

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

JAMES HANDWORK
Lake Erie Correctional Institution
P.O. Box 8000
Conneaut, Ohio 44030

Plaintiff,

v.

**THE OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION**
777 West Broad St.
Columbus, OH 43222

and

GARY C. MOHR
In his official capacity as Director of Ohio Department
of Rehabilitation and Correction
777 West Broad St.
Columbus, OH 43222

Defendants.

Civil Action No. 1:16-cv-00825
Judge Solomon Oliver, Jr.

**PLAINTIFF’S REPLY TO DEFENDANTS’ RESPONSE
TO PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

This Court should grant Plaintiff’s Motion for Summary Judgment. There is no genuine dispute as to the material facts of this case, and the applicable law is clear. The material facts are that (1) Plaintiff James Handwork has a hearing disability requiring him to wear two hearing aids, and (2) Defendants have denied him two hearing aids based on their policy that hearing disabled prisoners may have but one. The law provides that this denial is a violation of Mr. Handwork’s

rights under the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and the Eighth Amendment to the Constitution, and that Defendants are the only parties accountable for it.

I. The material facts are not in dispute.

A. Mr. Handwork requires two hearing aids.

The abundant and uncontroverted evidence establishes that Mr. Handwork requires two hearing aids. This evidence includes a history extending back for decades, recent documentation by medical providers, and corroboration by others. *See, e.g.*, Mr. Handwork's Complaint attesting to his history of binaural hearing loss since 1986 and documenting Trumbull Correctional Institution's 2005 provision of two hearing aids to him, Doc. 1, PAGEID# 3; his declaration stating the same, Doc. 15-9, PAGEID# 174-75; and reports by a prison-contracted audiologist and doctor in 2015 and 2016, Doc. 15-2, PAGEID# 166 and Doc. 15-3, PAGEID# 167, all confirming Mr. Handwork's need for two hearing aids. Defendants ignore all of this evidence except for Mr. Handwork's own sworn statements, which they attempt to dismiss with the ludicrous assertion that sworn testimony does not constitute evidence. Defendants' Reply to Plaintiff's Motion for Summary Judgment and Plaintiff's Opposition to Defendants' First Motion for Summary Judgment,¹ Doc.19, PAGEID # 320. Sworn testimony of any individual, including a party, always constitutes evidence. Moreover, Mr. Handwork corroborates his complaint and sworn declaration with ample evidence in other forms and from other sources.

Defendants do not proffer any contrary evidence (nor does any exist). Instead they repeatedly focus on a single fact: Mr. Handwork has not been written-up for any rule violation since 2006. Defendants ask the Court to conclude from Mr. Handwork's exemplary behavior that

¹ Hereinafter "Def. Reply."

he can fully and safely navigate life in prison without two hearing aids. However the fact that Mr. Handwork hasn't suffered every conceivable hardship that could be caused by his lack of two hearing aids does not excuse Defendants for the other suffering they inflict upon him. Mr. Handwork's pleadings, motions, sworn testimony, and other uncontested evidence have unequivocally established his difficulty communicating with other prisoners, following orders, hearing alarms, and hearing his boss and performing at his prison job. *See* Complaint, Doc. 1, PAGEID# 10, Exhibits to Complaint, Doc. 1-4, PAGEID# 16, Doc. 1-5, PAGEID# 17, Doc. 1-6, PAGEID# 18, Doc. 1-7, PAGEID# 19, and Doc. 1-8, PAGEID# 20-21, and Mr. Handwork's Declaration, Doc. 15-9, PAGEID# 174-75.

B. Defendants have a statewide policy that hearing disabled prisoners may have only one hearing aid even if two hearing aids are medically needed.

Defendants' audacious assertion that they have "no such unwritten or written policy," allowing hearing-disabled prisoners only one hearing aid, Def. Reply, Doc. 19, PAGEID# 322, flies in the face of all of the evidence of record in this case—including several documents that Defendants' own employees created. *See* Exhibits A-E to the Complaint, Doc. 1-4, PAGEID# 16, Doc. 1-5, PAGEID# 17, Doc. 1-6, PAGEID# 18, Doc. 1-7, PAGEID# 19, and Doc. 1-8, PAGEID# 20-21. These documents not only unambiguously establish that such a policy exists, but also show that the policy was invoked several times to deny Mr. Handwork the second hearing aid that he so clearly needs.

Defendants cannot create a genuine issue of material fact by telling the Court that they now disavow or wish to rewrite statements made by their own agents who possessed the authority and knowledge to make such statements. Yet they try: Defendants attempt to scapegoat an employee who confirmed that Lake Erie Correctional Institution ("LaECI") was following ODRC's "one hearing aid" policy, saying of Nursing Director Viets, "[t]he nurse is obviously mistaken." Def.

Reply, Doc. 19, PAGEID# 322. Of Defendants' Assistant Chief Counsel's recitation of the policy, Defendants say only that "it is not as clear cut as [Plaintiff] would like it to appear." *Id.* at PAGEID# 323. But in fact, the Assistant Chief Counsel's statement that is supposedly not "clear cut" could not be clearer. He wrote simply, "[t]he 'established protocol' is to ensure one working hearing aid." *Id.* Despite Defendants' contortions to extricate themselves from the obvious truth, the facts of this case, including the fact that the state has a "one hearing aid" rule, are not genuinely in dispute.

II. The law clearly establishes that Defendants have violated the ADA and the Eighth Amendment, and that they are the proper defendants in this suit.

A. Under the undisputed facts, Defendants are violating Mr. Handwork's rights under the ADA and Rehabilitation Act.

As they did in their Motion for Summary Judgment, Defendants assert the incorrect standard for Mr. Handwork to recover under his statutory claims. Def. Reply, Doc. 19, PAGEID # 324. Mr. Handwork is not required to make a showing of deliberate indifference to recover damages or an injunction for his statutory claims.²

Immediately after citing this incorrect standard, Defendants confusingly announce the correct elements of Mr. Handwork's statutory claims, but then argue that he does not meet one of them. Defendants assert, without providing legal or factual support, that their refusal to accommodate

² See *Doherty v. S. Coll. Of Optometry*, 862 F.2d 570, 573 (6th Cir. 1988) (outlining the *prima facie* case for disability discrimination, which is the same under the ADA and the Rehabilitation Act); *R.K. ex rel J.K v. Bd. Of Educ. Cf Scott Cty., Ky*, No. 5:09-cv-344jmh, 2014 WL 4277482 at *10 (E.D.Ky. Aug. 28, 2014) *aff'd* 637 F.App'x 922 (6th Cir. 2016) (the Rehabilitation Act provides for damages without any extra showing); *Kacmarik v. Mitchell*, No. 1:15-cv-2062, 2016 WL 4393988 at *1 (N.D. Ohio Aug. 18, 2016) (same as to ADA damages). Even if Mr. Handwork's statutory claims required him to show Defendants were deliberately indifferent to his serious hearing loss, Mr. Handwork meets this standard due to his Eighth Amendment claim discussed *infra*.

Mr. Handwork's hearing disability has not "subjected [him] to discrimination" as to his full participation in prison life. Def. Reply, Doc. 19, PAGEID # 324.

Contrary to Defendants' unsupported and unsupportable assertion, the United States Supreme Court has held in sweeping terms that the ADA protects state prisoners' access to *all* "recreational 'activities,' medical 'services,' and educational and vocational 'programs,'" that "prisons provide [to] inmates," which "at least theoretically 'benefit' the prisoners." *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 210 (1998). Courts have therefore upheld ADA claims where prisoners' disabilities prevented them from fully taking advantage of a prison "boot camp" activity, *Yeskey*, 524 U.S. at 210; from working in the prison kitchen or attending classes, *Hale v. King*, 642 F.3d 492, 497 (5th Cir. 2011); from participating in prison work, *see, e.g., Henderson v. Thomas*, 913 F.Supp.2d 1267, 1309 (M.D. Ala. 2012); from attending a school program, *Clarkson v. Coughlin*, 898 F.Supp. 1910, 1029 (S.D.N.Y. 1995) (finding that defendants-prison officials violated hard-of-hearing prisoners' ADA rights "[b]y their failure to make reasonable accommodations to facilitate full participation...in educational, vocational and rehabilitative contexts such as classes and counselling sessions;" or from accessing medical care, participating in visitation, hearing alarms or announcements, and, more broadly, from being able to "engage in the kinds of complex communications that are required to navigate one's way through the prison system." *Pierce v. D.C.*, 128 F. Supp. 3d 250, 276 (D.D.C. 2015) (granting plaintiff-deaf state prisoner's motion for summary judgment as to his disability discrimination claims).

Because of Defendants' policy and refusal to accommodate Mr. Handwork's hearing disability, he experiences constant and serious impediments in communicating with other prisoners, following orders, hearing alarms, and performing at his prison job. Complaint, Doc. 1, PAGEID#

10; Exhibits to Complaint, Doc. 1-4, PAGEID# 16, Doc. 1-5, PAGEID# 17, Doc. 1-6, PAGEID# 18, Doc. 1-7, PAGEID# 19, and Doc. 1-8, PAGEID# 20-21; Mr. Handwork's Declaration, Doc. 15-9, PAGEID# 174-75. Though Defendants may disagree, they have adduced no evidence to rebut the facts Mr. Handwork has established. Based on these undisputed facts, Defendants' policy and practice prevent Mr. Handwork's full and safe participation in prison life in violation of the ADA and Rehabilitation Act.

B. Under the undisputed facts, Defendants are violating Mr. Handwork's Eighth Amendment right to be free from cruel and unusual punishment.

Defendants' conclusion that hearing loss is not "sufficiently serious" to establish an Eighth Amendment claim is unsupported by law. Def. Reply, Doc. 18, PAGEID# 326. To the contrary, the law dictates that hearing loss constitutes a serious medical need for purposes of Eighth Amendment analysis.

Under the Eighth Amendment, a medical need is sufficiently "serious" *either* if it "has been diagnosed by a physician as mandating treatment" or when it "is so obvious that even a lay person would easily recognize" it. *Harrison v. Ash*, 539 F.3d 510, 518 (6th Cir. 2008); *see also Carter v. Chambers*, 408 F.3d 305, 311 (6th Cir.2005).³ Courts have recognized that treatable hearing loss like Mr. Handwork's is a serious medical need for purposes of this analysis. *See Gilmore v. Hodges*, 738 F.3d 266, 269 (11th Cir. 2013); *Cooper v. Johnson*, 255 Fed.Appx. 891, 892 (5th Cir. 2007); *Wheeler v. Butler*, 209 Fed. Appx. 14, 15 (2nd Cir. 2006); *Large v. Wash. Cnty. Det. Ctr.*, 915 F.2d 1564 (4th Cir. 1990). Mr. Handwork's need for two hearing aids has been diagnosed by an audiologist, confirmed by a physician, and recognized as obvious by his boss and others—facts

³ Defendants inexplicitly cite to *Blackmore* to support their argument, but it actually supports Mr. Handwork's position. *Blackmore* established the obviousness criterion in this Circuit, finding medical evidence was an unnecessary hurdle for at-risk prisoners to have to show. Def. Reply PAGEID # 325, *Blackmore v. Kalamazoo Cnty.*, 390 F.3d 890, 895 (6th Cir. 2004).

which Defendants do not contest. The facts being undisputed, the law is clear: Defendants' policy mandates deliberate indifference to Mr. Handwork's binaural hearing loss and thus violates his Eighth Amendment rights.

C. Defendants continue to misapply the doctrine of *respondeat superior*, the proper application of which establishes that they are the only proper defendants in this suit.

Defendants agree that the denial of Mr. Handwork's hearing aids was based on ODRC's "established protocol," Doc. 18, PAGEID # 321; that LaECI staff "contacted the ODRC" to discover and apply this protocol in Mr. Handwork's case, *id.* at PAGEID# 322; and that in general, as a "subcontractor" of the ODRC, "LaECI staff follows ODRC prison rules, regulations, and policies for ODRC inmates." *Id.* at PAGEID# 327. Although these facts remain undisputed, Defendants continue to allege that Mr. Handwork has sued the wrong parties, and that ODRC and Director Mohr may not be held responsible for the statewide policies they promulgate and require of their subcontractors.

When, as here, a private subcontractor acts pursuant to the state's controlling policies, the state is liable. *See Ford v. County of Grand Traverse*, 535 F.3d 483, 495 (6th Cir. 2008), citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978); Ohio Rev. Code §9.06(b)(3) (requiring all ODRC facilities to comply with ODRC policies); *see also* Black's Law Dictionary, 10th Ed. 2014 (West) (defining *respondeat superior* as "the doctrine holding an employer or principal liable for the employee's or agent's wrongful acts."). The ODRC cannot escape liability for its unconstitutional policies by hiding behind its private subcontractors. *See West v. Atkins*, 487 U.S. 42, 55-56 (1988). Because only Defendants, and not Corrections Corporation of America, have the power to rescind

their own policy and supply Mr. Handwork's needed hearing aid, they are the only necessary or proper defendants in this case.⁴

Plaintiff James Handwork respectfully requests that this Court apply well-established law to the uncontested and unambiguous evidence in this case to grant Plaintiff's Motion for Summary Judgment.

Dated this 7th Day of November, 2016.

Respectfully submitted,

s/ Freda J. Levenson
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⁴ Defendants have tried to cloud this case with an irrelevant (and untrue) allegation. They claim that when Mr. Handwork finally received *one* of the two hearing aids he needs, he did not operate it correctly. Defendants' First Motion for Summary Judgment, Doc. 12, PAGEID# 78; Def. Reply, Doc. 18, PAGEID# 329. In fact, it was the prison that failed to have that hearing aid calibrated correctly, and it had the device recalibrated only after Mr. Handwork's counsel intervened. But more to the point, this "fact" is completely irrelevant to this case's disposition: This case is about Defendants' refusal to provide Mr. Handwork with *two* hearing aids, not one. Defendants' continuing to raise this inaccurate and wholly immaterial "fact" should not be permitted to obscure the real issue: Mr. Handwork's undisputed, severe, and medically confirmed hearing deficiency can only be successfully treated by two hearing aids, and the state's unambiguous "one hearing aid" policy denies Mr. Handwork the treatment he needs to function fully and safely in the prison environment.

CERTIFICATE OF SERVICE

I certify that the foregoing Plaintiff's Reply to Defendants' Response to Plaintiff's Motion for Summary Judgment was electronically filed with the District Court of the Northern District of Ohio on November 7, 2016. The Court's electronic filing system will provide notice of this filing to all parties, and all parties may access this filing through the Court's electronic filing system.

s/ Freda Levenson
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