IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 10-cv-1005-RBJ-KMT

TROY ANDERSON,
Plaintiff,
v.

STATE OF COLORADO, DEPARTMENT OF CORRECTIONS, et al.,
Defendants.

PLAINTIFF'S TRIAL BRIEF

In this trial, Troy Anderson—a mentally ill prisoner who is held in solitary confinement at Colorado State Penitentiary—will demonstrate that his civil rights are being violated. Specifically, Mr. Anderson will demonstrate : 1) that he is being denied effective, community standard mental health treatment, in violation of the Eighth Amendment, the Americans with Disabilities Act ("ADA") and the Rehabilitation Act ("RA"); 2) that the progression program at CSP is based on an arbitrary demerit system; and 3) that Defendants subjected Mr. Anderson to cruel and unusual punishment by being denying him any outdoor access for over twelve years.

POINTS OF LAW

I. MENTAL HEALTH TREATMENT

It is not in dispute that Mr. Anderson suffers from mental illness; both parties' doctors agree that he has Attention Deficit Hyperactivity Disorder ("ADHD"). The question at this trial will be whether the care Defendants have provided to treat Mr. Anderson's serious mental conditions is adequate, or whether Defendants' treatment is discriminatory and deliberately indifferent.

The Eighth Amendment, the ADA and the RA require Defendants to provide Mr. Anderson with additional treatment for his mental illness. At this time, Mr. Anderson is

withdrawing his due process claim regarding the non-formulary process because he does not have any non-formulary requests that have been denied by the committee. Despite withdrawing this claim, evidence regarding the formulary process and the non-formulary committee is relevant to the extent it impacts what medications Mr. Anderson is provided.

1) EIGHTH AMENDMENT

To demonstrate an Eighth Amendment claim, a prisoner must show 1) that his medical or mental health need is objectively serious; and 2) that the defendants knew of a serious condition or risk and "fail[ed] to take *reasonable* measures to abate it." *Farmer v. Brennan*, 511 U.S. 825, 847 (1994).

During this trial, there will be little dispute that Mr. Anderson is a man suffering from multiple diagnosed mental illnesses, and that his need for care is objectively serious. There also is no dispute that he has received care from many Department providers. However, the mere provision of continuing medical treatment does not foreclose a claim for deliberate indifference to medical needs. *Halpin v. Simmons*, 33 F.App'x 961, 964 (10th Cir. 2002) (overturning district court); *see also Waldrop v. Evans*, 871 F.2d 1030, 1035 (11th Cir. 1989) ("choice of an easier but less efficacious course of treatment can constitute deliberate indifference").

The dispute in this case is about what treatments Mr. Anderson is entitled to. Prison officials are deliberately indifferent if they fail to take *reasonable* measures to abate a serious condition of a prisoner in their custody. *Farmer*, 511 U.S. at 847; *Hunt v. Uphoff*, 199 F.3d 1220, 1224 (10th Cir. 1999). Adequate or reasonable medical care requires qualified medical personnel to determine what services are of a quality that is acceptable when measured by professional standards in the community. *See Hill v. Corr. Corp. of America,* 2009 WL 2475134, *7 (D. Colo. Aug. 11, 2009)(*citing Barrett v. Coplan*, 292 F.Supp.2d 281, 285 (D.N.H. 2003)); *Langley v. Coughlin*, 888 F.2d 252, 254 (2d Cir. 1989) (""[T]he basic legal principle is clear and well established. . .that when incarceration

deprives a person of reasonably necessary medical care. . .which would be available to him or her if not incarcerated, the prison authorities must provide such surrogate care.").

Mr. Anderson seeks effective care. Doctors from both sides will testify that stimulant medications are the most effective form of treatment for ADHD. While mere disagreement with medical professionals would not give rise to an Eighth Amendment violation, *Perkins v. Kansas Dept. of Corr.*, 165 F.3d 803, 811 (10th Cir. 1999), here there is no disagreement about what treatment is most effective. In addition, Mr. Anderson seeks to have a "treatment team" or group of individuals to work with to assist him with his mental health concerns. Defendants already use such treatment teams—which typically include the current psychologist, mental health supervisors, correctional officers, and at times the prisoners—to monitor and support a prisoner's treatment and progress.

2) ADA & RA

Title II of the ADA prohibits discrimination on the basis of disability by public entities. 42 U.S.C. § 12132. The Rehabilitation Act prohibits such discrimination by recipients of federal funding. 29 U.S.C. § 794. To state a claim under these statutes, the plaintiff must allege that "(1) he is a qualified individual with a disability, (2) who was excluded from participation in or denied the benefits of a public entity's services, programs, or activities, and (3) such exclusion, denial of benefits, or discrimination was by reason of a disability." *Robertson v. Las Animas County Sheriff's Dep't*, 500 F.3d 1185, 1193 (10th Cir. 2007).

A person has a qualifying disability when she has an impairment that substantially limits one or more of his major life activities, has a record of such impairment, or is regarded as having such an impairment. 42 U.S. C. § 12102(1); 29 U.S.C. § 705(20)(B). Major life activities include thinking, learning, and concentrating. *See* 42 U.S.C. § 12102(2)(A). In addition, the majority of circuits have determined that the ability to interact with others is a major life activity. *Jacques v. DiMarzio, Inc.* 386

F.3d 192, 202 (2d Cir. 2004). The evidence at trial will demonstrate that Mr. Anderson has a long history of mental illness that has substantially impaired—and continues to substantially impair—his ability to think, learn, concentrate, and interact with others, and that Defendants regard him has having such impairments.

(a) Denial of Services on the Basis of Disability

The ADA and RA prohibit the denial of services on the basis of disability. 28 C.F.R. § 35.130(b)(i) & (ii). "Access to prescription medications is part of a prison's medical services and thus is one of the 'services, programs, or activities' covered by the ADA." *Kiman v. N.H. Dep't of Corr.*, 451 F.3d 274, 286-87 (1st Cir. 2006).[1] In McNally, the court found a delay of necessary medications to all HIV-positive individuals was discrimination pursuant under the ADA. *McNally v. Prison Health Servs*, 46 F. Supp. 2d 49, 58-59 (D. Me. 1999). Here, the evidence will show that there is a blanket denial of the most effective medications to treat ADHD, and that in the past the prison has largely denied the need for treatment of ADHD at all.

(b) Failure to Provide Reasonable Accommodations

Mr. Anderson will demonstrate that his disabilities prevent him from being able to participate in and benefit from the Quality of Life Level Program ("QLLP"), therapeutic and other services at CSP. He is qualified to participate in the QLLP program because he is a prisoner housed at CSP. *See* OM 650-100, Joint Ex. 10. The QLLP program, which controls Mr. Anderson's access to services such as phone calls, visits, and job opportunities, qualifies as a "service, program, or activity" under the ADA. *See supra* fn 2. Public entities are required to "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

[1] Services, programs and activities include, essentially, "anything a public entity does"; almost any official activity in which inmates participate in prisons is in the scope of the ADA. *See Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 211 (1998).

modification would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7). Here, Mr. Anderson is asking for the reasonable modification of effective medications and treatment that will permit him to successfully participate in the QLLP program.

While Defendants characterize this as a medical malpractice claim, Mr. Anderson is not seeking adequate treatment *per se*, but rather the reasonable modification of CDOC's policies so that he receives treatment sufficient to permit him to participate in the QLLP program. *See, e.g., Rouse v. Plantier*, 997 F. Supp. 575, 582 (D. N.J. 1997), *vacated on other grounds*, 182 F.3d 192 (3d Cir. 1999) (holding that plaintiffs stated claim under ADA when defendant prison's failure to treat their diabetes had "excluded [them] from participating in prison programs.").

If this Court determines that Mr. Anderson is not entitled to additional treatment, he argues in the alternative that he is entitled to the reasonable accommodation of additional services while being housed in administrative segregation. Mr. Anderson is denied services and benefits because he is in administrative segregation. So long as his disability prevents him from successfully participating in the QLLP and/or requires that he be segregated, he will be denied services and benefits, such as outdoor access, books, educational programs, canteen items, on the basis of his disability. A prisoner who must be housed in a specific location because of his disability may not – by dint of that placement – be denied access to the services and programs of the prison. *See Pierce v. County of Orange*, 526 F.3d 1190, 1220-22 (9th Cir. 2008) (holding that prisoners who use wheelchairs may be segregated in accessible facilities but must be provided similar services to nondisabled prisoners); *see also Love v. Westville Corr. Ctr.*, 103 F.3d 558 (7th Cir. 1996) (holding that denying quadriplegic prisoner housed in infirmary access to programs violated the ADA).

QLLP PROGRESSION PROCEDURES

The processes for determining whether Mr. Anderson is able to able to progress out of

solitary confinement at CSP violate his rights under the Due Process Clause. There is no dispute that he must successfully complete three levels of the QLLP before he is transferred to another facility where he would receive additional services and benefits, as well as be held at a lower custody status. Prisoners are prevented from progressing if they have "inappropriate behavior" as determined by prison staff members. *See* OM 650-100, Joint Ex. 10. There exist no clear or objective criteria for what behavior is "inappropriate" and prisoners are prevented from progressing if they receive a "negative chron," which is a behavioral note for which there is no listed criteria and no procedural protections.

To state a procedural due process claim, a plaintiff must establish: 1) that he has a liberty or property interest protected by the due process clause, and 2) that he was not afforded an appropriate level of process. *See Veile v. Martinson*, 258 F.3d 1180, 1184-85 (10th Cir. 2001).

a) LIBERTY INTEREST

The touchstone inquiry in determining whether a person possesses a liberty interest in avoiding particular conditions is the *nature* of the conditions themselves. *Wilkinson v. Austin*, 545 U.S. 209, 223 (1995). If administrative segregation poses an "atypical and significant hardship compared to the ordinary incidents of prison life," it implicates a liberty interest. *Sandin v. Conner*, 515 U.S. 472, 484 (1995). The Supreme Court has not established a baseline for what prison conditions are "ordinary" for purposes of comparison. *Wilkinson*, 545 U.S. 209, 223 (1995).

In *Estate of DiMarco v. Dept. of Corr.*, the Tenth Circuit also declined to adopt a baseline for the liberty interest inquiry, and instead directed district courts to consider four factors in assessing whether an individual has a protected liberty interest: 1) the legitimate penological interest in segregation; 2) the extreme nature of the conditions; 3) whether segregation may increase the duration of confinement; and 4) whether placement in segregation is indefinite. 473 F.3d 1334,

1341-42 (10th Cir. 2007). These factors are not exclusive, and "the proper approach is a fact-driven assessment that accounts for the totality of conditions presented by a given inmate's sentence and confinement." *Rezaq v. Nalley*, --F.3d--, 2012 WL 1372151 at *9 (10th Cir. Apr. 20, 2012).

In addition to the four *DiMarco* factors, multiple Tenth Circuit decisions have considered the duration of placement in segregation—even when it was as short as a few months—to be determinative. *See Trujillo v. Williams*, 465 F.3d 1210, 1225 (10th Cir. 2006); *see also Payne v. Friel*, 266 F. App'x 724, 728 (10th Cir. 2008). This emphasis comports with other circuits across the country. *See Harden-Bey*, 524 F.3d 789, 793 (6th Cir. 2008) ("most (if not all) of our sister circuits have considered the nature of the more-restrictive confinement and its duration in determining whether it imposes an "atypical and significant hardship"); *Stephens v. Cottey*, 145 F.App'x 179, 181 (7th Cir. 2005) (in determining liberty interest "courts place a premium on the duration of the deprivation."); *Beverati v. Smith*, 120 F.3d 500, 504 (4th Cir. 1997) (assessing duration).

Discussing this standard, a recent decision the Tenth Circuit distinguished between punitive segregation and administrative segregation, noting that the "'ordinary incidents of prison life' will differ depending on a particular inmate's conviction and the nature of nonpunitive confinement routinely imposed on inmates serving comparable sentences." *Rezaq,* 2012 WL 1372151 at *9.

Thus far, Defendants have not challenged the assertion that Mr. Anderson's conditions are an atypical and significant hardship compared to the ordinary incidents of prison life. Mr. Anderson also will demonstrate that his conditions are remarkably similar to the conditions at issue in *Wilkinson*, where the Supreme Court found that the conditions were an atypical and significant hardship compared to any baseline.

b) MEANINGFUL PROCESS

Once a liberty interest is established, the next question is what process is to be afforded.

Wilkinson, 545 U.S. at 224. Just this month, the Tenth Circuit clarified what process is to be afforded to a prisoner in segregation in the context of the QLLP program. *Toevs v. Reid*, --F.3d--, 2012 WL 1085802 (10th Cir. Apr. 2, 2012). The panel held that "Where, as here, the goal of the placement is solely and exclusively to encourage a prisoner to improve his future behavior, the review should provide a statement of reasons, which will often serve as a guide for future behavior (i.e., by giving the prisoner some idea of how he might progress toward a more favorable placement)." *Id.* at *6 (citing *Wilkinson*, 545 U.S. at 226).

The panel reviewed the QLLP process under *Mathews v. Eldridge*, which requires courts to examine "the probable value, if any, of additional or substitute procedural safeguards" and "the fiscal and administrative burdens [on the government] that the additional or substitute procedural requirement would entail." *Id.* (quoting *Mathews*, 424 U.S. 319, 335 (1976)). Specifically, the panel determined that the QLLP is intended to provide the prisoner the incentive to make better choices and earn his eventual release to the general population. *Id.* Accordingly, the court held that a vague or ambiguous decision is not meaningful; "one supposedly has the keys to one's release, but one has no idea what they are." *Id.* Meaningful process requires reasons for denial and a "guide" for how the prisoner can improve his behavior. *Id.*

Mr. Anderson asserts that he is regularly denied progression in the QLLP, but that he is not certain about what he needs to accomplish or how exactly his behavior must be modified in order to progress. He requests clear, objective criteria about what he must do to prevent "inappropriate behavior" so that he can progress out of CSP.

II. OUTDOOR ACCESS

The third area at issue in this lawsuit concerns the long-term denial of outdoor access to Mr. Anderson. There is no dispute that Mr. Anderson—and all prisoners housed at CSP—are denied

access to the outdoors, and only receive recreation in an inside room. As a result of this blanket denial, Mr. Anderson has not been outside or felt the sun on his skin in over eleven years.

The Eighth Amendment is violated if a prison subjects those within its custody to "unnecessary suffering" or conditions that are counter to "society's evolving standards of decency." *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976) ("unnecessary suffering"); *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (evolving standards). A prisoner is not required to demonstrate actual harm; rather, a condition is sufficiently serious if Mr. Anderson is placed at future risk of harm to his physical or mental health. *Helling v. McKinney*, 509 U.S. 25, 33-35 (2009). Risk of harm need not relate to a *particular* prisoner, but can be applicable to a group of at-risk individuals. *Tafoya v. Salazar*, 516 F.3d 912, 916 (10th Cir. 2008)(emphasis added). To demonstrate deliberate indifference, the plaintiff must show that prison officials are aware of a significant risk of harm, and that they have failed to take reasonable steps to abate it. *Farmer*, 511 U.S. at 847. The factfinder may conclude that a prison official subjectively knew of the substantial risk of harm by circumstantial evidence or "from the very fact that the risk was obvious." *Id.* at 842.

Long-term denial of outdoor access is a serious deprivation as it results in unnecessary suffering, and is counter to society's evolving standards of decency. For many decades, courts have recognized that prisoners are harmed if they are not permitted outdoor access, as "some form of regular outdoor exercise is extremely important to the psychological and physical well being of inmates." *Bailey v. Shillinger*, 828 F.2d 651, 653 (10th Cir. 1987) (citing *Spain v. Procunier*, 600 F.2d 189, 199 (9th Cir.1979)); accord *Williams v. Greifinger*, 97 F.3d 699, 703–05 (2d Cir.1996) (discussing contours of right to out-of-cell exercise); *Mitchell v. Rice*, 954 F.2d 187, 191 (4th Cir.1992) ("Generally a prisoner should be permitted some regular out-of-cell exercise."); *Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7th Cir. 1988) (allowing only one hour of out-of-cell exercise a week violated Eighth

Amendment). Periods significantly shorter than a decade have been found—as a matter of law—to constitute a significant risk of harm. *See Thomas v. Ponder*, 611 F.3d 1144, 1151 (9th Cir. 2010) (thirteen month denial sufficient); *Lopez v. Smith*, 203 F.3d 1122, 1133 (9th Cir. 2000) (six weeks).

Defendants have acted with deliberate indifference to the serious risk resulting from extended denial of outdoor access. First, Defendants are aware of the risk of harm from long-term denial of outdoor exercise both because it is obvious, and because this lawsuit itself has put them on notice of the denial. In addition, Defendants are aware that outdoor access is considered basic need of prisoners as it is regularly provided by all correctional facilities at all security levels. Colorado stands alone in the type of blanket denial of outdoor exercise suffered by Mr. Anderson. Second, in light of this knowledge, Defendants have responded unreasonably. Even though CSP has an outdoor exercise area, Defendants do not allow any prisoners to utilize it. Further, they have failed to construct an outdoor area in the secure perimeter of CSP, a step that would require little effort and expense and would actually improve safety.

III. RELIEF SOUGHT

Mr. Anderson seeks the following injunctive relief:

1) community standard mental health care including effective medications and a treatment team;
2) improved procedures to evaluate his progression in the Quality of Life program, including objective criteria and an opportunity to participate in the review process; and
3) regular access to the outdoors.

In addition, Mr. Anderson seeks nominal damages under the Rehabilitation Act for the discrimination he has endured. Nominal damages are permitted under the RA , and are not foreclosed by the limitations on damages in the Prisoners Litigation Reform Act. *See, e.g., Cassidy v. Ind. Dep't of Corr.,* 59 F.Supp.2d 787, 793-94 (S.D. Ind. 1999); *see also Perkins,* 165 F.3d at 808 n.6.

Respectfully submitted this 23rd of April, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April, 2012, I electronically filed the foregoing document, Plaintiff's Trial Brief, with the clerk using the CM/ECF system, which will send notification of such filing to the following email addresses:

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