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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DONALD TERRILL, NICOLAS PANDO,
and MICHAEL WESLEY *individually, and on*
behalf of a class of others similarly situated,

Plaintiffs,

v.

STATE OF OREGON and COLETTE
PETERS, in her official capacity as Director
of the Oregon Department of Corrections,

Defendants.

NO. 6:21-cv-00588-AA

FIRST AMENDED CLASS ACTION
COMPLAINT

Americans with Disabilities Act (42
U.S.C. 12101 et seq.); Rehabilitation
Act (42 U.S.C. 794); Declaratory and
Injunctive Relief, and Damages

DEMAND FOR JURY TRIAL

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Plaintiffs and class members are people with disabilities incarcerated in Oregon Department of Corrections (ODOC) facilities. Plaintiffs seeks injunctive and declaratory relief from ODOC's discriminatory administrative rules and practices which require people with disabilities to pay for the durable medical equipment and/or healthcare appliances necessary for them to access the programs and services of the prisons. Plaintiffs and class members further seek reimbursement for amounts paid or wrongfully taken from their inmate trust accounts as garnishment for their disability-related accommodations.

JURISDICTION

1. This court has jurisdiction over the subject matter of this Complaint under 42 U.S.C. 12101 et seq., and 28 U.S.C. §§ 1331, 1343(a)(3), and 1343(a)(4).

VENUE

2. Venue is proper within the District of Oregon because all of the events giving rise to this claim occurred in this judicial district, and all defendants reside in this judicial district. 28 U.S.C. § 1391(b).

PARTIES

3. Plaintiffs Donald Terrill, Nicolas Pando and Michael Wesley are adults in custody currently residing at Snake River Correctional Institution (SRCI) in Malheur County, Oregon.

4. Defendant State of Oregon operates the Oregon Department of Corrections (ODOC) facilities. At all times relevant, the State of Oregon is obligated to accommodate people with disabilities lodged in its facilities.

5. Defendant Collette Peters is the Director of ODOC. At all material times she was acting

under color of law. She is sued in her official capacity. Her office is in Salem, Marion County, Oregon.

FACTUAL ALLEGATIONS

6. Mr. Terrill has a lower leg amputation. He requires a prosthetic leg in order to walk and to access all aspects of ODOC's facilities, such as meals, classes, recreation, the law library, and call outs.

7. He received his first prosthesis at ODOC in May 2013.

8. Ever since May 2013, ODOC has been garnishing Mr. Terrill's trust account to pay for the prosthesis.

9. According to the ODOC inmate trust account documents, Mr. Terrill has paid approximately \$10,675 towards the cost of his prosthesis, and still owes approximately \$14,415.

10. Mr. Terrill's ODOC Trust Account Statement has his debt listed as MEDA, short for Medical Advance.

11. Mr. Pando is hearing impaired and requires the use of hearing aids in order to hear and understand all communications so that he may access all programs and services of ODOC such as classes, programs, employment, recreation, communicating with friends and family, and hearing commands of corrections officers.

12. Mr. Pando was charged \$900 for new hearing aids. Like Mr. Terrill, his ODOC inmate trust account is docked monthly. He has paid about \$555 towards his hearing aids, and still owes \$345.

13. Mr. Pando's ODOC Trust Account Statement has his debt listed as ADAA, short for ADA Advance, or Americans with Disabilities Act Advance.

14. Mr. Wesley is a paraplegic and requires the use of his personal wheelchair in order to access all aspects of ODOC's facilities, such as meals, classes, recreation, the law library, and call outs.

15. ODOC refused to pay for repairs for Mr. Wesley's wheelchair, forcing him to pay for repairs. Mr. Wesley was required to pay up front by completing a CD28 form so that money could be taken from his trust account to pay for the repairs. He had the funds so he did not incur debt. His wheelchair requires regular maintenance, thus causing him to incur significant expense.

16. Charges for medical aids such as prosthetics, hearing aids and wheelchairs are covered in Oregon Administrative Rules (OAR) 291-124-0085 – **Charges for Elective Care or Treatment**. ODOC Health Services considers orthoses, prostheses, hearing aids, personal wheelchairs, and other mechanical aids to be “elective” devices when they are “not essential to prevent significant deterioration in the health of the AIC but are nevertheless reasonably expected to significantly improve the quality of life,”— OAR 291-124-0085(2)(b)—in other words, when they are accommodations that people with disabilities require in order to have equal access to the prison's programs, activities, and services.

17. Because ODOC Health Services considers prostheses, hearing aids, personal wheelchairs and other mechanical aids that are disability accommodations to be “elective” devices, it requires the person with a disability to pre-pay for the item and/or its repair, or incur indebtedness to obtain or repair the item, assuming ODOC Health Services approves the device or the repair. OAR 291-124-0085(2)(d). There is no provision regarding waiver of costs for indigent people.

18. Therefore, a person with a disability requiring an artificial limb in order to walk, a

hearing aid in order to hear, or a simple wheelchair repair in order to be mobile, must pre-pay or incur significant debt in order to access the prison facility and all of its programs and services.

19. On the other hand, OAR 291-124-0085(2)(a) does not require a person to pay for medical aids used for short term or acute medical conditions.

20. ODOC personnel were put on active or constructive notice that OAR 291-124-0085 was discriminatory and in violation of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973 (Rehabilitation Act or § 504) in the lawsuits of *Brown v. State of Oregon et al.*, District of Oregon Case No. 3:19-cv-01048-MO, Docket #13, First Amended Complaint, paragraphs 17-20 and 44; and *Wiese v. State of Oregon et al.*, District of Oregon Case No. 6:20-00864-MK, Docket #1, Complaint, paragraph 34.

21. Even though both the *Brown* and *Wiese* cases settled in 2020, ODOC continued to dock trust accounts of people with disabilities for their accommodations in the form of mechanical aids.

22. Upon information and belief, after the lawsuits mentioned in paragraphs 15-16, ODOC personnel took to writing some new Administrative Rules in order to better comply with the ADA. Yet, it appears there were no changes made to OAR 291-124-0085, and ODOC continues to dock the trust accounts of people with disabilities for their medical devices.

23. At least one other state, California, abandoned the practice of charging people with disabilities, indigent or otherwise, for their durable medical equipment or healthcare appliances several years ago. See Cal. Code Regs. tit. 15 § 3999.395 (“Appliances include, but are not limited to, eyeglasses, artificial eyes, dental prosthesis, artificial limbs, orthopedic braces and shoes, and hearing aids. . . . [P]rescribed appliances shall be provided at state expense.”)

24. Having to pay for their disability accommodations places Mr. Terrill, Mr. Pando and Mr. Wesley at a severe economic disadvantage as follows:

- a. People who are incarcerated must use their own funds in order to procure necessary and non-necessary items. Examples of items that people who are incarcerated can procure from the prison commissary are toothpaste, soap, shampoo, athletic shoes, underwear, TVs, music players, art supplies, books, magazines, snacks, coffee, envelopes, paper, postage, and other health and/or comfort items. According to a 2019 Oregonlive article, men who are incarcerated spend an average of \$22.35 a week on commissary items. It costs people who are incarcerated significant funds to correspond with friends and family such as making phone or video calls (all phone calls cost money, even if local). People who are incarcerated also use their own funds to accrue money to live on once released (transitional fund). This gives people who are incarcerated some breathing room to find jobs and housing before ending up on the streets.
- b. People who are incarcerated do not make minimum wage. For example Mr. Terrill has a job and currently makes approximately \$45 per month. By statute (ORS 423.105), 10% of his money goes to court ordered financial obligations (\$4.50), and 5% goes to his transitional fund (\$2.25). Per Oregon Administrative Rules, Mr. Terrill gets the remaining $\frac{1}{2}$ of the funds, \$19.125, while the remaining \$19.125 goes to pay for his prosthetic leg. Should a family member place money on his books, the administrative rules allow ODOC to take any amounts exceeding \$40 (including wages) per month. Therefore, incarcerated individuals with disabilities cannot save money because ODOC will take any funds remaining on their books at the end of the month. The practical effect

on incarcerated individuals with disabilities is that there is no point in having money on their books that exceed their wages, because ODOC will take it all. As a result, individuals who are disabled have far less to spend on commissary, than the average person who is incarcerated as described in the previous paragraph, and they cannot accrue funds to pay for more expensive items such as headphones or decent athletic shoes.

CLASS ACTION ALLEGATIONS

25. Plaintiffs bring this action pursuant to Rules 23(a), 23(b)(2), and 23(b)(3) of the Federal Rules of Civil Procedure on behalf of themselves and a class of similarly situated individuals.

26. The class that Plaintiffs seek to represent is defined as all people with disabilities currently and formerly in the custody of the Oregon Department of Corrections, who have been charged for durable medical equipment (DME) and/or healthcare appliances constituting disability accommodations including but not limited to prostheses, orthotics, necessary footwear, wheelchairs, wheelchair repairs, and hearing aids pursuant to Oregon Administrative Rules (OAR) 291-124-0085.

27. This action is properly maintainable as a class action for the following reasons:

- a. The Class is so numerous that joinder of all members is impracticable. It is estimated that there may be more than 1,000 members of the proposed Class; and
- b. There are common questions of law and fact which predominate over questions only affecting individual Class members; specifically, whether plaintiff and class members were charged for durable medical equipment and/or healthcare appliances in violation of the ADA and/or Rehabilitation Act.

28. The Plaintiffs' claims are typical of the claims of the other members of the Class in that

all members of the Class have been and will be damaged by the Defendants' actions.

29. The named Plaintiffs are committed to the vigorous prosecution of this action and have retained competent counsel to do so. Accordingly, Plaintiffs are adequate representatives of the Class and will fairly and adequately protect the interests of the Class.

30. In enacting OAR 291-124-0085 and enforcing it in a discriminatory manner against Plaintiffs and Class members, refusing to stop enforcing the Rule, and continuing to charge Plaintiffs and Class members for DME and/or healthcare appliances, Defendants have acted in a manner generally applicable to the entire Class such that final injunctive relief and declaratory relief are appropriate for the Class as a whole.

31. The prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class which would establish incompatible standards of conduct for the Defendants, and adjudications with respect to individual members of the Class would as a practical matter be dispositive of the interests of other members of the Class not party to those adjudications and would substantially impair or impede the ability of non-party Class members to protect their interests.

32. A class action is superior to other methods for the fair and efficient adjudication of the controversy because Class members may have an individual interest that is too small for them to commence as an individual action.

CLAIM FOR RELIEF

(Americans with Disability Act 42 U.S.C. 12101 et seq., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 – Defendant State of Oregon)

33. Plaintiff realleges paragraphs 1-32.

34. Mr. Terrill, Mr. Pando, and Mr. Wesley bring this claim on behalf of themselves and all persons similarly situated.

35. The prisons comprising the Oregon Department of Corrections have been recipients of federal funds and are thus covered by § 504's mandate, which requires recipients of federal monies to reasonably accommodate persons with disabilities in their facilities, programs, activities, and services, and reasonably modify such facilities, services and programs to accomplish this purpose.

36. The prisons comprising the Oregon Department of Corrections are public entities within the meaning of Title II of the ADA, and provide programs, services or activities to the general public. Title II of the ADA has essentially the same mandate as § 504.

37. Plaintiffs and class members are qualified individuals within the meaning of the ADA and meet the essential eligibility requirements for the receipt of the services, programs, or activities of ODOC. Specifically, plaintiff and class members have disabilities that "substantially limit one or more major life activities," including but not limited to the general life activities of standing, walking, hearing, and other activities of daily living.

38. The Oregon Department of Corrections provides programs and services for § 504 and ADA purposes to people who are incarcerated, including but not limited to housing, meals, medical and mental health treatment, recreation, and work and educational programs.

39. Under the ADA and Rehabilitation Act, the Oregon Department of Corrections is required to accommodate people with disabilities in a manner which allows them to participate in the same programs, services, and activities as non-disabled people.

40. Plaintiffs and Class members need their durable medical equipment and/or healthcare

appliances as reasonable accommodations in order to participate in the programs, services, and activities of the prisons; including, for example, working, recreation, exercise, classes and other programs and services. Their needs for durable medical equipment in order to have comparable access to these programs, services, and activities as non-disabled people are well documented and obvious.

41. ODOC personnel have been and continue to be deliberately indifferent to Plaintiffs and Class members by requiring them to pay for their durable medical equipment and/or healthcare appliances in violation of the ADA and Rehabilitation Act as follows:

a. ADA regulations, under the general prohibitions against discrimination, clearly forbid placing surcharges on durable medical equipment necessary for people with disabilities to access prison programs, services, and activities. 28 CFR 35.130(f).

b. The OAR 291-124-0085 requirement that a person pay for their own durable medical equipment and/or healthcare appliances that constitute disability accommodations amounts to a surcharge as follows:

i. In ODOC prisons, people without disabilities do not have to pay any fee or charges to access yard, go to chow, attend programming or otherwise be incarcerated. Yet, people who have disabilities must expend considerable funds to access the same programs, services, and activities.

ii. In ODOC prisons, people without disabilities have access to durable medical equipment and/or healthcare appliances without charge. Yet, people who have disabilities must expend considerable funds for the same or similar equipment.

c. In addition, OAR 291-124-0085 violates the following federal ADA regulations:

i. 28 CFR §35.150(b)(1)(ii), which requires a public entity to provide a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is equal to that afforded others;

ii. 28 CFR §35.150(b)(1)(iv), which requires a public entity to provide a qualified individual with a disability the same aids, benefits, or services that are provided to others; and

iii. 28 CFR §35.150(1)(vii), which requires a public entity to provide a qualified individual with a disability the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

42. As a direct and proximate result of the ODOC administrative rule, defendant State of Oregon discriminates against Plaintiffs and Class members on the basis of their disability in violation of the Americans with Disabilities Act and Rehabilitation Act.

43. Accordingly, Plaintiffs and Class members are entitled to judgment against the State of Oregon for any amounts they have paid towards durable medical equipment and/or healthcare appliances in violation of 42 U.S.C. § 12101 et seq. and §504 of the Rehabilitation Act, and for attorney fees and costs pursuant to 42 U.S.C. §§ 12205 and 29 USC §794a.

DECLARATORY RELIEF

44. Defendant State of Oregon's practice of charging for durable medical equipment and/or healthcare appliances constituting disability accommodations for people with disabilities is ongoing and continues to violate Plaintiffs and Class members' rights under the Americans with Disability Act and Rehabilitation Act as alleged above.

45. Plaintiffs and Class members seek declaratory relief that OAR 291-124-0085 violates the Americans with Disabilities Act and Rehabilitation Act.

INJUNCTIVE RELIEF

46. Plaintiffs and Class members seek injunctive relief against Ms. Peters in her official capacity requiring ODOC to cease the practice of charging people with disabilities for any durable medical equipment and/or healthcare appliance in violation of the Americans with Disabilities Act and Rehabilitation Act.

WHEREFORE, Plaintiffs pray for relief as follows:

- a. That the Court certify the proposed Class and allow this case to proceed as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure;
- b. That Plaintiffs and the Class receive judgment against the Defendants for all amounts they have paid towards their durable medical equipment and/or healthcare appliances constituting disability accommodations;
- c. For a judgment of declaratory and injunctive relief declaring which portions of OAR 291-124-0085 violate federal law and preventing Defendants from continuing to enforce the illegal provisions;
- b. For reasonable attorneys' fees and costs pursuant to 42 U.S.C. §12205 and 29 USC §794a; and
- d. For such other and further relief as may appear just and appropriate.

DATED: 11/24/2021

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