

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

ERIC WILBURN,

Plaintiff,

v.

INDIANA STATE OF,

Defendant.

Case No. 3:17-CV-59 JD

FINAL PRETRIAL ORDER

Pursuant to the order of the Court, the attorneys for the parties to this action appeared before the Court on May 26, 2022, for a conference under Rule 16 of the Federal Rules of Civil procedure.

Plaintiff was represented by Andrew Chabot and Defendant was represented by Andrew Upchurch.

Thereupon, the following proceedings were had and the following engagements and undertakings arrived at:

A. Jurisdiction

This Court has personal jurisdiction over the Plaintiff and the Defendant. The Court has federal question subject matter jurisdiction over the dispute because the applicability of the Americans with Disabilities Act and Prison Rehabilitation Act is at issue.

B. Issues and Joint Statement of Case

The question presented is whether the Defendant violated Plaintiff's statutory rights under the Americans with Disabilities Act or Prison Rehabilitation Act when the Defendant

punished the Plaintiff for not providing a urine sample for the Indiana Department of Correction Offender Urinalysis Program. Plaintiff's counsel indicated during the Final Pretrial Conference that he would consider whether it is necessary for the Plaintiff to proceed to trial on both an ADA and PRA claim. He additionally stated that he will submit a filing with the Court prior to trial indicating how he and his client intend to proceed.

Plaintiff's counsel further agreed during the Final Pretrial Conference that if there is no existing Eighth Amendment claim against the Defendant, it would be inappropriate to proceed on such a claim at trial. After reviewing the Amended Complaint, the Court has confirmed that there is not an Eighth Amendment claim pending against the Defendant in this lawsuit. The Amended Complaint, which is the operative complaint at this stage of the litigation, made clear that "Defendant State is not named for purposes of Mr. Wilburn's constitutional claims." (DE 34 at 2, 11.)

Finally, the parties agreed during the Final Pretrial Conference that any reference to or evidence of the Plaintiff's experience while on parole is outside the scope of this lawsuit and cannot be raised during trial.

C. Pending Motions

There is currently a pending Motion to Exclude/Objection/Motion in Limine regarding the "expert" testimony of Dr. Steven Kim and several other proposed limitations at trial. The motion requested that the Court exclude both Dr. Kim's anticipated testimony and the introduction of an affidavit Dr. Kim had prepared as part of this case. It also requested the Court grant two motions in limine. The Court granted the Plaintiff's motions in limine during the Final Pretrial Conference and reserved ruling on the Plaintiff's motion to exclude testimony from Dr. Kim. Defense counsel confirmed that the Defendant will not be introducing Dr. Kim's affidavit

into evidence, which eliminated the need for the Court to rule on that aspect of the Plaintiff's Motion to Exclude. The Court will issue a more detailed ruling on the Plaintiff's motion to exclude Dr. Kim's testimony closer to the start of trial.

The Defendant filed a motion in limine requesting seven limitations for trial. Plaintiff's counsel stated during the Final Pretrial Conference that there were no objections to the first six of the Defendant's motions in limine, and the Court subsequently granted the Defendant's first six motions in limine.

While Plaintiff's counsel indicated there were no objections to any of the Defendant's first six limitations, he did request more guidance on Defendant's Motion in Limine 5, which sought to preclude any "golden rule" argument during trial. Plaintiff's counsel explained that the Plaintiff wanted the jurors to be able to consider the harm that the Plaintiff allegedly suffered as part of his alleged punishment for failing to participate in required drug testing. The Court makes clear that the Plaintiff may ask the jury to consider the conditions of the Plaintiff's confinement for purposes of assessing any injury – to the extent the conditions are relevant to physical injury - without infringing on the Court's order regarding the Golden Rule motion in limine. However, the bar on Golden Rule argument prevents the Plaintiff from asking the jury to consider the Plaintiff's confinement for purposes of evoking sympathy. *See Ledford v. Lamartz*, 462 F. Supp. 3d 905, 912 (N.D. Ind. 2020); *Spray-Rite Serv. Corp. v. Monsanto Co.*, 684 F.2d 1226, 1246 (7th Cir. 1982) *aff'd*, 465 U.S. 752 (1984) ("A 'Golden Rule' appeal in which the jury is asked to put itself in the plaintiff's position is universally recognized as improper because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence.") (internal citations omitted).

The Court reserved ruling on Defendant's Motion in Limine 7 because of outstanding questions about whether Dr. Byron Holm's anticipated testimony may constitute testimony of an expert witness under Federal Rule of Evidence 702. The Court will issue a ruling on Defendant's Motion in Limine 7 closer to trial.

D. Plaintiff's Contentions

Plaintiff's primary disputed contention is that he cannot initiate urination on command. Plaintiff contends that Defendant violated his statutory rights by first refusing to acknowledge his documented disability and to provide a reasonable accommodation for this disability. Defendant then punished Plaintiff for his disability, claiming that he refused to do what he could not do, assessing misconduct charges, changing his classification, and ultimately increasing the security level of his incarceration (from ISO to ISP). Plaintiff continued to seek relief through various administrative remedies and appeals processes provided through the DOC and State of Indiana, but even after succeeding in his appeal in May 2016, Plaintiff was kept in ISP until his release date in January 2017.

Plaintiff confirmed during the Final Pretrial Conference that he is only pursuing a failure to accommodate claim against the State of Indiana.

E. Defendant's Contentions

Plaintiff is capable of initiating urination on command. Even if he is not capable of initiating urination on command, this inability does not amount to a disability under the Americans with Disabilities Act such that the Defendant was required to provide an accommodation. To the extent the Plaintiff suffered a disability, the State did not know of the Plaintiff's disability or did not discriminate against him because of his disability.

Defendant's counsel confirmed during the Final Pretrial Conference that the Defendant is not disputing whether the Plaintiff's claimed disability itself legally qualified as a disability under federal statute but is instead disputing whether the Plaintiff can factually show that he had the disability he claims.

F. Contested Issues of Fact

Whether a pelvic crush injury of the type the Plaintiff suffered can cause difficulty initiating urination.

Whether the Plaintiff is capable of initiating urination within the timeframe established for the Offender Urinalysis Program without an accommodation by the IDOC.

Whether the Defendant punished Plaintiff because of his lack of ability to initiate urination.

Whether the Defendant's refusal to do a blood draw or catheterization prevented him from providing a urine sample for a drug screen.

Whether blood draws and/or mouth swabs were authorized for Plaintiff at various points in this litigation.

G. Contested Issues of Law

Whether the ADA or PRA requires IDOC to provide accommodations for a prisoner who claims to be incapable of initiating urination on command. The Court notes again that Defendant's counsel confirmed during the Final Pretrial Conference that the Defendant is not challenging whether the Plaintiff's claimed condition legally qualifies as a disability under federal statute, but instead whether the Plaintiff can factually show he had the disability.

Whether the ADA or PRA requires IDOC to provide accommodations for a prisoner upon documentation provided by a primary care physician that indicates the need for an accommodation.

H. Damages

Plaintiff's counsel indicated during the Final Pretrial Conference that the Plaintiff was intending to seek both compensatory and punitive damages in this case. The Court explained during the Final Pretrial Conference that the Plaintiff cannot recover punitive damages for an ADA or PRA claim, pursuant to *CTL ex rel. Trevatoski v. Ashland Sch. Dist.*, 743 F.3d 524, 528 (7th Cir. 2014) (citing *Barnes v. Gorman*, 536 U.S. 181, 189 (2002)), and encouraged the parties to look into the case to confirm their agreement.

The parties did not dispute that the Plaintiff's claims are governed by the Prison Litigation Reform Act because the Plaintiff filed his ADA and PRA claims while he was incarcerated. The parties additionally did not dispute that because the PLRA governs the Plaintiff's claims, he must show a non-de minimis physical injury as part of his case if he wants to receive compensatory damages. *See Shaw v. Wall*, 2015 WL 1925045 at *1 (W.D. Wis. Apr. 28, 2015) (citing *Cassidy v. Indiana Dep't of Corr.*, 199 F.3d 374, 375 (7th Cir. 2000)). Plaintiff's counsel stated that the Defendant's decision to lock the Plaintiff up in a more secure and less well-kept area of the prison facility was the only basis for physical injury that the Plaintiff intended to present at trial. Defendant's counsel stated during the Final Pretrial Conference that the Defendant disputes whether the Plaintiff having been transferred to a different location can constitute a physical injury sufficient to entitle the Plaintiff to compensatory damages. The Court anticipates that this issue will be resolved closer to the beginning of trial and will expect the parties to have relevant support for their respective positions.

Finally, the parties agreed that there are no pending requests for injunctive relief at issue in this lawsuit and that no such requests will arise as this lawsuit continues.

I. Stipulations

1. The Offender Urinalysis Program required a prisoner to urinate within a two-hour time period. Up to an additional hour was authorized at the discretion of the shift supervisor for physical *or psychological* impediments.
2. Mr. Wilburn was subject to drug testing at Indiana State Prison in 2016 at least five times.
3. Mr. Wilburn was transferred to “ISP” (Indiana State Prison Maximum Security Unit) in March 2016.
4. Mr. Wilburn remained in ISP until his release from IDOC in 2017.
5. IDOC receives federal funds for purpose of PRA.
6. Drug screens can also be done by blood draw or mouth swabs.

The parties confirmed during the Final Pretrial Conference that there is a factual dispute about whether drug tests by blood draw had been authorized for the Plaintiff in 2016 and therefore whether that fact could be the basis of an additional stipulation. The parties agreed that they would confer about whether available evidence may resolve this dispute and will file a document with the Court indicating the outcome of their discussion prior to trial.

J. Exhibits

1. Plaintiff’s List of Trial Exhibits

- a. Medical records relating to initial MVA which caused Plaintiff’s pelvic crush injury, including operative report, X-Rays, and others;

- b. Notes by Dr. Byron Holm produced to IDOC requesting accommodations for Mr. Wilburn;
- c. Communications between Mr. Wilburn and medical and prison staff;
- d. Housing classification sheets;
- e. Communications between Mr. Wilburn and appeal/review officers;
- f. Any and all documents necessary to refresh a witness's recollection, as well as those documents necessary for the purposes of impeachment, rehabilitation, or rebuttal;
- g. Any and all documents identified by Defendant.

2. Defendants' List of Possible Trial Exhibits:

- a. IDOC Policy and Administrative Procedure 01-02-107;
- b. Executive Directive 10-10 issued February 26, 2010;
- c. Executive Directive 10-56 issued December 1, 2020;
- d. Plaintiff's medical records maintained by Corizon Health, Inc;
- e. Any and all documents necessary for the purposes of impeachment, rehabilitation, or rebuttal;
- f. Any and all documents identified by Plaintiff.

The parties indicated during the Final Pretrial Conference that they did not have any objections regarding the authenticity of any of the proposed exhibits. However, they did indicate that they may raise other objections as deemed necessary as the exhibits are being offered for admission during trial. The Court will expect to resolve any objections to the exhibits as they are raised during trial.

K. Witnesses

1. Plaintiff's Witness List

- a. Eric Wilburn (Plaintiff) – will testify to his disability, his attempts to make the IDOC aware of his disability, their refusal to accommodate his disability, his conditions of confinement, his communications with IDOC, the effects of his being denied an accommodation, and any other claims or allegations relevant to the case. The parties agree that Mr. Wilburn will not be able to provide an opinion about diagnosis or causation during his testimony.
- b. Dr. Byron Holm (Physician) – will testify to Mr. Wilburn's disability and testify regarding the foundation and authenticity of the medical documentation he provided to IDOC on Mr. Wilburn's behalf. Dr. Holm will only testify as a lay witness.
- c. Ron Neal (Warden) – will testify as a supervisor within IDOC who has knowledge of the disciplinary matters and dispositions of this case and may be required to lay foundation and support for internal messages between IDOC staff relating to the initial punishment of Mr. Wilburn, the eventual dismissal of misconduct charges against Mr. Wilburn, and the reasons for those developments.
- d. Any other witnesses needed for purposes of impeachment, rebuttal, or verification/identification of a document

2. Defendant's Witness List

- a. Eric Wilburn (Plaintiff) – will testify to the nature of his alleged disability, his refusal to comply with the Offender Urinalysis Program, and the nature of the allegations raised in his Amended Complaint.

- b. Dr. Byron Holm (Physician) – will testify as a lay witness regarding his interactions and personal knowledge of Plaintiff’s alleged disability. Dr. Holm may also testify as to the authenticity of the documents he provided IDOC in 2005 and 2016.
- c. Willie Parnell (IDOC official) – may testify regarding his interactions with Plaintiff on January 5, 2016, during a requested urinalysis testing. This testimony may include a description of the Offender Urinalysis Program, how it is generally administered to offenders, and the consequences for offenders who fail to provide urine specimens during the allotted time.
- d. Dr. Steven Kim – may give a description of the documents he reviewed and personal knowledge he possesses of Plaintiff’s alleged inability to urinate on command in giving an opinion about Plaintiff’s alleged disability.
- e. Any other witnesses needed for purposes of impeachment, rebuttal, or verification/identification of a document

Plaintiff’s counsel stated during the Final Pretrial Conference that the Plaintiff might have an objection to Mr. Parnell’s testimony. The Court stated that any objections not already presented in the pending motion in limine or motion to exclude will be resolved as necessary during the course of trial.

L. Trial Documents

As the Court stated at the Final Pretrial Conference, the Court will file its proposed trial documents for the parties’ review by June 22, 2022. The parties must file any objections or requests to supplement the Court’s proposed trial documents by June 28, 2022.

P. Trial Specifics

