IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 12-cv-00053-MSK-BNB

MAJOR JON MICHAEL SCOTT,

Plaintiff,

v.

CITY & COUNTY OF DENVER,

Defendant.

PLAINTIFF'S MOTION TO COMPEL

Plaintiff, by and through his counsel, hereby files this Motion to Compel, requesting that this Court order Defendant City and County of Denver (the "City"):

1. To identify all other deaf and hard of hearing inmates since 2007 and state what accommodations, if any, each received; and

2. To produce documents relating to disciplinary proceedings against Plaintiff Scott.

Background

Plaintiff Scott is deaf and primarily communicates with American Sign Language ("ASL"). He was arrested for burglary in February 2007 and incarcerated at the Denver County Jail for approximately three months. In July, 2007, he pled guilty and received three years of probation. He has been arrested and detained on a number of occasions since that time for violating his probation. On several of those occasions, including but not limited to his detention

in October 2010 and again in October, 2011, the City failed to provide Mr. Scott with a sign language interpreter.

Mr. Scott has brought suit under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq*. ("ADA"), and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504") alleging that the City failed to provide required auxiliary aids and services necessary to ensure effective communication. *See* 28 C.F.R. § 35.160(a)(1). He has further alleged that the City systematically, knowingly, and intentionally discriminated against him and other deaf and hard of hearing individuals, that it is likely that he will suffer discrimination in the future, and that the City has been on notice since at least 2007 "of the deficiencies in its policies and practices for the provision of interpreters and other accommodations to deaf and hard of hearing detainees." Complaint (ECF 1) ¶¶ 3, 24, 25. He has requested both damages and injunctive relief. *Id.* at 8 (¶¶ 3-4).

Interrogatory No. 4: The Identity of Other Deaf Detainees

Plaintiff's Interrogatory No. 4 ("Ig. 4") requested that the City:

> Identify all individuals who are deaf or hard of hearing who have been arrested or detained by the City from 2005 to the present and for each, identify any Accommodations he or she requested and/or received, identify the circumstances in which any Accommodation was provided, all individuals with information relating to such Accommodation, and all documents relating to such Accommodation.

Robertson Decl., Exhibit 1 at 5-6. This interrogatory was served on March 28, 2012. The City served its responses on May 11, its supplemental responses on June 1, and its second supplemental responses on June 15.

Although the original interrogatory requests information back to 2005, Plaintiff would be satisfied with information back to 2007, when he was first incarcerated.

In both its initial and supplemental responses, the City objected that Ig. 4 was overbroad, vague, and not reasonably calculated to lead to discoverable information. It further asserted that:

> neither DSD's nor DPD's[1] computer systems are designed to track encounters with deaf or hard of hearing arrestees or inmates. As such, at this time, Defendant has not identified any reasonably efficient, effective or accurate method to obtain the information responsive to Interrogatory #4.

Robertson Decl. Ex. 1 at 6.

However, in the case of *Ulibarri v. City and County of Denver*, 07-cv-1814-ODS-MJW,[2] a lawsuit by two other deaf former inmates and the estate of a third alleging similar ADA and Section 504 violations, the City made clear that it did indeed track deaf or hard of hearing inmates. In a pleading filed on June 11, 2012 -- just ten days after the interrogatory response above -- the City stated that, "[i]f an inmate is deaf, an 'alert' containing that information is placed in the inmate's computerized file and will show on a document known as a tier sheet." *Id.*, Def.'s Corrected Resp. To Suggestion Re: Organizational and Associational Standing, ECF No. 417 at 19 (Robertson Decl. Ex. 2). In support, the City submitted to the court two redacted samples from its computer system showing inmates whose records reflected the comment that they were "deaf." *Id.*, Exs. 4-4 & 4-5 (Robertson Decl. Ex. 3).

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[1] "DSD" refers to the Denver Sheriff Department; "DPD," to the Denver Police Department.

[2] The undersigned is also counsel for the plaintiffs in *Ulibarri*.

As part of his attempt to resolve this dispute, Plaintiff sent copies of Exhibits 4-4 and 4-5 from the *Ulibarri* case to counsel for the City on the present case and suggested that this alert would make it possible for the City or its information technology professionals to search for and identify any current or past inmates who are or were deaf. Robertson Decl. Ex. 4. In response, counsel for the City stated that "DSD and DPD's computer systems are designed to *store information*; they are not designed to *retrieve information*. Or, stated differently, although information may be input into DSD or DPD's computer systems, it does not mean it is readily available for retrieval." Robertson Decl. Ex. 5 (italics in original).

This is facially inconsistent with the assertion that the information is shown on the tier sheet. *Ulibarri*, ECF 417 at 19 (Robertson Decl. Ex. 2). It is also inconsistent with the fact that the City was able to find two examples of deaf inmates to attach to their *Ulibarri* pleadings. Finally, in *Ulibarri*, the City has also asserted that it sends a "deaf advocate" to meet with deaf inmates, and that these deaf advocates fill out and submit to the City certain paperwork about each. *Id.* at 19-22. Plaintiff requested production of this information in an interrogatory due on August 16, 2012. Robertson Decl. Ex. 12. While likely not comprehensive, these documents would also provide a source of information to respond to Ig. 4.

In a further attempt to resolve this matter, Plaintiff requested an informal interview with the City's information technology personnel, and served a notice of deposition pursuant to Rule 30(b)(6) on that topic. Robertson Decl. Exs. 6 & 7. Counsel for the City responded that he would not consent to an informal interview and would not be able to make anyone available for deposition until late August. Although Plaintiff requested on July 23 that the City propose dates

for such a deposition, as of today – July 27 – no dates have been proposed. Robertson Decl. ¶ 10 & Exs. 8 & 9.

Plaintiff also requested that, as a start, the City remove the redactions from *Ulibarri* Exhibits 4-4 and 4-5 and produce those documents, as both would be responsive to Ig. 4. Robertson Decl. Ex. 8. The City has not responded to this request. *Id.* ¶ 10.

In any event, the undersigned has likely solved the problem of searchability and thus of burden, in a conversation with the company that supplied the relevant software. From publicly available documents, Plaintiff's counsel learned that Denver uses software sold by Syscon Justice Systems to track inmates.[3] On July 23, the undersigned called Syscon and spoke both with an individual in tech support and an executive. Those individuals both explained that while it is true that one cannot use the software itself to search the "comment" field (in which the City has noted the fact that an inmate is deaf), there are two other methods that would permit the parties quickly and easily to identify present and former inmates who are deaf. First, one can export the entire database -- including the comment field -- to a Microsoft Excel spreadsheet and then search or filter to get those in which that field contains keywords ("deaf" or "hearing" - as in "hard of hearing" or "hearing impaired," etc.). Alternatively, one can create a report in pdf format, and then use the search function in a similar fashion. Syscon personnel expressed that the former method would be far more efficient. Robertson Decl. ¶¶ 14-17.

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[3] For example, the contract between the company and the City. www.denvergov.org/sirepub/cache/2/f1jkkbeafti1ic55syw5pt45/171691072320120409472 11.pdf

Plaintiff informed counsel for the City of this call on July 23, recited the above explanation, and requested that the City use one of those methods to respond to Ig. 4. The undersigned added that, if the City continued to believe this was burdensome, Plaintiff would be willing to either have the City produce agreed fields from the database unfiltered pursuant to a protective order, or to pay for a neutral third party database consultant to do the work. *See id.* ¶ 18 & Ex. 10. Plaintiff has not received a response to this email. *Id.* ¶ 19.

Request for Production No. 3: Documents Relating to Disciplinary Hearing

Plaintiff's Request for Production No. 3 ("RFP No. 3") requested that the City produce

> [a]ll documents relating to Plaintiff Scott, including but not limited to those in the possession of the Department of Safety, and those in possession of the Office of Sign Language Services and Resources.

Robertson Decl. Ex. 1 at 14.

While the City has produced a number of documents relating to Mr. Scott, they have not produced any relating to a disciplinary hearing that appears to have occurred on or about February 9, 2011. Plaintiff has informed counsel for the City of this oversight on two occasions -- on July 11 and again on July 24, Robertson Decl. Ex. 11 -- and has not received a response. The City has not asserted any objection to producing these documents, but has not produced them.

ARGUMENT

I. Plaintiff is Entitled To The Identity of Other Deaf Inmates.

The City raises two types of objection to Plaintiff's request to identify other deaf inmates: that the information is not relevant; and that it is burdensome to gather it. Neither has merit.

A. The Identity of Other Deaf Inmates Is Relevant.

Plaintiff Scott alleges that the City's effective communications policies are deficient and that the City discriminated against him intentionally. He requests both damages -- for which intent is an element -- and injunctive relief. The City, however, claims that its policies were lawful, Answer, ECF 10, at 5, and has, in the *Ulibarri* case, argued that it has reformed its policies. These claims and defenses make the experiences of other deaf inmates relevant. *Cf. Underwood v. Sullivan*, 2012 WL 761661, at *5 (E.D. Cal. March 7, 2012) (holding that in prison excessive force claims, "the Court allows discovery of records of other claims of excessive force against named defendants in the past").

For example, these experiences will be able to shed light on the City's state of mind throughout the relevant period, its policies, and the implementation thereof. Under the ADA and Section 504, "intentional discrimination can be inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights." *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1153 (10th Cir. 1999). Although Mr. Scott does not have to prove the existence of a pattern or practice to obtain damages, the question whether and how the City has implemented and is implementing its effective communication policies with respect to other deaf inmates will be relevant under *Powers*. It will, in addition, be relevant to the need for and the content of any injunctive relief.

B. Identifying Other Deaf Inmates is Not Burdensome.

As explained above, all that is required to identify deaf inmates is to export the information in the City's jail database to an Excel spreadsheet and search or filter for the use of the word "deaf" or "hearing" in relevant fields. Production of documents from the "deaf advocate" program would provide additional -- though likely not comprehensive -- information.

The first procedure -- use of an Excel spreadsheet -- is, in the undersigned's experience, very simple. If the City believes it is burdensome, Plaintiff is willing to incur the cost of an independent database consultant to perform the work. The City has not objected that it would be burdensome to produce documents related to the deaf advocate program; indeed, it did not appear to recognize that those documents could be a source of responsive information. Even where a prison chaplain was required to "sort through all his chaplaincy records for hundreds of offenders," the court held that this was not unduly burdensome. *Nelson v. Miller*, 2006 WL 2506438, at *1 (S.D. Ill. Aug. 25, 2006).

II. Plaintiff is Entitled to Documents Relevant to Disciplinary Proceedings Against Him

Plaintiff has requested all documents relating to himself in the possession of the City. The City did not object, but has failed to produce documents relating to his February, 2011, disciplinary proceedings, despite repeated requests.

Certificate of Compliance with FRCP 37(a) and D. Colo. L.R. 7.1A

The undersigned certifies that before filing this motion, she conferred at length with counsel for the City, as described above and documented in Paragraphs 14 through 20 and Exhibits 4 through 10 of the Robertson Declaration.

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that this Court order that the City:

1. Identify all deaf and hard of hearing inmates as requested in Interrogatory No. 4 from 2007 to the present; and

2. Produce all documents related to the disciplinary hearing against Plaintiff Scott in or about February 2011.

Respectfully submitted,

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Attorneys for Plaintiff

Dated: July 27, 2012

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email address:

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