1999 WL 1068669
United States District Court, N.D. Illinois, Eastern Division.

Milton WILLIAMS, Jr. Plaintiff,
v.
ILLINOIS DEPARTMENT OF CORRECTIONS; Joliet Correctional Center; Dr. Sood; Officer Curtis; Doe Defendants 1–10 Defendants.

No. 97 C 3475. | Nov. 17, 1999.

Opinion

MEMORANDUM OPINION AND ORDER

PLUNKETT, Senior J.

***1** Milton Williams, Jr. ("Williams") has sued the Illinois Department of Corrections ("IDOC") for alleged violations of the Americans with Disabilities Act, 42 U.S.C. § 1201 *et seq.* and the Rehabilitation Act, 29 U.S.C. § 794 *et seq.* Before the Court are the parties' cross motions for summary judgment. For the reasons stated herein, we grant Williams's motion for summary judgment against IDOC and deny IDOC's motion for summary judgment against Williams.

Facts[1]

At the time of his complaint, Williams was incarcerated at Joliet Correctional Center in the custody of IDOC. (Pl.'s Local Gen. R. ("Rule") 56.1(a)(3) Stmt. ¶ 1.) IDOC receives federal funding from the United States government. (*Id.*)

Williams is visually impaired in both eyes as the result of eye injuries suffered in a beating in 1994 prior to his incarceration. (*Id.* at 6.) Williams can only distinguish light from dark in his left eye and his vision in his right eye is 20/200, with a light adaptation problem. (*Id.* ¶ 9.) Williams' light adaptation problem makes it difficult for him to see anything other than shadows when he moves from one light condition to another. (*Id.*) As a result of his eye problems, Williams has a small tunnel of vision and virtually no peripheral vision. (*Id.*) Williams can read large print books and can walk and navigate his way around when he wears glasses. (Def.'s Rule 56.1(a)(3) Stmt. ¶¶ 3, 11.)

After the beating in 1994 and for the next two years, Williams received treatment for his eye injuries from Dr. Marcus J. Solomon at the University of Illinois at Chicago ("UIC") Eye Center (Pl.'s Rule 56.1(a)(3) Stmt. ¶¶ 6–7; *id.,* Ex. C ¶ 3.) During the course of this treatment, Dr. Solomon diagnosed Williams as having high myopia with recurrent retinal detachments in both eyes, which according to Dr. Solomon, rendered Williams legally blind. (*Id.* at 6–7; *id.,* Ex. C. ¶¶ 3, 5–6.)

Williams was incarcerated at Joliet Correctional Center in August 1996. (*Id.* ¶ 8.) Dr. Kul B. Sood,[2] the Medical Director at Joliet Correctional Center, sent Williams to UIC Eye Center for consultations for his eyes. (*Id.*) In August 1997, pursuant to Dr. Sood's request, Williams was seen at UIC Eye Center by Dr. Daniel C. Alter. (*Id.*) In his report to IDOC, Dr. Alter opined that Williams was legally blind under the State of Illinois criteria. (*Id.,* Ex. E.)

In his second amended complaint, Williams claims he was denied access to certain IDOC services, programs and activities while he was incarcerated at Joliet Correctional Center. (Sec.Am.Compl.¶ 15(a)-(d).) One of these services is the Joliet Correctional Center's library. (*Id.* ¶ 15(d).) The general population incarcerated at Joliet Correctional Center is allowed access to this library, which has more that 1,000 books, including fiction and nonfiction, reference materials, magazines and newspapers. (Pl.'s Rule 56.1(a)(3) Stmt. ¶ 11.) The Joliet Correctional Center library does not contain any books on tape, braille materials, or large-print books. (*Id.* ¶ 12.) Williams made requests, including the filing of two grievances in June 1997, for the library to provide him access to books on tape and braille materials. (*Id.* ¶ 13.) IDOC can accommodate a prisoner with vision impairment with books on tape, braille materials and large-print books. (*Id.* ¶ 14.) These materials are available at other IDOC institutions. (*Id.*)

***2** Another IDOC service to which Williams complains he was denied access was the educational program offered by IDOC for its inmates at Joliet Correctional Center. (Sec.Am.Compl.¶ 15(b).) IDOC offers educational services, programs and activities such as a G.E.D. program, a general education program, and adult basic education program and a special education program. (Pl.'s Rule 56.1(a)(3) Stmt. ¶ 15.) Williams is required by law to take adult basic education program classes. (*Id.* ¶ 16.) He has made requests, including the filing of grievances in June 1997, August 1997 and October 1997, for accommodations that would enable him to participate in the education programs. (*Id.* ¶ 18.) IDOC can accommodate a prisoner with vision impairment with educational materials on tape, braille lessons or one-on-one education and has done so at other IDOC institutions. (*Id.* ¶ 19.)

Finally, Williams alleges in his complaint that IDOC denies him safe movement through the prison, including the safe use of the dining hall and showers. (Sec.Am.Compl.¶ 15(c).) He has requested that IDOC accommodate his visual impairment by providing him with assistance in navigating around Joliet Correctional Center (including the use of a blind stick) or transferring him to an institution that is better equipped to handle visually-impaired inmates. (Pl.'s Rule 56.1(a)(3) Stmt. ¶¶ 21, 23.) IDOC denied these requests, including those filed as grievances in June and August 1997. (*Id.*) IDOC can provide navigation assistance through the institution to prisoners with visual impairments by giving these prisoners assistance from other inmates. (*Id.* ¶¶ 22, 23.)

There are accommodations for inmates with visual impairments at other IDOC facilities that are not available to visually impaired prisoners at Joliet Correctional Center. (*Id.* at 24.) These accommodations include providing readers to assist inmates in reading and sending mail, providing tape recorders and tapes to permit them to tape messages, and providing certain recreational activities. (*Id.*)

Discussion

In October 1997, Williams filed his second amended complaint raising three claims arising from his incarceration at Joliet Correctional Center. Williams' motion for summary judgment against IDOC rests on Counts I and II for violations of the Americans with Disabilities Act, 42 U.S.C. § 1201 *et seq.* ("ADA") and the Rehabilitation Act, 29 U.S.C. § 794 for failing to accommodate his visual impairment.[3] IDOC's motion for summary judgment[4] rests on its argument that Williams failed to exhaust administrative remedies prior to filing this action as required by the Prisoner Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997(e), and as a result, his claims are barred from review. (Def.'s Mem. at 3–7). We shall review IDOC's motion first because it raises a procedural claim and then go on to Williams' motion which addresses the merits of the action.

***3** To prevail on a summary judgment motion, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, [must] show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). At this stage, we do not weigh evidence or determine the truth of the matters asserted. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986). We view all evidence and the inferences from it in the light most favorable to the non-moving party. *Karazanos v. Navistar Int'l Transp. Corp.,* 948 F.2d 332, 335 (7th Cir.1991). Summary judgment for the plaintiff is warranted when it is clear that a reasonable jury could only find that the plaintiff has met his burden as to all the elements of his claim. *Liberty Lobby,* 477 U.S. at 249–50.

A. IDOC's Motion for Summary Judgment

The PLRA requires prisoners to exhaust their administrative remedies prior to filing suit for injuries suffered as a result of prison conditions. It states: "No action shall be brought with respect to prison conditions under section of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). A prisoner's failure to exhaust administrative remedies before filing a claim arising under federal law is an affirmative defense under Rule 8(c) of the Federal Rules of Civil Procedure. *Massey v. Helman,* No. 99–1459, 1999 WL 989388, at *7 (7th Cir. Nov. 2, 1999). As a result, defendants have the burden of pleading and proving the defense. *Id.* "Defendants may waive or forfeit reliance of § 1997e(a), just as they may waive or forfeit the benefit of a statute of limitations." *Perez v. Wisconsin Dep't of Corrections,* 182 F .3d 532 (7th Cir.1999).

IDOC argues it is entitled to summary judgment because Williams failed to exhaust his administrative remedies before he filed his original, *pro se* complaint on May 7, 1997. (Def.'s Mem. at 3 .) On September 29, 1997, IDOC and Dr. Sood moved to dismiss Williams amended complaint, in part, for failure to exhaust administrative remedies. A few weeks later, on October 10, 1997, Williams, with assistance of his current counsel, filed his second amended complaint alleging the dates of his grievances and the administrative outcomes of each. Later that month, IDOC and Dr. Sood withdrew their motion to dismiss with prejudice and on October 31, 1997, they filed their answer to Williams second amended complaint. IDOC did not raise exhaustion as an affirmative defense when it filed its answer nor did it amend its answer to include it. In fact, the next time IDOC raised this issue was two years later in its motion for summary judgment. Williams asserts in his response to IDOC's summary judgment motion that IDOC has waived its ability to rely on PLRA's exhaustion requirement because it did not plead exhaustion as an affirmative defense. We agree.[5]

***4** IDOC argues that this Court may forgive its technical failure to plead the affirmative defense because IDOC raised the exhaustion issue in its motion to dismiss. In *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.,* 811 F.2d 326, 334 (7th Cir.1987), the Seventh Circuit held that a technical failure to plead the affirmative defense is not fatal when the parties have argued the defense in the district court. However, that was not done here. IDOC withdrew its motion to dismiss Williams' complaint for

failure to exhaust after Williams filed a second amended complaint.[6] It then went on two weeks later to answer Williams' complaint, abandoning the exhaustion defense until its summary judgment motion two years later.

IDOC has offered no justification for its delay in asserting this defense and Williams would be prejudiced by IDOC's use of a summary judgment motion to raise the affirmative defense. *See Venters v. City of Delphi,* 123 F.3d 956, 967–68 (7th Cir.1997) (balancing factors such as reason for delay and prejudice to plaintiff to assess whether defendant waived its affirmative defense when it failed to raise it until its response to plaintiff's summary judgment motion.) Just like the defendant in *Venters,* IDOC waited to raise the affirmative defense until after discovery had closed and extensive work on the summary judgment motion had taken place. Similarly, just like the Seventh Circuit in *Venters,* this Court finds IDOC waived its right to assert the PLRA's exhaustion requirement as an affirmative defense to Williams action against it. As a result, we deny IDOC's motion for summary judgment and proceed to the merits of Williams' motion for summary judgment.

B. Williams' Motion for Summary Judgment

Williams alleges that IDOC's refusal to provide access or accommodate his visual impairment violates section 504 of the Rehabilitation Act and Title II of the ADA. (Compl.¶¶ 21–26, 27–31.) Section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance...." 29 U.S.C. § 794(a). Title II of the ADA, which is interpreted to be co-extensive with section 504, provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U .S.C. § 12132; *Love v. Westville Correctional Ctr.,* 103 F.3d 558, 560 (7th Cir.1996). The Supreme Court has established that the ADA applies to inmates like Williams who are incarcerated in state prisons. *Pennsylvania Dep't of Corrections v. Yeskey,* 524 U.S. 206 (1998). To prevail on a claim under either statute, Williams must show that he is a qualified individual with a disability as defined by the statute, was denied the benefit of services at Joliet Correctional Center, and was denied this benefit by reason, or solely by reason, of his disability. 42 U.S.C. § 12132; 29 U.S.C. § 794(a). Williams makes the requisite showing.

***5** In its answer to Williams' second amended complaint, IDOC admits that Williams is disabled and qualified under the ADA. It now seeks to wiggle out of this admission and to amend its pleading to clear up the "ambiguity" surrounding its answer. This Court finds no ambiguity in IDOC's answer and is not prepared to permit IDOC in the final hours to change the landscape of the entire action.

In Count II (ADA claim), paragraph 23 of his second amended complaint, Williams pleads:

> Because he is legally blind, Williams is "disabled" at [sic] that term is defined by the ADA. Williams is a "qualified individual with a disability" because he meets the eligibility requirements for participating in various prison programs and activities, including safe use of the dining hall, library and shower, and educational and recreational opportunities.

(Pl.'s Rule 56.1(a)(3) Stmt., Ex. A ¶ 23.) In response to this paragraph, IDOC answers: "Defendants admit that plaintiff is disabled but deny that he has been denied the safe use of the alleged facilities at Joliet Correctional Center." (*Id.*)

It is a well-settled rule that IDOC is bound by what it states in its pleadings. "Judicial admissions are formal concessions in the pleadings ... that are binding upon the party making them." *Keller v. United States,* 58 F.3d 1194, 1198 n. 8 (7th Cir.1995); *see Solon v. Gary Community Sch. Corp.,* 180 F.3d 844, 858 (7th Cir.1999). A judicial admission generally serves to take the fact at issue out of contention in the case. *See Murrey v. United States,* 73 F.3d 1448, 1455 (7th Cir.1996). Thus, this rule serves to promote "judicial efficiency" to prevent a party from controverting what it has already told a court in pleadings or other formal manner. *See Soo Line R.R. Co. v. St. Louis S.W. Ry. Co.,* 125 F.3d 481, 483 (7th Cir.1997).

In its response memorandum to this Court, IDOC asserts in three conclusory sentences, unsupported by any case authority, that it should not be bound to its answer because it amounts to a legal conclusion. (Def.'s Resp. Mem. at 4–5.) While this Court should consider IDOC's argument waived for failure to fully articulate and support it, even a review of this argument shows it has no merit. In its answer, IDOC admits that Williams is "disabled" and "qualified"[7] as defined under the ADA. An individual is disabled under the ADA if he has a physical or mental impairment that substantially limits one or more of the major life activities of such individual; has a record of such an impairment; or (C) is regarded as having such an impairment. 42 U.S.C. § 12102(2). Thus, in its answer,

IDOC implicitly admits that Williams is disabled under one of these three fact scenarios. It therefore removed from this litigation a dispute over the facts supporting "disability" as defined by the ADA. Instead, as its answer in paragraph 23 demonstrates, IDOC focuses the issues in the case to whether Williams has been denied access to services because of his disability and whether he could be accommodated at Joliet Correctional Center.

***6** Perhaps in acknowledgment of its weak argument that its answer is not a judicial admission, IDOC asks this Court to grant it leave to amend its answer in paragraph 23. On November 4, 1999, this Court denied IDOC's motion based on IDOC's undue delay in raising its request. Like its failure to plead the affirmative exhaustion defense, IDOC offers no justifiable reason why it did not request to amend its answer before it filed its final summary judgment brief.[8] Furthermore, permitting IDOC to change its answer at this late date would prejudice Williams because the discovery and landscape of this entire action has been shaped around IDOC's admission that Williams is a qualified individual with a disability. *See Sports Ctr., Inc. v. Brunswick Marine,* 63 F.3d 649, 652 (7th Cir.1995). As Williams counsel pointed out at the November 4, 1999 motion call on IDOC's request to amend, Williams did not conduct any discovery on this issue, including retaining an expert on the extent of his visual impairment. Discovery has been closed now for over 16 months and we are not prepared to allow this case start anew. *See Fort Howard Paper Co. v. Standard Havens, Inc.,* 901 F.2d 1373, 1380 (7th Cir.1990) (request for leave to amend should be denied where granting the motion would require additional rounds of discovery after discovery already has closed). Thus, this Court reiterates that IDOC's request for leave to amend its answer is denied. As a result, pursuant to IDOC's answer, there is no dispute that Williams is a qualified individual with a disability as defined under the ADA.

Williams must now demonstrate that he was denied the benefits of services at Joliet Correctional Center and that such denial was because of his disability. 42 U.S.C. § 12132. It is clear that Williams' access to certain programs and services in Joliet Correctional Center was severely limited or denied in full. The ADA covers activities in state prisons such as education programs, use of the library and use of the dining hall. *Crawford v. Indiana Dep't of Corrections,* 115 F.3d 481, 483 (7th Cir.1997). It is undisputed that inmates in the general population at Joliet Correctional Center have access to programs and services such as educational programs, use of the prison library and use of the dining hall. (Pl.'s Rule 56.1(a)(3) Stmt. ¶¶ 11, 15.)

There is no dispute that Williams cannot read regular size print. (*Id.* ¶ 13.) The library at Joliet Correctional Center does not contain any books with large print, books on tape, or braille material, despite Williams' requests for them. (*Id.* ¶¶ 12–13 .) The education programs at the prison are textbook-based and Williams is unable to read the standard print textbooks. (*Id.* ¶ 13.) Williams has requested textbooks on tape, one-on-one teaching and braille lessons but those requests have been denied. Clearly, Williams has been effectively denied access to the library services and the education programs at Joliet Correctional Center. It does not take a leap in logic to conclude that he was denied access due to his disability because he could have participated in the programs and activities in question with reasonable accommodations from the prison. IDOC does not make the argument that no reasonable accommodations existed that would have allowed Williams access to those programs. In fact, Williams presents undisputed facts that other IDOC institutions offer the type of accommodations he requested. (*Id.* ¶¶ 14, 19.) Instead IDOC merely asserts that prisoners with disabilities are treated on an individual basis and that there is no "program" for prisoners with visual disabilities. (Def.'s Resp. Mem. at 10.) Viewing this assertion in the light most favorable to IDOC, this still does not raise an issue of material fact as to whether Williams was denied access to benefits due to his disability. Rather, IDOC's argument supports Williams position: IDOC can reasonably accommodate prisoners with disabilities on an individual basis according to their needs. The fact that IDOC has no uniform program for all blind prisoners is no defense to its failure to accommodate Williams. Williams has shown that he was denied the benefit of the library and education services at Joliet Correctional Center due to his disability.

***7** Furthermore, Williams has shown that he cannot safely navigate around Joliet Correctional Center. Williams testifies that he cannot safely move around prison without stumbling on cracks in the floor or bumping into inmates or things in the dining hall or showers where his vision is especially diminished. (Pl.'s Rule 56.1(a)(3) Stmt. ¶ 20; *id.,* Ex. B at 17–18, 20.) IDOC attempts to counter this evidence with the deposition testimony of Dr. Sood who testified that he did not believe that Williams had trouble seeing his way around because he never treated Williams for an injury sustained from a fall. (*Id.,* Ex. D, at 103–04.) The mere fact that Williams never sought or required medical attention for an injury suffered from a fall does not create an issue of material fact that Williams cannot safely navigate around the prison. IDOC has accommodated other inmates with visual disabilities with navigational assistance, including the use of other prisoners to assist the blind prisoners. (Id.¶ 22.) While Williams has requested the use of this assistance and/or the use of a blind stick, there is no evidence that it is reasonable for IDOC to accommodate Williams with a blind stick. However, Williams has been denied the use of safe navigation around the prison, which impacts his access to the showers and dining hall, due to his disability.

Williams has met his burden of proving on his ADA claim that he is a qualified individual with a disability, he has been denied access to certain benefits at Joliet Correctional Center, and this denial was because of his disability. He need only show one more element to meet his burden on his Rehabilitation Act claim, that he was denied access to a "program or activity receiving federal financial assistance." The Rehabilitation Act defines a "program or activity" to include a "department, agency ... or other instrumentality of a State or local government." 29 U.S.C. § 794(b)(1)(a). IDOC admits that it receives federal funds but argues that Williams failed to prove that IDOC received the federal funds for the programs and activities at issue in this case. However, the Rehabilitation Act does not require such specificity and IDOC, as the *department* of the State of Illinois responsible for the custody of Williams, admits it receives federal funds toward the financing of its prisons, including Joliet Correctional Center. (Pl.'s Rule 56.1(a)(3) Stmt., Ex. A, ¶ 4.) Furthermore, as Williams points out in his reply memorandum, IDOC failed to provide him with the specific funding information when he requested it in discovery. (Pl.'s Reply Mem. at 11, n. 10.) When Williams attempted to discover the "specific uses of the federal funding received by IDOC, IDOC answered that it was impossible to determine that information, stating that it 'lack[ed] knowledge as to what specific grants Joliet Correctional Center, or the Illinois Department of Corrections receive." ' (*Id.*) IDOC cannot now turn around to claim that its inability to determine where its federal funds go bars Williams' Rehabilitation Act claim. It is undisputed that IDOC receives federal funds so Williams clearly proves his claim under the Rehabilitation Act.

***8** In sum, a reasonable jury could only find that Williams has met his burden as to all the elements of his ADA and Rehabilitation Act claims. Accordingly, we grant Williams' motion for summary judgment. This case is a tragedy. Here is a man almost completely without sight who is blocked by IDOC from making any effort to obtain an education or even to read. This Court issues an injunction compelling IDOC to take immediate steps to do the following:

> (a) Provide Williams access to library materials that are either in large print that he can read, books-on-tape or braille material. If IDOC provides Williams with braille material, it must also provide him education on how to read braille. *See* (b).
>
> (b) Provide Williams access to a prison education program through one of the following: (1) textbook(s) on tape; (2) one-on-one teaching; or (3) braille lessons.
>
> (c) Provide Williams with navigational assistance when he is moving around the prison. This assistance may include the use of other prisoners to assist Williams.

Conclusion

IDOC has waived its affirmative defense of exhaustion of administrative remedies. Accordingly, IDOC's motion for summary judgment is denied. There is no genuine issue of material fact as to Williams' ADA and Rehabilitation Act claims. Accordingly, Williams is entitled to a judgment as a matter of law against IDOC on these claims.

In light of this ruling, this Court issues an injunction compelling IDOC to do the following:

> (a) Provide Williams access to prison library materials that are either in large print that he can read, books-on-tape or braille material. If IDOC provides Williams with braille material, it must also provide him education on how to read braille. *See* (b).
>
> (b) Provide Williams access to a prison education program through one of the following: (1) textbook(s) on tape; (2) one-on-one teaching; or (3) braille lessons.
>
> (c) Provide Williams with navigational assistance when he is moving around the prison. This assistance may include the use of other prisoners to assist Williams.

Parallel Citations

17 NDLR P 54

Footnotes

1 These facts are undisputed and taken from the parties' statements of uncontested facts. The parties filed Local Rule 12(M) and 12(N) statements in accordance with this district's local rule. However, during the course of the briefing on this motion, this district's local rule was amended, effective September 1, 1999, to reflect a new rule number, Local Rule 56.1. The substance of this rule has not been altered. While the parties' statements are filed under the previous local rule number, we have cited to their statements herein under the new rule number.

[2] Dr. Sood was a named defendant in this action until October 5, 1998, when this Court dismissed with prejudice William's Count III Section 1983 claim against him and other officials.

[3] On August 19, 1998, Williams brought this motion as one for partial summary judgment against IDOC on Counts I and II of his complaint. At that time, Williams' complaint also included a Count III against Dr. Sood, Officer Curtis and Doe Defendants 1–10 for alleged violations of his civil rights stemming from the denial of medical care. On October 5, 1998, this Court dismissed Count III with prejudice on Williams' motion. Also, named defendant Joliet Correctional Center was improperly named as a defendant in this action. Accordingly, we construe Williams' motion before us as a summary judgment motion on all remaining counts against the sole remaining defendant, IDOC.

[4] The Illinois Attorney General, counsel for all named defendants, filed the motion for summary judgment on behalf of IDOC and Dr. Sood. (Def.'s Mem. at 1, n. 1.) The assistant attorney general filed the summary judgment motion on behalf of Dr. Sood because he was unclear whether Dr. Sood was dismissed from the entire action when the Court dismissed Count III in October 1998. In fact, Dr. Sood was dismissed from the entire action because he was only named as a defendant under Count III. As a result, we shall refer to IDOC as the movant on the summary judgment motion now under consideration. For this same reason, we decline to address the argument made on Dr. Sood's behalf that summary judgment should be granted on qualified immunity grounds. (*Id.* at 10–11.)

[5] This is not the first time that a party represented by the Illinois attorney general's office has waived what could amount to a dispositive defense, *see Carr v. O'Leary,* 167 F.3d 1124, 1126 (7th Cir.1999) (citing five seventh circuit opinions in the last decade where the courts have noted the "familiar failing of the Illinois attorney general's office ... [of] waiving a dispositive defense...."). Nor, unfortunately, is it the only "failing" by the attorney general's office in this case. *See infra* pp. 10–11.

[6] The filing of an amended complaint supersedes all prior complaints and controls the case from that point forward. *Carver v.. Condie,* 169 F.3d 469, 472 (7th Cir.1999). IDOC's motion to dismiss was filed on the first amended complaint and withdrawn after the filing of Williams' second amended complaint. IDOC intentionally relinquished its right to raise the exhaustion defense by never raising it again until now.

[7] Under Federal Rule of Civil Procedure 8(d), silence when answering an averment results in the averment being admitted. FED. R. CIV. P. 8(d). By failing to deny or respond to the averment that Williams is "qualified" under the ADA, IDOC admits it. Furthermore, IDOC makes no argument that Williams is not qualified to participate in the prison benefits at issue in this case.

[8] IDOC had plenty of time to request leave to amend its answer prior to the time it attempted to do so. It answered Williams' second amended complaint on October 31, 1997. The parties conducted discovery for the next nine months. Williams filed his summary judgment motion on August 18, 1998. In his summary judgment memorandum and statement of uncontested facts, Williams clearly relied on IDOC's admission in paragraph 23 to support his request for summary judgment. Almost one year later, on July 30, 1999, IDOC filed its motion for summary judgment and response to Williams' motion. Not even then did IDOC request leave to amend its answer. Instead, IDOC waited until the last possible moment, requesting leave to amend in its reply memorandum filed on September 7, 1999.