatives, in that situation, he was "not going to make a determination outside of what my doctors are going to recommend." Ex. A at 17:13-17:15.

But the doctors are not making a reasoned medical decision to add "no hobbycraft" – they are just following the rules laid out in Directive 9.036. And the ADA Coordinator's refusal to consider a duty status change is especially shocking considering that the Louisiana Administrative Code *explicitly* lists a "change in duty status" as a method for the ADA coordinator to make an accommodation. 22 LAC § 308(E)(2)(b).

Thus, the DOC's blanket application of the Directive 9.036 no-hobbycraft policy entirely flunks the "individualized review required by the ADA" for persons with disabilities. *See Rodriguez v. Conagra Grocery Products Co*., 436 F.3d 468, 476 (5th Cir., 2006). In *Rodriguez*, the Fifth Circuit held that an "assessment not reached in an individualized manner is not an assessment that we can credit." *Id.* at 476 ("In its *Sutton*, *Toyota Motor Manufacturing*, and *Murphy v. UPS, Inc.* decisions, the Supreme Court repeatedly emphasized "the individualized approach of the ADA.").

The Supreme Court has specifically emphasized that an "individualized assessment of the effect of an impairment is particularly necessary when the impairment is one whose symptoms vary widely from person to person." *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 199 (2002).

Here, the DOC's own documents highlight the fact that "All deaf people are not alike." Ex. J ("Communicating Effectively with Deaf or Hard-of-Hearing Offenders") at 14.[22]

Thus, a policy that makes general assessments without consideration of the particularized condition of a particular person with a disability "runs directly counter to the *individualized inquiry mandated by the ADA*." *Kapche v. City of San Antonio*, 304 F.3d 493, 497 (5th Cir., 2002) (emphasis in original). In *Kapche,* the Fifth Circuit found that a city's guidelines that classified persons without an individualized inquiry was "contrary to both the letter and the spirit of the ADA." *Id.* at 498, *citing Bragdon v. Abbott*, 524 U.S. 624 (1998). In *Shaikh v. Texas A&M Univ. Coll. of Med.*, the Fifth Circuit explained that it is discriminatory under the ADA to exclude someone because they might be a liability.[23]

Considering the black-letter "individualized inquiry" requirement of the ADA, it is not surprising that this Court has looked at Angola's Directive 9.036 "no hobbycraft" rule in two cases and treated it with suspicion both times, although the Court has not yet reached the merits on the issue. In the first case, *Reeves v. LeBlanc*, this Court held that a *pro se* plaintiff with "flat feet" had stated an ADA claim when "no hobbycraft" was added to his duty status of "sitting job, no prolonged walking, standing [or] sports." 13-0586, R. Doc. 5 (M.D. La., Oct. 23, 2014). The Court did not fully decide the issue on the merits due to a statute of limitations problem.

Subsequently, in *Lewis v. Cain,* this Court cited directly to Directive 9.036 for the proposition that "[e]vidence was presented showing that disabled inmates with a duty status were

[22] It is particularly disturbing that LSP has this facially discriminatory policy because it is a facility particularly designated by the state to "house deaf and hard of hearing inmates" and is a facility directed that "Special attention will be focused on its responsibility to these individuals." Ex. J at 25.

[23] *Shaikh v. Texas A&M Univ. Coll. of Med.*, 739 F. App'x 215, 223 at n. 9 (5th Cir. 2018)

prohibited from certain programs and activities" 15-cv-318 (M.D. La., Feb. 26, 2019), *citing* Rec. Doc. No. 358-4 at 152 (Directive 9.036).

Now, this Court can finish the analysis it began in *Reeves* and *Lewis,* and finally declare that Directive 9.036's "no hobbycraft" rule for disabled inmates with duty statuses facially violates the ADA/RA because it "tend[s] to screen out . . . any class of individuals with disabilities.

C. The DOC Caps the Pay of a Class of Disabled Persons – Those with a Limited Duty Status – at 4 Cents Per Hour. This Policy Facially Violates the ADA/RA.

Inmates at Angola must work, and they receive pay for that work at rates ranging from 2 cents per hour to $1.00 or more per hour. *See* Ex. D (LSP Directive 19.001) at 2, 4. Inmates can receive annual raises of up to 4 cents per hour, and can be paid 14 to 100 cents per hour for participation in certification programs like the Baptist Theological Seminary or the Corrections Education Association. *Id*. at 4, 5. But for one category of inmates, pay is capped at 4 cents per hour. That category is: "All offenders classified in Limited Duty status (as defined in Health Care Policy HC-15) and who are eligible to earn incentive wages shall earn at a rate of no more than $0.04 per hour." *Id*. at 3."Limited Duty" is defined in Health Care Policy HC-15 as for those inmates who are "unable to perform full-time work or educational assignments due to health-related reasons." Ex. C (DOC Policy HC-15) at 4.

The problem here is obvious: an inmate who is "unable to perform full-time work or educational assignments due to health-related reasons" is by definition a person with a disability under the ADA/RA. That is because an individual has a disability if he has "a physical or mental impairment that substantially limits one or more major life activities" (42 U.S.C. § 12102(1)(A)) and "working" and "learning" each are a "major life activity" (42 U.S.C. § 12102(2)(A).)

The DOC has thus explicitly identified a class of persons with disabilities – those with Limited Duty status – and ruled that they cannot be paid as much as other inmates. This is almost

comically violative of the ADA/RA. Specifically, the DOC policy capping pay for Limited Duty inmates facially violates the prohibition on criteria that prevent any class of persons with disabilities from "equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered." 28 CFR § 35.130(b)(8).

Here, Mr. Guy was subject to this policy. On October 31, 2016, he was assigned to "LIMITED DUTY." Ex. F. And at no point thereafter was he ever paid more than 2 cents per hour. *E.g*., Ex. G (Incentive Pay Log) at 5 (showing "PAY RATE" of ".020").

It should go without saying: a government entity cannot identify a class of disabled persons and say that they will get paid less than other persons for the same work. Accordingly, this Court should find that the DOC's pay cap for disabled persons violates the ADA/RA.

D. Defendants Violated the ADA/RA When They Barred Mr. Guy From Any Paying Work Whatsoever Due to His Disability.

As described above, Louisiana law requires that the DOC "shall provide employment opportunities and vocational training for all inmates, regardless of gender, consistent with available resources, physical custody, and appropriate classification criteria" (R.S. 15:832(A)), and inmates are paid for the work (Ex. A at 130).

Defendants concede that even "with his hearing impairment, Mr. Guy is capable of doing some of the paid jobs at Angola," such as working as a dorm orderly, tier walker, or office clerk. Ex. I at RFA Nos. 10-13. And at times, he did have a paying job. Ex. A at 118.

But for two periods in 2016 and 2017 totaling approximately nine months, Mr. Guy was not paid a single cent. Ex. A at 120-121. He had not been terminated from a job or put on extended lockdown – he just was not given any paid hours. *Id*. at 120-122.

According to Mr. Guy, his lack of incentive pay was due to the fact that he was (1) assigned to filed work but (2) had a "out of field" duty status. As a result, he "had to go out by the gate and show my duty status, and then they [would] turn me around." Ex. N at Page 62:5 to 62:6. He would "go back to the dorm," and was required to do janitorial work without pay. *Id.* at Page 62:8 to 62:22.

Mr. Guy's explanation is corroborated by the DOC's records and testimony, which show that he was "assigned to work in the field" (Ex. A at 134) and also had a permanent "out of field" duty status with the reason being "hearing impaired." Ex. E. And in Mr. Guy's circumstances, the DOC testified that "because of where he is housed . . . he does not have the opportunity to request a new job." Ex. A at 149; *see also id.* at 170-171 (if he had filled out a job change form "he would be given it back because of the fact of where he's housed, his job comes along with that housing.") As a result, Mr. Guy "would have to stay in his cell" instead of going out to do paid work. Ex. A at 150. He didn't receive a paying job until the mattress factory requested him in 2017 because they were below "quota." Ex. A at 163.

Even after an investigation, the DOC could not proffer <u>any</u> non-discriminatory reason why Wilfred Guy was not getting paid hours from May 2016 to October 2016.[24] Likewise, from March 17 to May 23, 2017, the DOC testified that "he was on limited duty. He didn't even have a job assignment." Ex. A at 141. For that period as well, the DOC could not identify any non-discriminatory reason why he "was not working for those for those three months or didn't receive any pay." *Id*. at 143.

[24] Ex. A at 139 ("Q. . . . [S] sitting here today at the deposition, though, you don't have any information for me about why Mr. Wilfred Guy didn't work for those six months? A. No.").

Compare with 30(b)(6) deposition topic Number 8, in Exhibit M ("The reasons why Wilfred Guy received no incentive pay from January 2015 to August 2015, November 2015 to December 2015, May 2016 to October 2016, March 2017 to May 2017.")

In fact, the DOC's representative testified that the *only* reason they could think of that an inmate would "go months without pay" was because of "a duty status, like if they have out of field, like I said before, no prolonged walking, squatting, standing, whatever the restrictions may be, until that is lifted, they can't go to work if that specific job they are assigned to requires those things." Ex. A at 144-145.

Thus, Mr. Guy received no pay at all for approximately nine months, solely because of his hearing impairment – even though he was qualified to do some Angola jobs. This is a violation of the ADA/RA. *See Miraglia v. Bd. of Supervisors of Louisiana State Museum*, 901 F.3d 565, 574 (5th Cir. 2018) (Illegal to deny a person the benefits of a government activity by reason of their disability.)

E. Mr. Guy Has Experienced Discrimination Because Inmates at Angola are Automatically Given "No Sports, No Hobbycraft, No Rodeo" if they have a Duty Status, without any Individualized Assessment.

There is no doubt that "both the ADA and the Rehabilitation Act impose upon public entities an affirmative obligation to make reasonable accommodations for disabled individuals."[25] The State of Louisiana's categorial refusal to permit individuals with a disability to participate in sports, hobbycraft, or the rodeo constitutes a *per se* violation of the ADA.

1. The State of Louisiana Has a Rigid Policy that Individuals with Disabilities are Prohibited from Participating in Sports and Rodeo — Regardless of the Individualized Circumstances.

When the DOC gives an inmate at Angola a duty status – any kind of duty status – they also give him a "no sports, no hobbycraft, no rodeo" duty status. As described above, the automatic "no hobbycraft" restriction is required by written policy (Ex. B at 2), and the addition of "no sports" and "no rodeo" restrictions is the common practice.[26]

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[25] *Bennett–Nelson v. La. Bd. of Regents*, 431 F.3d 448, 454 (5th Cir. 2005).

[26] Ex. A at 59 (default policy is that "if an offender has a restricted duty status, then he shouldn't participate in recreation, he shouldn't participate in sports, or hobby craft"); *id.* at 51 (DOC's

This practice results in restrictions that are absolutely unconnected to medical need. For example, inmates with duty statuses conditions such as "flat feet" or "genital warts" also receive the "no sports, no hobbycraft, no rodeo" restriction.[27]

The DOC's medical director and 30(b)(6) witness, Dr. Lavespere, acknowledged that the rodeo is risky for even non-disabled inmates, but those inmates can "voluntarily choose to accept the risk and participate in the rodeo." Ex. A at 63. They can do so even though there are "hundreds" of risks for inmates, including "heat stroke," "concussions," "broken bones," "hematomas," "head trauma," "problems with their eyes." Ex. A at 63-64. By contrast "an inmate who receives a no rodeo restriction because of their disability, those inmates can't choose to participate in the rodeo." *Id.*

Why are inmates without disabilities allowed to take on these risks, but not inmates with disabilities? The medical director explained why: **personal liability to the head of medicine**. He testified:

> Those inmates won't be allowed to participate in the rodeo because then **I assume some liability** in that case because if I know that they have an impairment of some type, say if a guy broke his leg and he's not healed, and I allow him to go out there in the rodeo, and he rebreaks his leg, or say he injures himself severely where he is crippled, I can't tell you how many lawsuits I would get because I let him go back out in the rodeo.

30(b)(6) witness could not identify a single inmate "having a duty status but nonetheless having the ability to participate in sports, hobby craft, or rodeo"). *See also Hacker v. Cain*, 14-cv-63 (M.D. La. June 6, 2016) (inmate with cataracts had "no sports, no hobbycraft, no rodeo" added to duty status); *Adams v. Cain*, 13-cv-530 (M.D. La., Jan. 26, 2016) (inmate with neck and back pain had "no sports, no hobby craft, [and] no rodeo" added to duty status).

[27] *Reeves v. LeBlanc*, 13-cv-586 (M.D. La., Oct. 23, 2014) (inmate with flat feet had "no sports, no hobby craft, [and] no rodeo" added to duty status); Plaintiff's Undisputed Fact No. 10 (inmate with genital warts had "no sports, no hobby craft, [and] no rodeo" added to duty status).

Ex. A at 63 (emphasis added).[28] *Compare with Shaikh, supra,* 739 F. App'x 215 at n. 9 (5th Cir. 2018) ("the Dean of Admission's statement that Shaikh 'was a liability for psychiatric reasons' demonstrates some discriminatory animus.")

Note that the DOC's 30(b)(6) representative was not talking about some specific disabilities that cause an extraordinary risk (*e.g.,* hemophilia). He was talking about **any** inmate with "an impairment of some type." *Id.*

Likewise, the DOC conceded that hobbycraft can be dangerous for disabled and non-disabled inmates alike – they both face the risks of "cutting your fingers off, boards falling and hitting you, tripping and falling into a saw. . . . There's all kinds of injuries that we see related to hobby craft. . . . I have sewn up 100 of them. I have sent them to the hospital on the street for amputations." Ex. A at 65, 75. The DOC lets nondisabled inmates work in the hobby shop "until 1:00 or 2:00 o'clock in the morning" leading up to the rodeo, even though that results in "router

[28] In his deposition, Dr. Lavespere repeated the theme of *personal or institutional liability* over and over again as being a reason why he excluded disabled inmates from the programs, services, and activities available to non-disabled inmates at Angola:

- "I try to keep the offender safe, and I try to **keep the institution from having liability**." Ex A at 58.
- "[W]e try to be fair to the offender **keeping the liability off the penitentiary.**" *Id*. at 60.
- "So he is not happy about it, but he understands the health risk involved, and the **liability on the institution**." *Id*. at 63-64.
- "Every duty status that I do, I look at the safety of the offender, and **the safety and liability on the institution**." *Id*. at 68.
- "You know, **it's strictly keeping liability off this facility**, what is safe for the inmate, and what is best for the facility." *Id*. at 70.
- "I don't think he needs to be working around loud machinery because if something were to happen, and a belt broke loose, and it was coming at him, and somebody tried to say, duck, and he couldn't hear them, and it hits him in the head, well, **then I would have to end up in court** explaining why I had him working around machinery, you know." *Id*. at 86.
- "Well, because of, again, the possibility of putting him at risk for harm, and putting the **liability on the institution**." *Id*. at 89.
- "[Y]ou have to be cautious this day and time because it's the **liability of the institution**, the safety of the institution, and the safety of the inmate." *Id*. at 90.

injuries, saw blade injuries, board injuries." Ex. A at 75. But just as with the rodeo, nondisabled persons are allowed to "accept that risk" and participate, and disabled inmates are not. Ex. A 63-65.

And just as with the rodeo, Angola's head of medicine lumped all persons with disabilities together. Speaking about **all** "folks with disabilities," he testified that "I don't think they should be able to work with saws in the environment that they're working in." Ex. A at 65-66.

The DOC's treatment of sports is similar to hobbycraft and rodeo. Sports at Angola include basketball, flag football, and "pickle ball." Ex. A at 20.

Dr. Lavespere issued Mr. Guy a "no sports" duty status (Ex. E), and testified that "I won't make an adjustment for sports" (Ex. A at 80). He was quick to testify that Mr. Guy, with his hearing impairment, would be at an "increased risk" of playing pickle ball:[29]

> **Q. So you can't tell me, for example, precisely how much greater risk Mr. Wilfred Guy would be at for playing pickleball than a non --**
> A. I can tell you he is at an increased risk.
> **Q. An increased risk?**
> A. Yes.

But in the same deposition, Dr. Lavespere confessed that *he does not know what the sport of pickle ball is*:[30]

[29]Ex. A at 71.
[30]Ex. A at 90.

> Q. And I think the only one that we haven't addressed is sports, and it's basically the same question. By the way, just so the record is clear, do you know what pickleball is?
> A. No. What is it?
> Q. I don't know. I was asking you. We don't know either.

So what is pickleball? It is a "paddle sport created for all ages and skill level"[31] that involves a perforated plastic ball "similar to a wiffle ball, but slightly smaller." The game "was designed to be easy to learn and play whether you're five, eighty-five or somewhere in between."[32]

This is a pickle ball:[33]

Thus, the DPS&C is banning Mr. Guy and other inmates with disabilities from sports they *cannot even identify or describe* with no opportunity for an "adjustment," even when those sports are low-intensity whiffle-ball-like games designed for children and the elderly.

This practice violates the ADA/RA's requirement of individualized assessments of an activity's risks and a person's needs, including in the sports context. *See Anderson v. Little League Baseball, Inc.*, 794 F. Supp. 342, 345 (D. Az. 1992) ("Defendants' policy amounts to a absolute ban on coaches in wheelchairs in the coachers box, regardless of the coach's disability or the field or game conditions involved. Regrettably, such a policy — implemented without public discourse

[31] https://www.usapa.org/what-is-pickleball/ (last accessed 2019/6/17).
[32] https://www.pickleball.com/what-is-pickle-ball-s/118.htm (last accessed 2019/6/17).
[33] https://topspintennis.ca/products/jugs-indoor-pickleball (last accessed 2019/6/17).

— falls markedly short of the requirements enunciated in the Americans with Disabilities Act and its implementing regulations."); *Shultz v. Hemet Youth Pony League*, 943 F. Supp. 1222, 1225-1226 (C.D. Cal. 1996) (failure of a baseball league to "make necessary and reasonable attempts to ascertain what modifications, if any, were plausible in order to accommodate Plaintiff's disability" violated ADA).

And the DOC's attitude is also directly contrary Section 504 of the Rehabilitation Act, "which prohibits 'paternalistic authorities' from deciding that certain activities are 'too risky' for a handicapped person." *Wright v. Columbia University*, 520 F. Supp. 789, 794 (E.D. Pa. 1981), *citing Poole v. South Plainfield Bd. of Ed*., 490 F. Supp. 948, 953-954 (D. N.J. 1980) ("The purpose of § 504, however, is to permit handicapped individuals to live life as fully as they are able, without paternalistic authorities deciding that certain activities are too risky for them.")

Here, Dr. Lavespere described his decision-making for inmates in almost literally paternalistic terms, denying Mr. Guy any choice because he didn't "know how smart he is":

> Q. How about the field and the away from machinery restriction? Are you willing to -
>
> A. I think that's a good decision. I think that keeps him out of situations where he could unknowingly hurt himself. I don't know what kind of education Mr. Guy has. I don't. I don't know how smart he is. I don't know what kind of decisions he makes, and when I don't know that, I try to make decisions that are best for him, best for his family, and best for the institution.

Ex. A at 92-93.

This process of blanket, non-individualized application of duty statuses violates the ADA/RA, and partial summary judgment should issue.

2. The State of Louisiana's Refusal to Modify Its Policy Violates § 35.130(b)(7)(i).

A public entity is obligated to modify its policies and procedures based on the individualized circumstances. In another deaf-rights case, the Court rejected that the defendant could provide auxiliary aids without evaluation of the individual's needs.[34]

Here, Defendants did exactly that – they denied Mr. Guy's request without any individualized assessment of his limitations or the risks associated with his impairment.

In 2012, Wilfred Guy was issued a permanent duty status of "no sports, no hobby craft, no rodeo." Ex. A at 40; Ex E. But Mr. Guy wanted to participate in these programs like other inmates, and so on March 8, 2017, he made a written request for accommodation specifically for access to "sports, hobbycraft, and rodeo, three programs that my hearing disability does not prevent me from being able to participate in." Ex. K (ARP) at 4.

On July 14, 2017, after more than four months, the DOC denied his request. *Id*. at 5 ("Your request for administrative remedy is denied."). To reach that denial, the DOC assembled a packet of documents for use in evaluating Mr. Guy's request for accommodation, and the documents were reviewed by Angola's ADA coordinator. Ex. A at 39.

But the coordinator (also the DOC's 30(b)(6) witness) conceded that nothing in the packet "explains how sports, hobby craft or rodeo would be dangerous for Mr. Wilfred Guy." Ex. A at 41. Nor could the DOC's 30(b)(6) witness identify any discussion with "Mr. Wilfred Guy's doctors or other medical providers" – or anyone else – about whether Mr. Guy could participate in sports, hobbycraft, or rodeo. *Id.* at 42.

They did not consult with medical providers, even though medical providers will in some cases modify a no-hobbycraft restriction upon request. Ex. A at 67-68.

[34] *Pierce v. D.C.*, 128 F. Supp. 3d 250, 272 (D.D.C. 2015).

Thus, the DOC system is set up so as to make it nearly impossible for inmates to achieve hobbycraft accommodations. It works like this:

1. LSP policy requires doctors to automatically add "no hobbycraft" to any medically-required duty status. Ex. B at 2.

2. Then, if an inmate requests a modification of that status, it is denied by the ADA Coordinator on the theory that "medical opinion is controlling" (Ex. A at 54) – even though "no hobbycraft" is a *policy choice*, not an individualized medical assessment.

3. And because of the idea that "medical opinion is controlling," the ADA coordinator does not even contact the doctor to see if a modification would be possible (*id*. at 42), even though the doctors say that they can make modifications upon request to specify which hobbycraft activities would be safe (*id*. at 67-68, 80-81).[35]

With sports and rodeo, it is even worse – there is not even the nominal possibility that the head of medicine might make an adjustment to a sports or rodeo duty status. Dr. Lavespere testified that although he will make "adjustments" to a no-hobbycraft duty status if requested as an accommodation, "I won't make an adjustment for sports, and I won't make an adjustment for rodeo." Ex. A at 69, 80. (By contrast, the Louisiana Administrative Code explicitly lists a "change in duty status" as a method for the prison to make an accommodation. 22 LAC § 308(E)(2)(b).)

LSP's ADA process is so dysfunctional that the Head of Medicine has literally *never* met with the ADA Coordinator to discuss the Americans With Disabilities Act or the Rehabilitation Act. Ex. A at 72. That is because each person thinks the <u>*other*</u> has the final say about accommodations:

[35] Dr. Lavespere testified that even though the written policy has not changed, he has started letting some offenders with duty statuses do hobbycraft upon request. Ex. A at 79. This in no way absolves the DOC of liability under the ADA. A policy that only "tends" to exclude persons with disabilities still violates the ADA. 28 CFR § 35.130(b)(8). And this exception process is only available if an inmate writes a letter to the head of medicine directly or approaches him directly. Ex. A at 79. By contrast, if the inmate completes a Request for Accommodation ARP and submits it to the ADA Coordinator, they simply get a flat denial.

The Head of Medicine testified that:

> "**[T]he ADA coordinator is in charge of making those final decisions**" (Ex A at 73) and "**Whenever he makes those ADA recommendations, I sign off on them**" (*id*. at 82).

But the ADA Coordinator testified that:

> "**[T]hose determinations come from medical** in dealing with the safety of the offender that is requesting accommodation" and so "**I'm not going to make a determination outside of what my doctors are going to recommend**." Ex. A at 16 - 17.

As a result, each side – medical and the ADA coordinator – thinks that they are relying on the decisions of the other. Based on this Kafkaesque process, Mr. Guy's request for reasonable modification was denied without the ADA Coordinator ever consulting with the doctor. Ex. A at 74 ("Q. Do you have any reason to believe that you did discuss Mr. Wilfred Guy with the ADA coordinator? A. I haven't.")

Under the policies and day-to-day practices that Defendants have implemented, individuals with disabilities who submit a request for reasonable modification do not receive an interactive dialogue or an individualized inquiry. Instead, as with Mr. Wilfred Guy, a packet of documents is assembled, and an automatic rejection is issued. This process violates the ADA's requirement of an individualized assessment and partial summary judgment should issue.

3. Mr. Guy's Faces the Real and Immediate Threat of Injury Because the State of Louisiana is Refusing to Permit him to Participate in Sports or Hobbycraft.

For his injunctive relief claim, Mr. Guy must demonstrate that he faces a "real and immediate" threat that he will experience a violation of the law again in the future. Mr. Guy readily satisfies that threshold.

The State of Louisiana concedes that Wilfred Guy can safely do certain hobby craft activities. Ex. A at 69 ("Now, leather work, painting, there's no inherent danger to him. He can do that all day.")

But they *also* concede that Wilfred Guy "still has the no sport, no hobby craft, no rodeo restriction." Ex. A at 43. And this is a "permanent duty status." *Id.* at 38. Accordingly, without Court intervention, Mr. Guy will continue to be barred from participation in hobby craft.

Similarly, Dr. Lavespere testified "I won't make an adjustment for sports, and I won't make an adjustment for rodeo." Ex. A at 69, 80. Accordingly, without Court intervention, Mr. Guy will continue to be barred from participation in any group sports at Angola for the foreseeable future – even extraordinarily low-intensity sports like pickleball.

F. The Discrimination Against Mr. Guy is "By Reason of His Disability" Because His Duty Status Says "REASON . . . HEARING IMPAIRED."

Finally, a plaintiff must establish a causal connection between his or her disability and the alleged discrimination to satisfy the ADA's "by reason of" requirement. *Sandison v. Michigan High Sch. Athletic Ass'n., Inc.*, 64 F.3d 1026, 1036 (6th Cir.1995); *Rhodes v. Ohio High Sch. Athletic Ass'n.*, 939 F.Supp. 584, 592 (N.D.Ohio 1996). If a plaintiff was excluded for a legitimate reason other than because of a disability, then that action does not violate the principles of the ADA. *Southeastern Community College v. Davis*, 442 U.S. 397, 410, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979)(explaining that purpose is to "eliminate discrimination against otherwise qualified individuals"). Under the RA, a plaintiff must establish that he was excluded "solely" by reason of his/her disability. *Soledad v. U.S. Dep't of Treasury*, 304 F.3d 500, 504 (5th Cir. 2002). In contrast, the Fifth Circuit has held that the that "the ADA does not require 'sole causation.'" *Pinkerton v. Spellings*, 529 F.3d 513, 519 (5th Cir. 2008)

Here, Defendants have prohibited Mr. Guy from participating in sports, hobbycraft, and the rodeo because of his disability. Defendants made this section of the analysis very easy: On September 6, 2012, he was issued a permanent duty status of "no sports, no hobbycraft, no rodeo,"

with an explicit description of the reason: "REASON: MEDICAL DIRECTOR REVIEW / HEARING IMPAIRED." Ex. E.

The listed "reason" easily satisfies the RA and ADA's "by reason of" causation requirement. But further, the DOC could identify **no reason** reflected in the documents underlying the ARP denial that "explains how sports, hobby craft or rodeo would be dangerous for Mr. Wilfred Guy." Ex. A at 41. In fact, the DOC conceded that there *are* hobbycraft activities like leather work and painting that represented "no inherent danger to him." Ex. A at 69.

For the other activities, such as sports, Dr. Lavespere claims that there is risk, but he admits he does know how much risk there would be for Mr. Guy to participate in football, pickleball, or any other sport. In fact, when pressed as to the different risk levels between non-disabled inmates and Mr. Guy, Dr. Lavespere admitted that any comparison of risk levels would be "pure speculation." See Ex. A at 70. However, decisions to exclude an individual with a disability must be based on "actual safety risks," and cannot be based on "mere speculation, stereotypes, or generalizations." 28 C.F.R. § 35.130(h). The State of Louisiana's exclusion of Mr. Guy from sports was based on mere speculation, stereotypes, and generalizations. Mr. Guy was excluded solely "by reason of" his disability.

Thus, because the explicit "reason" for Mr. Guy's restrictions is that he is "hearing impaired," the ADA's "by reason of" requirement is satisfied.

G. Mr. Guy's Remedy for the State of Louisiana's Violation of the ADA/RA.

In terms of the remedy for the State of Louisiana's violation of the ADA and RA, Mr. Guy requests that the Court order that the State of Louisiana modify its policies, procedures, and practices to comply with the applicable requirements of the ADA. In the Fifth Circuit, broad injunctive relief orders in ADA cases are not "clearly erroneous." In the case of *Johnson v. Gambrinus Co./Spoetzl Brewery*, the plaintiff brought suit over refusal of a brewery to permit him

to bring his service animal on a tour of the brewery. 116 F.3d 1052, 1055-56 (5th Cir. 1997). Following a finding for the plaintiff, the Court entered an injunction prohibiting an act (banning all service animals from the brewery tour) and ordering the defendant to consult the Department of Justice and submit a written policy incorporating that guidance. *Id*. at 1057. On appeal, the defendant argued that the injunctive relief Order was too broad and that the "district court had a duty to delineate the exact nature of the changes." *Id*. at 1064-65. The Fifth Circuit rejected this argument, holding that the district court had "no such obligation" and that the injunctive relief order was not clearly erroneous. *Id*.

Given the absence of a factual dispute as to whether the State of Louisiana violated the ADA and RA, Mr. Guy asks the Court to enter partial summary judgment on liability. The case can then be tried concurrently to the Jury and Court, with the Jury deciding the appropriate quantum of damages and the Court deciding the appropriate scope of injunctive relief. It is well established that a party does not have a right for a jury on injunctive relief. *See United States v. Reddoch*, 467 F.2d 897, 899 (5th Cir. 1972) (stating that, in "a suit for injunctive relief, not one at common law, there was no right to a jury trial").

H. The State of Louisiana Has Committed Intentional Discrimination per the Holdings of the Fifth Circuit.

To recover compensatory damages in a case regarding the failure to provide an accommodation a plaintiff must also make a showing of intentional discrimination. Here, the State of Louisiana had knowledge of Mr. Guy's disability, limitations, and needed accommodations, but chose not to accommodate. This constitutes intentional discrimination.

This issue of "intentional discrimination," however, is only applicable to Mr. Guy's claim for damages. The Fifth Circuit has explained that the issue of "intentional discrimination" is an *additional* element of a claim for damages. *See Windham v. Harris Cty.*, 875 F.3d 229, 235 n.5

(5th Cir.2017) ("To recover compensatory damages for disability discrimination under Title II of the ADA, a plaintiff must **also** show that the discrimination was 'intentional' in the sense that it was more than disparate impact."). Conversely, no showing of intentional discrimination is required for a plaintiff to recover injunctively relief.

1. *Under Fifth Circuit Precedent, Failure to Accommodate Despite Knowledge of a Plaintiff's Disability, Resulting Limitation, and Necessary Accommodation Constitutes Intentional Discrimination.*

The panel in *Delano-Pyle v. Victoria Cty., Tex.*, 302 F.3d 567 (5th Cir. 2002) was confronted with an individualized need for an accommodation: an arrestee who alleged that the local police entity failed to adequately accommodate his hearing impairment during the process of arresting him for driving while intoxicated. *See Delano-Pyle*, 302 F.3d at 570. No matter how many times the arrestee repeated himself and no matter how loudly he spoke, the officer could not understand most of what he was saying. *See id*. at 575. The officer attempted to accommodate the Deaf individual by writing his Miranda warnings on a blackboard. *See id*. at 571. The Jury found that the Defendant committed intentional discrimination and the Fifth Circuit sustained that finding. *See id*. at 571, 576.

Subsequently, in *Perez v. Doctors Hosp. at Renaissance, Ltd.*, 624 F. App'x 180, 185–86 (5th Cir. 2015) the Fifth Circuit was again presented with a deaf individual who was seeking an individualized accommodation. In that case parents who were deaf and hard of hearing took their four-month-old daughter to the emergency room at a hospital. *Id*. at 182. The plaintiffs put forward testimony that on several occasions, an interpreter was requested but not provided. There was also evidence indicating that one of the forms of communication that the defendant-hospital was utilizing, the VRI machines, was often ineffective. The District Court granted summary judgment to the defendant. The Fifth Circuit determined that the summary judgment evidence was sufficient

to create a genuine dispute as to whether the defendant intentionally discriminated against the plaintiffs. Specifically, the Fifth Circuit noted that:

> "In *Delano–Pyle*, the plaintiff did not show he ever requested an interpreter or auxiliary aid, yet we concluded that the failure to provide an effective form of communication was evidence of intentional discrimination. Here, some evidence indicates that the plaintiffs made repeated requests for auxiliary aids, yet DHR failed on several occasions to provide effective aids and in some instances refused to provide an interpreter after one had been requested. We conclude that, even without applying a deliberate indifference standard, there is a genuine dispute of material fact as to whether DHR intentionally discriminated against the plaintiffs."
>
> *Id*. at 185-86 (emphasis added).

A public entity is put on notice of a disabled individual's need for accommodation either through a request for accommodation, or when "the disability, resulting limitation, and necessary reasonable accommodation" [are] open, obvious, and apparent to the entity's relevant agents." *Windham v. Harris Cty., Texas*, 875 F.3d 229, 237 (5th Cir. 2017) (internal citations, quotations, and alterations omitted). The Fifth Circuit has explained that a disability can be "obvious" where the relevant agent either "knew or should have known" what sort of accommodation was needed. *Id*. at 237-38. Where the public entity has an opportunity to accommodate the known needs of a person with a disability and yet fails to accommodate, the public entity may be held liable for intentional discrimination. *See Miraglia*, 901 F. 3d at 575.

In the case of *Shaikh v. Texas A&M Univ. Coll. of Med.*, the Fifth Circuit explained that intentional discrimination is conduct that is either "purposeful" discrimination or animus-based discrimination.[36] The Court went on to explain that the plaintiff adequately alleged intentional discrimination where he pled that college officials were aware of his mental limitations, that those limitations impaired his ability to take an examination, but that the college officials constructively

[36] 739 F. App'x 215, 223 at n. 9 (5th Cir. 2018).

dismissed him for failing to retake the examination.[37] The Court stated that the Dean of Admission's statement that the plaintiff "was a liability for psychiatric reasons" demonstrates some discriminatory animus.[38] Excluding an individual with a disability because they might be a "liability" is wholly impermissible and constitutes animus-based discrimination.

2. *The State of Louisiana Committed Intentional Discrimination Because it Had Knowledge of Mr. Guy's Disability, Limitations, and Needed Accommodations, but Chose Not to Accommodate Mr. Guy.*

As before, the State of Louisiana made this section of the analysis very easy. On March 8, 2017 Mr. Guy made a written request for accommodation specifically for access to "sports, hobbycraft, and rodeo, three programs that my hearing disability does not prevent me from being able to participate in." Ex. K (ARP) at 4. In his written request Mr. Guy identified his disability and his needed accommodation. On July 14, 2017 the DOC denied Mr. Guy's request. *Id*. at 5.

The State of Louisiana made an intentional choice to deny Mr. Guy a reasonable accommodation. The State of Louisiana's employees had more than four months to review, consider, and draft a response to Mr. Guy's request for accommodation. As is set forth above, Defendants' ADA coordinator admitted that he did not even speak to Dr. Lavespere prior to denying Mr. Guy's request for reasonable accommodation. The State of Louisiana made no attempt to determine the risks of hobbycraft or sports, accommodations or auxiliary aids that would help alleviate these unidentified risks, or otherwise ensure that Mr. Guy was not being subjected to discrimination. In fact, as is set forth above, the decision to exclude Mr. Guy was made, in part, as a result of a self-serving interest of avoiding personal or institutional liability. As is set forth by the Fifth Circuit, this self-serving interest goes beyond mere "intentional discrimination" and, in fact, sounds in animus-based discrimination. *Shaikh*, 739 F. App'x at 223 at n. 9.

[37] *Id*.
[38] *Id*.

In any event, Defendants' ADA coordinator confirmed that he and Tiffany Bellue intentionally refused to grant Mr. Guy's written request for accommodation. Tracy Falgout testified that Tiffany Bellue typed and drafted the response to Mr. Guy's request for accommodation.[39] She then signed it as drafted.[40] Mr. Falgout also made the choice to sign and initial the response to Mr. Guy's ARP as-drafted.[41] He didn't "accidently initial" the document.[42] Likewise, in the second step response to Mr. Guy's ARP, the secretary or his designee made an intentional choice on how to respond to Mr. Guy.[43] The intentional response by the State of Louisiana did not even respond to Mr. Guy's request to be removed no sports, no hobbycraft, and no rodeo restrictions.[44]

Mr. Guy further notes that it would be legal error for this Court to generically submit all issues to the Jury. Each violation of the ADA must be analyzed separately. Indeed, just recently in the case of *Hamer v. City of Trinidad*, the Tenth Circuit Court of Appeals held "that a public entity violates Title II of the Americans with Disabilities Act and section 504 of the Rehabilitation Act each day that it fails to remedy a noncompliant service, program, or activity."[45] The ADA and RA are best analyzed under the "repeated violation doctrine" where each day an individual is denied access to a program, service, or activity constitutes a separate and actionable claim for relief.[46]

[39] Ex. A (Falgout Rule 30(b)(6) depo.), 47:15-25.
[40] *Id*.
[41] *Id*. at 48:1-11.
[42] *Id*. at 48:10-11.
[43] *Id*. at 52:7-53:7.
[44] *Id*. at 53:8-15.
[45] 924 F.3d 1093, 1097 (10th Cir. 2019)
[46] *Id*. at 1101 ("As shown below, the repeated violations doctrine 'transforms what would otherwise represent a single, time-barred claim A into a series of fresh claims, identified as claims B, C, D, etc.' ")

Mr. Guy's claims related to the State of Louisiana's denial of his written request for accommodation to participate in sports and hobbycraft, and other violations, easily satisfy the "intentional discrimination" test. Granting partial summary judgment on the issues described herein is necessary so that only those issues where there is a "genuine issue of material fact" are submitted to the Jury.

V. CONCLUSION

For the reasons set forth above, Mr. Guy's motion for partial summary judgment should be granted.

Respectfully submitted,

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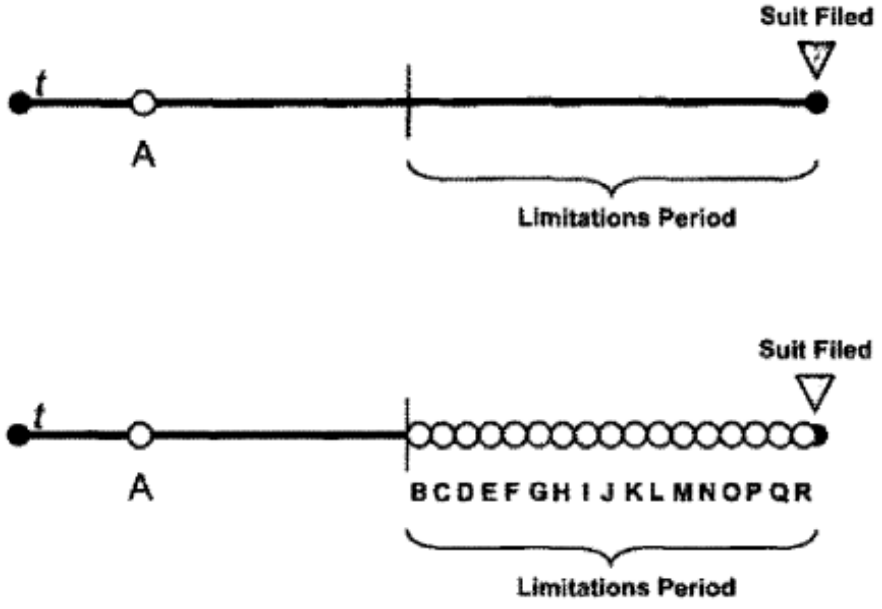

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2019, a copy of the Plaintiffs' *Memorandum in Support of Motion for Partial Summary Judgment* was transmitted to counsel for defendants, James "Gary" Evans, by operation of ECF.

/s/William Most
William Most