

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION**

IN THE MATTER OF LITIGATION RELATING TO CONDITIONS OF CONFINEMENT AT MONTANA STATE PRISON CV 93-46-H-DWM-JCL

THIS DOCUMENT RELATES TO:

LANGFORD, et al.,

ORDER

Plaintiffs,

vs.

GOV. BRIAN SCHWEITZER, et al.,

Defendants.

I. PROCEDURAL BACKGROUND

This matter comes before the Court in a continuing effort to arrive at a final resolution of the issues that remain in this case. This case is a 15-year old consolidated class action lawsuit addressing various conditions of confinement of inmates at the Montana State Prison (MSP) in Deer Lodge, Montana.

In October 1994, the parties entered a Settlement Agreement establishing procedures to address and resolve the various issues raised by this lawsuit. The process set forth in the Settlement Agreement employs impartial experts who conduct on-site investigations to determine whether Defendants are in substantial compliance with the terms of the Settlement Agreement. If the

experts find that Defendants are in substantial compliance with specific provisions of the Settlement Agreement then the agreement provides that Defendants may seek dismissal of those portions of the action where substantial compliance is found. Alternatively, if the experts find that Defendants are not in substantial compliance with certain provisions of the Settlement Agreement then this Court retains continuing jurisdiction over those aspects of this lawsuit until substantial compliance is reached.

Over the years the parties have previously stipulated to the dismissal of numerous aspects of this lawsuit on the basis experts have found that Defendants were in substantial compliance with specific provisions of the Settlement Agreement. There remains for resolution, however, the issue of the Settlement Agreement's provision requiring compliance with the Americans with Disabilities Act (ADA). The ADA provision reads as follows:

SECTION 9 - ADA COMPLIANCE

Defendants shall ensure that inmates with disabilities are not excluded from participation in, or denied the benefits of housing, services, facilities and programs because of their disabilities.

The Defendants shall develop and implement plans to integrate the disabled inmates into the mainstream of the institution.

On August 18, 2005, Defendants moved to dismiss the remaining provisions of the Settlement Agreement, including the ADA provision. Defendants requested dismissal in accordance with

various terms of the Settlement Agreement. Alternatively, pursuant to the Prison Litigation Reform Act (PLRA) the Defendants moved for dismissal or termination of the prospective relief imposed by the Settlement Agreement.

On January 26, 2006, United States Magistrate Judge Leif B. Erickson issued an Order denying Defendants' Motion to Dismiss. Judge Erickson found there had been no conclusive finding by any expert, one way or the other, as to whether the Defendants were in substantial compliance with the ADA provision of the Settlement Agreement. Therefore, the Court concluded the Settlement Agreement required it to retain jurisdiction over the ADA provision pending further proceedings in this case.

The Court's January 26, 2006 Order also addressed Defendants' request for termination under the PLRA. In addressing that issue Judge Erickson stated as follows: "At this point the PLRA is not relevant to the discussion, though this is not to say it could not become so at a later date."¹ In substance, the January 26, 2006 Order denied Defendants' request for termination under the PLRA.

Plaintiffs opposed Defendants' Motion to Dismiss, and on November 28, 2005, Plaintiffs moved for a scheduling order and the appointment of an expert to conduct further investigations as to the conditions at MSP. The Court's January 26, 2006 Order

¹January 26, 2006 Order at 5.

granted Plaintiffs' motion, and on January 26, 2006, the Court issued a separate scheduling order. The scheduling order established a procedure for identifying and narrowing the remaining ADA issues, and for appointing an expert to investigate those issues. On February 24, 2006, however, Defendants filed a Notice of Appeal. Defendants appealed the January 26, 2006 Order denying their motion requesting dismissal and termination of all remaining provisions of the Settlement Agreement.

On April 17, 2007, the Ninth Circuit Court of Appeals issued its decision and Judgment dismissing Defendants' appeal. The Ninth Circuit addressed both the Defendants' request for termination under the PLRA, and their request for dismissal under the terms of the Settlement Agreement. With regard to the PLRA the Ninth Circuit found the district court did not enter a final order on the PLRA issue and, therefore, the Ninth Circuit did not have jurisdiction over Defendants' appeal of that issue. Nonetheless, in exercise of its pendent jurisdiction over the matter the Ninth Circuit stated that the district court properly did not resolve the PLRA termination issue, noting that the district court is obligated to take evidence on the conditions at MSP before it can render a decision on the PLRA termination issues.

The Ninth Circuit also addressed the issue of whether dismissal of the case was appropriate under the provisions of the

parties' Settlement Agreement. The Ninth Circuit agreed with the district court's order finding that the parties had not fully complied with the Settlement Agreement's procedures for establishing either Defendants' substantial compliance, or their non-compliance, with the ADA provision of the Settlement Agreement. Accordingly, the Ninth Circuit remanded this case for further proceedings to resolve the remaining ADA issues.²

In light of the Ninth Circuit's April 17, 2007 rulings, this Court issued an Order on April 19, 2007, requiring the parties to file status reports identifying the issues which remain to be resolved in this litigation.³ The Court also set a hearing to establish a schedule for resolution of the remaining issues. Following the hearing held on May 10, 2007, the Court issued an Order on May 18, 2007, imposing a procedure and schedule for the identification and resolution of the remaining ADA issues.

In compliance with the May 18 scheduling order, and following an extension of time requested by the Plaintiffs, the parties jointly advised the Court on October 1, 2007, that they

²On June 13, 2007, the Ninth Circuit issued an Order amending its April 17, 2007 Judgment confirming that the appeal was dismissed, and clarifying as follows: "[T]he judgment of the District Court in this cause be, and hereby is **AFFIRMED** and the case is **REMANDED** for further proceedings."

³The Court notes that in their May 8, 2007 Status Report filed in response to the April 19 Order the Defendants stated that their August 18, 2005 motion to terminate under the PLRA remains pending before the Court.

were unable to reach an agreement as to either the issues that remained for resolution, or the procedure which should be used to resolve the remaining issues. The parties advised they would each simultaneously file a brief by November 15, 2007, setting forth their respective positions on those matters.

On November 7, 2007, Plaintiffs moved for an extension of time for the parties to file their briefs as proposed in the October 1 Joint Status Report. On November 7, 2007, the Court granted the motion and ordered the parties to file their simultaneous briefs by December 11, 2007. The Court also set a hearing for January 8, 2008.

The Court held the January 8, 2008 hearing for the purposes of identifying those issues which remain to be resolved in this case under the parties' Settlement Agreement and particularly the ADA provision, and establishing a schedule for final disposition of this case. At the hearing the parties agreed that the ADA issue is the sole remaining matter to be resolved in this case. The parties have not, however, reached any agreement as to the scope of the areas in which inquiry must be made, or the scope of ADA compliance required by the Settlement Agreement.

II. SUMMARY OF THE PARTIES' POSITIONS

The parties each filed a brief on December 11, 2007, as ordered by the Court. Their respective positions are summarized below.

A. Plaintiffs' Position

Plaintiffs filed their Brief Detailing Current Status of the Case on December 11, 2007. Plaintiffs advise they have gathered substantial evidence from individual disabled inmates at MSP, which Plaintiffs contend establishes Defendants' non-compliance with the ADA provision of the Settlement Agreement. Plaintiffs have investigated and reported on numerous individual inmates' allegations of conditions or circumstances at MSP that violate the ADA. Those individual complaints include the following claims: (1) Defendants have not provided adequate assistance to hearing-impaired inmates, (2) Defendants have denied assistive and auxiliary aids to physically disabled inmates to enable them to travel around the prison and participate in prison programs, (3) some physically disabled inmates' cells, toilets, and showers are not handicap-accessible, (4) some physically disabled inmates have been unable to participate in prison programs or engage in some prison jobs due to their disabilities and physical barriers at MSP, (5) there are mentally ill or learning disabled inmates to whom Defendants have denied access to some programs based on their disabilities, and (6) some disabled inmates have been disciplined for behaviors that are a product of their disability, and Defendants did not provide those inmates with adequate assistance to navigate the disciplinary process. Plaintiffs

further complain that Defendants have failed to make reasonable accommodations for the ADA complaints identified above.

Plaintiffs assert that the Court must appoint an expert to investigate the remaining ADA issues. They advise that the most recent expert report, apparently issued in 1997, was inconclusive on the issue of compliance with the ADA provision. Plaintiffs represent to the Court that in that report the experts stated they had made no findings concerning ADA compliance and instead recommended that the Court should resolve the issue of whether Defendants had achieved substantial compliance with the ADA. Therefore, Plaintiffs assert an expert must be appointed to assist the parties and the Court in determining whether Defendants are in substantial compliance with the ADA provision of the Settlement Agreement. Additionally, to the extent the PLRA termination provisions are relevant to the Court's consideration of the remaining issues, Plaintiffs believe an expert must be appointed to address those termination issues.

B. Defendants' Position

In their Brief Regarding the Issues Remaining for Determination, Defendants contend that Plaintiffs inappropriately propose an unreasonably broad approach for the identification and resolution of the ADA issue. Defendants argue Plaintiffs' identification of numerous individual inmate complaints on specific ADA-related matters fails to identify challenges to the

general issue of whether Defendants are in compliance with the ADA provision. Instead, Plaintiffs' efforts raise only isolated instances of breakdowns in Defendants' ADA compliance. In response to Plaintiffs' complaints, Defendants assert they have made systemwide improvements to the physical plant facilities at MSP, and they have improved the grievance system enabling inmates to effectively raise and address ADA-related claims.

Defendants adamantly contend the issue of substantial compliance under the Settlement Agreement is no longer the controlling issue in this case. Rather, Defendants assert that further proceedings in this case are governed by the PLRA. Defendants continue to assert that pursuant to the PLRA at 18 U.S.C. § 3626(b)(2) and (3), they are entitled to termination of the prospective relief provided in the Settlement Agreement.

In light of their legal position that the proceedings are limited by the PLRA, and the history of this case, Defendants contend that the scope of the review of ADA compliance should be limited to those issues previously identified by Plaintiffs during the course of this litigation. Specifically, Defendants argue the Plaintiffs should be limited to challenging only the Defendants' alleged systemwide ADA compliance failures, and that they should not be permitted to explore individual case-specific incidents of alleged ADA claims, or to indefinitely continue the Court's jurisdiction over individual prisoner complaints.

Defendants have proposed a process for resolving this case as follows: Defendants contend their Report on Section 1.9 of the Settlement Agreement filed July 2, 2007, sets forth prima facie evidence that Defendants have made improvements and have established a system that complies with the ADA. Therefore, Defendants believe Plaintiffs must produce evidence of current and ongoing ADA violations on a systemwide basis which pose a real and immediate threat of continuing systemwide future ADA violations. Defendants should then be given an opportunity to rebut Plaintiffs' claims with evidence that inmates have not requested accommodations under the ADA, that Defendants have made reasonable accommodations, that modifications would unduly burden or improperly alter the prison, or that modifications would be contrary to prison policy or regulation.

III. DISCUSSION

A. Termination of Prospective Relief Under the PLRA

Contrary to the Defendants' assertion, the Court finds Defendants' August 2005 motion under the PLRA requesting termination of the prospective relief awarded in the Settlement Agreement is no longer before the Court. The Court expressly denied the motion on January 26, 2006, and the Ninth Circuit's April 17 and June 13, 2007 rulings formally affirmed, and did not

modify, the January 26 order. Therefore, the Court need not address the PLRA termination issue at this time.⁴

B. Substantial Compliance Under the Settlement Agreement

Contrary to Defendants' position, the Court finds the issue of whether the Defendants have achieved substantial compliance with the ADA provision of the Settlement Agreement remains to be resolved. The Settlement Agreement establishes an agreed procedure for assessing substantial compliance. It provides that substantial compliance will be assessed by an expert selected jointly by Plaintiffs' and Defendants' experts. If the parties cannot agree on an expert then the Settlement Agreement provides that the parties may request the Court appoint an expert.

Following appointment, the expert will be called upon to investigate conditions at MSP in accordance with the Settlement Agreement and report to the Court whether or not the expert believes the Defendants are in substantial compliance with the Settlement Agreement. Upon review of the expert's report, and with the benefit of the parties' comments, the Court will

⁴The Court notes the PLRA termination issue may properly be raised after the issue of "substantial compliance" is addressed. As noted by the Ninth Circuit's decision in this case, the Court would be obligated under the PLRA to take evidence as to the current circumstances at MSP in order to issue findings relative to the PLRA termination provisions at 18 U.S.C. § 3626(b)(3). *Gilmore v. People of the State of California*, 220 F.3d 987, 1010 (9th Cir. 2000).

determine whether the Defendants have achieved substantial compliance with the ADA provision of the Settlement Agreement.⁵

C. Prior Expert Reports

The parties and the record refer to previous expert reports addressing the ADA provision. Plaintiffs and the Court's January 26, 2006 Order both refer to a 1997 expert report in which the experts state they make no findings concerning Defendants' compliance with the ADA, and instead recommended that the Court resolve the ADA compliance issues.

In contrast, Defendants and the Ninth Circuit's April 17, 2007 ruling both refer to a prior expert report in which the experts found substantial compliance with the ADA provision. The Ninth Circuit referred to a January 24, 1996 report which, for purposes of its ruling, the Ninth Circuit assumed contained a finding of substantial compliance with the ADA provision. Similarly, during the January 8, 2008 hearing in this matter counsel for the Defendants represented to the Court that there existed an expert report which concluded Defendants were in substantial compliance with the ADA. Counsel recognized at the hearing, however, that the experts chose to leave the ultimate legal determination of ADA compliance for the Court to resolve.

⁵The Settlement Agreement provides that the expert's report "will be considered as evidence, but not be binding on the Court which will make the final determination of substantial compliance." (Settlement Agreement ¶ II., 5.)

Based on counsel's representation, the Court will proceed on the basis that Defendants have previously achieved substantial compliance with the ADA provision. As previously stated by this Court and noted by the Ninth Circuit, however, the Settlement Agreement requires a second finding of substantial compliance. Specifically, the Settlement Agreement provides a two-stage process:

Should the impartial experts find the Defendants have achieved substantial compliance, the impartial experts shall make one (1) final on-site visit at the end of four (4) months following the impartial experts' finding of substantial compliance. The impartial experts' final on-site visit will be conducted according to paragraph [II., 3. of the Settlement Agreement.]⁶

Having found that Defendants previously achieved substantial compliance, as contemplated by stage one of the Agreement, this matter must now proceed to the final on-site visit as directed in paragraph II., 5. of the Settlement Agreement.

D. Scope of the ADA Compliance Issues to be Considered

Defendants assert that the scope of the inquiry whether substantial compliance with the ADA provision has been achieved should be limited to those issues Plaintiffs have previously identified in the course of this lawsuit. Defendants note that in 1995, 1996, and 1997 Plaintiffs identified the following areas of ADA non-compliance: (1) the inaccessibility of the low side

⁶Settlement Agreement at ¶ II., 5.

law library and classrooms in the low side support building,⁷ (2) the inaccessibility of the vocational and industries programs,⁸ (3) the inaccessibility of the honor dorm and pre-release programs,⁹ and (4) the inaccessibility of the high side prison cells.¹⁰

During the January 8 hearing counsel for Plaintiffs agreed that these four areas are necessary areas of inquiry with regard to ADA compliance. However, Plaintiffs' counsel also asserted that there are additional areas which must be investigated to determine substantial compliance under the Settlement Agreement. Plaintiffs' counsel suggests the parties should engage in a comprehensive process by which the parties could explore an unlimited expansive list of areas in which ADA compliance is required. Counsel does not, however, identify any legal authority for such a sweeping ADA inquiry.

The Court finds the Settlement Agreement does not contemplate a broad review of individual ADA complaints as Plaintiffs suggest. First, the Settlement Agreement clarifies that "substantial compliance" is all that is required and,

⁷Defendants' Status Report (May 8, 2007), Ex. 1 at 4, Ex. 3 at 7-8, and Ex. 4 at 12-13.

⁸*Id.*, Ex. 2 at 5.

⁹*Id.*, Ex. 2 at 5, and Ex. 3 at 8.

¹⁰*Id.*, Ex. 3 at 8, and Ex. 4 at 13.

therefore, it provides that sporadic, isolated, or unintentional “[i]ncidents of non-compliance do not necessarily prevent a finding of substantial compliance.”¹¹ Second, with regard to Plaintiffs’ remedies under the Settlement Agreement for non-compliance, Plaintiffs must establish “that Defendants’ failures or omissions to meet the terms of this agreement are not minimal or isolated, but are substantial and widespread.”¹²

Furthermore, the Settlement Agreement establishes a method for educating and informing the appointed expert as to the areas of inquiry he or she must make. The agreement permits the expert to “review all documents not otherwise privileged, speak with any Defendants or staff member at MSP, and [] engage in private conversations with any class member.”¹³ The Court finds that method is sufficient to allow the expert to develop a plan of action for his or her investigation at MSP.

Therefore, in the absence of a stipulation as to the scope of the ADA matters to be considered, and in light of the sufficient procedures set forth in the Settlement Agreement the Court will direct the expert’s inquiry as set forth below. The Court finds the experts’ inquiry is appropriately limited to the

¹¹Settlement Agreement at ¶ I., 7.

¹²*Id.*, at ¶ III., 1.

¹³*Id.*, at ¶ II., 3.

ADA matters previously identified by Plaintiffs as being at issue in this case.

In addition to the physical plant issues identified above, the parties acknowledged at the January 8 hearing that Defendants' grievance system needs to be assessed. The parties agreed that an expert should consider whether the MSP grievance system permits individuals with ADA-related complaints to adequately assert their claims through the grievance system, and whether the grievance system is effective at addressing those ADA-related complaints. Accordingly, the Court will also order an expert to investigate those issues.

Based on the foregoing, the Court hereby enters the following:

ORDER

1. On or before **February 29, 2008**, the parties shall meet and confer to agree upon a neutral expert to assess the remaining ADA matters and PLRA issues identified below. The parties shall file a joint notice with the Court on or before **March 5, 2008**, identifying their agreed expert.

2. If the parties are unable to agree upon an expert, then within 14 days of their meeting, and no later than **March 14, 2008**, each party shall submit the names and curriculum vitae of three candidates to the Court. The Court will then select one of the candidates, or a candidate of the Court's own choosing, and

appoint that expert pursuant to the Settlement Agreement and Fed. R. Evid. 706 to assess the matters identified in paragraph 3.

3. The matters the expert shall consider and address in terms of substantial compliance with the ADA provision of the Settlement Agreement are limited to the following:

- a. inaccessibility of law library and classrooms;
- b. inaccessibility of vocational and industries programs;
- c. inaccessibility of honor dorm and pre-release programs;
- d. inaccessibility of the high side living cell; and
- e. the effectiveness of the Montana State Prison's grievance system in addressing inmates' complaints arising under the ADA.

DATED this 8th day of February, 2008.

/s/ Jeremiah C. Lynch
Jeremiah C. Lynch
United States Magistrate Judge