

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Curtis J. Garrett,

Plaintiff,

versus

3:20 CV 986

Commonwealth of Virginia,

Defendant

Before: HONORABLE JOHN A. GIBNEY, JR.
United States District Judge

July 21, 2021
Richmond, Virginia

Gilbert F. Halasz, RMR
Official Court Reporter
U. S. Courthouse
701 East Broad Street
Richmond, Virginia 23219
(804) 916-2248

APPEARANCES

Arnold & Porter
by: **Andrew Edward Talbot, Esq.**
John Freedman, Esq.

Rights Behind Bars

by: **Kelly Jo Popkin, Esq.**
Oren Nimni Esq.

Laura Elizabeth Maughan, Esq.
Office of the Attorney General
For the defendant

1 THE CLERK: Case number 3:20 CV 986.

2 Curtis J. Garrett versus Commonwealth of Virginia.

3 Mr. Andrew Edward Talbot, Mr. John Freedman and Ms

4 Kelly Popkin represent the plaintiff.

5 Ms Laura Elizabeth Maughan represents the defendant.

6 Are counsel ready to proceed?

7 MS MAUGHAN: Commonwealth defendants are ready, Your

8 Honor.

9 MR. TALBOT: Plaintiff is ready, Your Honor.

10 THE COURT: All right. Who are you, sir?

11 MR. TALBOT: Andrew Talbot.

12 THE COURT: All right. And who else is with you at

13 your table today?

14 MR. TALBOT: My co-counsel, Kelly Popkin, Oren Nimni

15 from Rights Behind Bars, and John Freedman.

16 THE COURT: Who is the last gentlemen over here?

17 MR. TALBOT: John Freedman.

18 THE COURT: All right.

19 And you are all from Arnold and Porter?

20 MR. TALBOT: John and I are from Arnold and Porter

21 and Kelly Jo Popkiin and Oren Nimni are from Rights Behind

22 Bars, co-counsel.

23 THE COURT: Well, all right. Let's get rolling then.

24 We are here today, Ms. Maughan, on your motion to

25 dismiss the case, or dismiss parts of the case. So let's

1 hear what you have to say.

2 MS MAUGHAN: All right. Good morning, Your Honor.
3 This Laura Maughan on behalf of the defendants, Virginia
4 Department of Corrections, Defendant Hamilton, Davis,
5 Clarke, Robinson, Barbetto, Herrick and Marano.

6 If it pleases The Court, we are here today to argue
7 on behalf of the defendants' motion to dismiss.

8 THE COURT: I am having trouble understanding you.
9 Go ahead.

10 MS MAUGHAN: I am going to roadmap my argument a
11 little bit for The Court. I would like to start what I
12 think are the easier calls for The Court to make, that is
13 with the injunctive relief that the plaintiff is
14 requesting. I want to move then into the ADA claims that
15 they have made. And then into the negative supervision
16 and gross negligence claim that they are attempting to
17 make. And then I am going to get into the constitutional
18 law claims and why I believe those are deficient.

19 Overall --

20 THE COURT: I read your papers.

21 MS MAUGHAN: Excellent. Wonderful, Your Honor.

22 THE COURT: We don't need to repeat.

23 MS MAUGHAN: I won't.

24 THE COURT: You can address The Court on any
25 deficiencies in your papers. Other than that, I am pretty

1 familiar with your argument.

2 MS MAUGHAN: All right. I would start then with the
3 opinion that came out from Judge Cullen I believe
4 yesterday or Monday. Brought to The Court's attention and
5 talk about how I think that applies to the facts of this
6 case. I think to the extent Judge Cullen's opinion is
7 helpful on the injunctive relief issues for the defendants
8 in this case, and I understand that Judge Cullen allowed
9 the injunctive relief.

10 THE COURT: Wait. Your guy is not in prison,
11 Mr. Garrett, correct?

12 MS MAUGHAN: Right.

13 THE COURT: How could they get injunctive relief if
14 he is not in prison?

15 MS MAUGHAN: He can't. He lacks standing.

16 THE COURT: Move on to the next argument.

17 MS MAUGHAN: Excellent.

18 On the ADA claims, I understand from reading
19 plaintiff's brief, and from reviewing the law a little bit
20 more, I understand what the plaintiff is alleging is that
21 their ADA claims arise under the amendment to the ADA
22 which occurs in 2008. And they are correct. There is a
23 four-year catch all statute on limitations that applies to
24 those types of disabilities and claims that fall under
25 that type of -- under the amendments. From the

1 clarification and the response, I have to concede that the
2 four-year statute of limitation applies in this case to
3 the extent they are claiming that Mr. Garrett's damages,
4 or Mr. Garrett's accommodations were not that bad to the
5 extent that they are claiming that he had difficulty
6 ambulating, difficulty getting to the medical line,
7 difficulty getting to the chow hall to get food while in
8 prison. Those types of issues would not fall under the
9 ADA claims that would have fallen under the one-year
10 statute of limitations. They were made possible by
11 amendment. And therefore the four-year statute catch-all
12 applies. I concede that point. However, this is only a
13 claim for money damages under the ADA, not a claim for
14 injunctive relief under ADA. And count that is brought
15 against the Department of Corrections, which is a correct,
16 proper party for money damages under the ADA. And Warden
17 Davis in his individual capacity, Warden Davis is not a
18 proper party for purposes of an ADA claim in this context.

19 THE COURT: Okay.

20 MS MAUGHAN: That is important because under -- this
21 wasn't argued in the reply or motion. I understand The
22 Court doesn't want to hear that, but I give The Court
23 notice that my defense to this, part of my defense to this
24 claim, given the clarification that the disability was --

25 THE COURT: Well, maybe we ought to get them to

1 re-plead that so we can make sure, make clear exactly what
2 is in that claim and what is not. Because at the end of
3 this exercise today that is what is going to happen. We
4 are going to grant some of your motions, deny some of your
5 motions, and grant them leave to re-plead with a little
6 more precision on things like that.

7 MS MAUGHAN: I think that would be a wonderful idea,
8 Your Honor.

9 THE COURT: Well, thank you. And then you can come
10 in and tell us what is wrong. Okay?

11 MS MAUGHAN: That sounds great. I will skip over
12 that.

13 The Court has read the briefs on negligent
14 supervision and gross negligence claims.

15 THE COURT: We don't have a negligent supervision
16 claim in Virginia, do we?

17 MS MAUGHAN: Correct, we no not. Judge Cullen
18 clarified that and held the same in his opinion. I think
19 his logic applies here.

20 THE COURT: Let me ask you this. Can they make a
21 claim that there is a negligently administered whatever
22 program it was they were supposed to administer?

23 MS MAUGHAN: Not in federal court, Your Honor. The
24 Virginia Tort Claims Act would allow negligence claim
25 against the Commonwealth where there is some sort of

1 negligence on behalf of the DOC employee. But I don't --
2 maybe I take it back. I would have to do research. I
3 don't believe that claim could be brought in federal court
4 against the Commonwealth, but I reserve and would like --

5 THE COURT: Well, under the 11th amendment.

6 MS MAUGHAN: That's correct. If it were brought in
7 state court, yes; in federal court I don't think so. But
8 I would need to look that up a little bit more.

9 And the attempt to pin it to a gross negligence
10 claim, despite the fact --

11 THE COURT: They haven't pleaded it.

12 MS MAUGHAN: They haven't pleaded it, and Judge
13 Cullen made a very good point. If the duty doesn't exist,
14 how bad you breached that duty doesn't matter, whether
15 there is gross negligence or simple negligence, it doesn't
16 matter. There is no duty.

17 THE COURT: I am with you on that.

18 MS MAUGHAN: All right. We get to a little bit more
19 complicated sections of the motion and of the issues in
20 this case. I would start with count three, four and five.
21 And when I briefed these in defendants' original
22 memorandum supporting the motion to dismiss, I addressed
23 these Monel claims, and the reason that I did that is
24 because the language that is in the complaint that alleges
25 who did the bad things, how they are supposed to be

1 responsible, exactly tracks the tracks in the Monel claim
2 against a municipal entity. And these three claims
3 overlap with count three, and four, I believe are
4 overlapped with counts six and eight, which are eighth
5 amendment claims against some of the same people for the
6 same thing. So if they are supposed to be separate and
7 distinct claims, the way I read this was count three,
8 four, five have to be Monel claims.

9 THE COURT: Well, three is, I don't know, kind of a
10 hybrid failure to supervise type claim. But, maybe it is
11 failure to supervise.

12 Four and five, I think those are a little simpler to
13 address. Four and five are what the Supreme Court would
14 characterize as formulae recitations of the elements of
15 the claim without a whole lot of supporting facts, or,
16 more precisely, any sort of facts.

17 MS MAUGHAN: I agree with that. I think that applies
18 to count three as well.

19 THE COURT: Well, I don't know. I think three is a
20 little closer.

21 Go ahead.

22 MS MAUGHAN: So if we look at these outside the
23 context of a Monel claim, because it is now clear we all
24 agree there can't be a Monel claim here, it has to be a
25 supervisory liability claim. The people I am representing

1 here today are supervisory defendants in the Department of
2 Corrections. They were not personally involved in the
3 incident giving rise to Mr. Garrett's alleged injuries, so
4 they are all supervisors of those who would have been
5 involved.

6 THE COURT: All right. I know it is not -- a Monel
7 claim is a claim against the local government, so there is
8 not a local government that is a defendant in this case,
9 is there?

10 MS MAUGHAN: Correct, there is not.

11 THE COURT: So how could this possibly be a Monel
12 claim?

13 MS MAUGHAN: That was part of the, part of my
14 memorandum that supported dismissing. You can't have a
15 Monel claim against state actors. Has to be municipal
16 entities or municipal employees. But the way that they
17 are their pled reads exactly like a Monel claim to the
18 extent they are not.

19 THE COURT: Okay.

20 Three is, I think, is a failure to supervise claim.

21 MS MAUGHAN: We have training, supervise, discipline.

22 THE COURT: Training.

23 MS MAUGHAN: Right, which would be a supervisor
24 liability standard.

25 THE COURT: Right.

1 MS MAUGHAN: Right. So in reality, the plaintiff and
2 I agree that the supervisor had to have actual
3 constructive knowledge that the subordinate engaged in
4 conduct that was so pervasive and an unreasonable risk to
5 constitutional injury to the plaintiff. I think that is
6 what is missing in all three of these counts; three, four
7 and then five. Three relates to the failure to train and
8 discipline and supervise subordinates related to the k-9
9 program. Four is the failure provide medical care
10 provision. And five is related to the ADA accommodations.
11 In none of these counts is there, are any factual
12 statements in the complaint to show that these supervisory
13 people were aware of, or even knew about, any other
14 instance regarding bad bites, regarding bad medical care,
15 regarding bad ADA accommodations. So there is nothing in
16 the complaint, factual basis, to show those supervisors
17 knew or should have known that their subordinates were
18 engaged in pervasive conduct. Pervasive means more than
19 one. I know that in some cases, at least one instance of
20 a prior similar action can trigger a basis for supervisor
21 liability. Here we have nothing.

22 THE COURT: Aren't there occasions in which a
23 supervisor can be liable for allowing things to happen
24 that are inherently dangerous, like, for instance, in City
25 Canton, the justice in a concurring opinion, says that one

1 of the ways you could have liability in that circumstance
2 would be if training the frontline people on how to use
3 guns in the police department because sooner or later it
4 is going to be dangerous. Wouldn't you say the same thing
5 about a police dog?

6 MS MAUGHAN: I don't think you can, Your Honor. Not
7 based on what is in the complaint in this case.

8 THE COURT: Well, wait a second.

9 Police dogs bite people. It happens.

10 MS MAUGHAN: They do.

11 THE COURT: If you are not trained on how to keep it
12 from happening, you have got like you are pointing a gun
13 at somebody and you don't know how to put the safety on.

14 MS MAUGHAN: I would argue I think that is a slippery
15 slope, Your Honor. Correctional officers also are
16 authorized to use force.

17 THE COURT: Well, okay. Go ahead.

18 MS MAUGHAN: That could be inherently dangerous as
19 well. In that situation, you know, we do authorize --

20 THE COURT: That is why we train them on use of
21 force, that's why the Department of Corrections has an
22 academy out there in Goochland to tell people how to use
23 force.

24 MS MAUGHAN: They do. I think that gets into a
25 little bit of the policies that defendants attached in

1 support of their motion. It's a little bit disingenuous
2 that the Department of Corrections and the supervisors
3 failed to train these individuals, and they point to these
4 policies as insufficient for training.

5 THE COURT: Let me ask you a question. I am sure you
6 have done your homework on this. How did they train
7 people on K-9 usage in situations in cell extraction?

8 MS MAUGHAN: So actually K-9s are not used in the
9 Department of Corrections for cell extraction.

10 THE COURT: Well, okay. There was a dog in the cell,
11 wasn't there?

12 MS MAUGHAN: There was.

13 THE COURT: Okay. Weren't they trying to get him out
14 of the cell?

15 MS MAUGHAN: And based on my factual investigation,
16 no, that is not the purpose.

17 THE COURT: So then how they train people on using
18 K-9 when they go into cells to discuss the time of day
19 with inmates, or whatever they were doing there --

20 MS MAUGHAN: I don't believe that they were
21 discussing the time of day.

22 THE COURT: No, they weren't. They were pretty well
23 upset with this inmate.

24 MS MAUGHAN: That's correct.

25 THE COURT: So, how do they train K-9 officers on

1 what they are supposed to be doing in a situation like
2 this?

3 MS MAUGHAN: The training is very extensive. I don't
4 know that I could specifically -- I will tell The Court I
5 can't answer.

6 THE COURT: How do they keep the dogs from biting
7 people?

8 MS MAUGHAN: The dog is leashed at all times.

9 THE COURT: How did this dog bite this guy?

10 MS MAUGHAN: The dogs are leashed, and they have a
11 physical --

12 THE COURT: I understand what a leash is.

13 MS MAUGHAN: And they are held in restraint until the
14 officer who is controlling the dog gives command for the
15 dog to engage. And the officer gives that command, the
16 dog does engage. They are trained to bite.

17 THE COURT: How do they train them when they are
18 supposed to let the dog, sic the dog on the guy?

19 MS MAUGHAN: So I can't answer specifically as to
20 when, what to do inside of a cell. There is training on
21 how. I don't know what it is.

22 THE WITNESS: How many officers were there?

23 MS MAUGHAN: There were two K-9 officers present when
24 Mr. Garrett was bitten.

25 THE COURT: Anybody else?

1 MS MAUGHAN: Two correctional officers, not --

2 THE COURT: So four officers there, and the guy is in
3 a cell. And they had to use the dogs on him?

4 MS MAUGHAN: Well --

5 THE COURT: This may not be a good case for you.

6 MS MAUGHAN: I wouldn't go that far, Your Honor. I
7 know that we are dealing with what is alleged in the
8 complaint, but I believe that --

9 THE COURT: Okay, but you just told me there were
10 four guys there. He is in a cell. Not like he is going
11 to steal a car and drive away.

12 MS MAUGHAN: I will clarify a little bit for The
13 Court. I will add factual context at the risk of
14 disclosing too much.

15 What --

16 THE COURT: Well, you are going to have to disclose
17 it all. So you might as well disclose the whole schmeer
18 right now.

19 MS MAUGHAN: Sure. What happened with Mr. Garrett
20 and the other inmate, Mr. Garrett assaulted another inmate
21 with a broomstick after an altercation over use of the
22 phones. And Mr. Garrett said something to the effect of
23 fagots don't get to use the phone here and pushed the
24 other inmate, made comments about his sexual orientation
25 and engaged in physical altercation. Mr. Garrett and other

1 inmate ran up the tier, up to the second tier of the pod
2 and continued their altercation. The fight tended to kind
3 of peter out, but by that point correctional officers were
4 coming in, the dogs had come. Every one gets on the
5 floor. By that point Mr. Garrett, at least Mr. Garrett,
6 not sure about the other inmate, had come back to the pod
7 and was sitting on the floor. Most everyone is prostrate
8 on the ground. Get prostrate. You stay there and don't
9 move. Mr. Garment is on the ground. Not a hundred
10 percent prostrate, but on the ground. But on the ground
11 at the bottom tier of his prison pod. And suddenly gets
12 up, bolts up the stairs and runs back to his cell. So the
13 officers know at that point that he has been engaged in an
14 altercation. They know he is upset. They don't know why
15 he has run back to his cell. they are concerned he has a
16 weapon. They are concerned he is going to do something
17 either to himself or to the officers there. That is why
18 they go in the cell with the dog. And they don't go in
19 the cell with the dog.

20 THE COURT: Okay. I understand why they have the dog
21 there. Why do they sic the dog on the guy? That is
22 question in the case.

23 MS MAUGHAN: Right. I think the evidence would show
24 that Mr. Garrett was given multiple verbal warnings to
25 come to the door, come to the door. Not stopping what

1 he's doing. And I believe he is digging in his
2 properties, giving the officers an inference he was going
3 for something, either drugs or weapons. And so he didn't
4 listen. Didn't do what he was supposed to do. He didn't
5 stop, and the dogs were used to engage for protection of
6 the officers and protection of other people who were
7 there.

8 THE COURT: Tell me who else they were protecting
9 besides the other officers. Was there some fear that this
10 man would leave his cell sort of like Emit Smith of the
11 Cowboys and run through this line of four officers and two
12 dogs and then go out and stiff arm another inmate?

13 MS MAUGHAN: I don't know that was their concern
14 necessarily.

15 THE COURT: So who is the other than the officers?

16 MS MAUGHAN: The other?

17 THE COURT: You say they were concerned about other
18 officers, or other people, or the officers. Officers are
19 there. Who else was there?

20 MS MAUGHAN: He could have hurt himself, as well,
21 Your Honor. It is not unheard for inmates to try to
22 ingest something that the shouldn't ingest or try to hurt
23 themselves.

24 THE COURT: Might harm himself, so we sic the dogs on
25 him?

1 MS MAUGHAN: He could have gotten a weapon. The
2 doors --

3 THE COURT: Okay. You are not getting anywhere with
4 that argument.

5 MS MAUGHAN: All right. I will move on. I can't
6 speak for the officers a hundred percent. I have --

7 THE COURT: Well, you represent them.

8 MS MAUGHAN: No, Your Honor, I don't represent the
9 individuals who actually --

10 THE COURT: Okay. Who represents them?

11 MS MAUGHAN: Nobody. They are not --

12 THE COURT: Haven't been served yet. What is their
13 address?

14 MS MAUGHAN: One is Doe, and who has not been
15 identified by the plaintiff.

16 THE COURT: Do you know who he is?

17 MS MAUGHAN: I don't.

18 THE COURT: Clearly you have an incident report.

19 MS MAUGHAN: I do.

20 THE COURT: Why don't you give it to them?

21 MS MAUGHAN: I can do that.

22 THE COURT: Why haven't you done that already?

23 MS MAUGHAN: I haven't been asked for it, Your Honor.

24 THE COURT: Oh, come on. You know, litigation is not
25 a game.

1 MS MAUGHAN: I understand.

2 THE COURT: It is an attempt to get to the truth, to
3 ferret out justice, and when you play games like I won't
4 tell you who they are until you serve interrogatories on
5 them, it is just --

6 MS MAUGHAN: I don't --

7 THE COURT: You are playing it like it is a game.

8 MS MAUGHAN: I apologize, Your Honor. I really, I
9 take that --

10 THE COURT: Did you give them the address of the
11 other officers?

12 MS MAUGHAN: His name has been disclosed, and I
13 believe he has been served by publication. I don't think
14 I have given an address.

15 THE COURT: All right.

16 MS MAUGHAN: He is no longer a current employee of
17 the Department of Corrections.

18 THE COURT: Okay. You are directed to give the names
19 of both officers and their last known address to the
20 plaintiff in this case.

21 MS MAUGHAN: I want to say, I do apologize. Take it
22 to heart. I try not to play games.

23 THE COURT: I understand. I used to represent
24 people, too. I remember one case I had where they were
25 trying to serve somebody under the Hague Convention. And

1 so there I was representing the Bulgarian Tobacco Company,
2 which was a bunch of near-do-wells. And they were being
3 sued by your office. The people in your office, and God
4 bless them, nobody could figure it out. Couldn't figure
5 out how to serve them under the Hague Convention. And I
6 must confess that I, like you today, I didn't help them
7 one bit.

8 But, that probably wasn't my finest point as a
9 lawyer.

10 MS MAUGHAN: Your Honor, I don't -- I don't represent
11 Mr. Williams, who is one of the officers because he is no
12 longer employed by the Department of Corrections. I don't
13 anticipate I will be representing him at all. I
14 absolutely don't mind giving over the information that the
15 Department of Corrections has, but I don't anticipate I
16 will be representing him in this case.

17 THE COURT: Well, will the A G hire somebody to
18 represent him?

19 MS MAUGHAN: I am not sure at this point.

20 THE COURT: Okay. So did he get fired because of
21 this?

22 MS MAUGHAN: He did not.

23 THE COURT: Did he get fired?

24 MS MAUGHAN: I don't believe -- I am not sure if he
25 was fired or he resigned in lieu of termination, but

1 resigned later. The office would have a conflict
2 representing him is my opinion.

3 THE COURT: Yes, I represented a lot of correctional
4 officers. When they leave it is a mess.

5 Go ahead. All right. So here is what I think about
6 this. I think there is probably enough alleged in count
7 three to get past that. I think count four and five are
8 formulae recitations of the elements of the cause of
9 action. So I am going to grant the motion to dismiss
10 those. But if they can come up with some facts, they can
11 re-plead it. And what I am going to allow them to do --
12 all of the discovery in this case is going to get into all
13 this stuff. If they come up with some facts that
14 demonstrate liability through discovery they can amend
15 later on.

16 So let's go on to count six of the amended complaint.
17 This is -- they are suing the Department of Corrections.
18 They can't do that.

19 MS MAUGHAN: No, Your Honor, they can't. I think
20 that is fairly clear that is not appropriate.

21 THE COURT: Although if you actually read the
22 eleventh amendment, it doesn't say that.

23 MS MAUGHAN: Correct.

24 THE COURT: But the Supreme Court said that.

25 MS MAUGHAN: That's right. As for count six, I

1 believe that count six is very, very similar to count
2 three. It is against, I believe, the same people; Clarke,
3 Robinson, Barbetto. I take it back. Count three is also
4 against Warden Hamilton. And six is against Clarke,
5 Robinson and Barbetto. So three and six are nearly
6 indistinguishable under the agreement that count three is
7 an eighth amendment supervisory liability claim. I don't
8 see a difference between count three and count six.

9 THE COURT: Well, that's right. All right. So, what
10 about count three?

11 MS MAUGHAN: Count eight is also duplicative to count
12 four. And it does name the same defendants, Clarke,
13 Robinson, Herrick, Hamilton and Davis. And it is
14 regarding Mr. Garrett's access to medical care. So I
15 would posit if count four goes count eight has to go as
16 well.

17 THE COURT: Well, but eight is a little closer to, a
18 little closer to them knowing or having constructive
19 knowledge about something as opposed to specific events in
20 this case. I think four deals with the availability. But
21 I am going to let that one go forward.

22 And that leads us to -- what is next?

23 Well, you know, interestingly, eight -- who they have
24 alleged knowledge of in eight is different I think from
25 each defendant. So I think that with respect to Robinson

1 and Herick, they have got a little bit of an issue there
2 as far as their liability under the eighth amendment.

3 Nine we have already dealt with, right?

4 MS MAUGHAN: Nine is the ADA claim, yes, Your Honor.
5 We have already dealt with that.

6 THE COURT: And injunctive relief we have dealt with.
7 Okay. Let me hear from them.

8 Okay. Thank you. Good job, ma'am. Good job on your
9 brief, by the way.

10 MS MAUGHAN: Thank you.

11 THE COURT: So, let me hear from the plaintiff.

12 So tell me, are you guys wearing masks in the office?

13 MS MAUGHAN: We are not any more. Right now we are
14 permitted to come in to the office, but not required. And
15 if you are vaccinated you do not have to wear a mask, and
16 I believe the plan is mid September we are going to be
17 moving back from the old times, everyone in the office as
18 long as circumstances stay the same.

19 THE COURT: Good. Thank you. All right.

20 You are Mr. Talbot.

21 MR. TALBOT: Yes, Your Honor. Good morning.

22 THE COURT: Good morning to you.

23 So, Mr. Talbot, what do you think about the
24 injunctive relief aspects of this?

25 MR. TALBOT: Your Honor, I don't have anything to add

1 aside from what we have already said in the brief.

2 THE COURT: So, that is not a good claim any more.
3 You have heard what I thought about the ADA. I think you
4 need to re-plead that so that it is clear that you are
5 within the four-year statute of limitations. So you need
6 to plead the specific things that come within the
7 amendment so you get within the four-year statute of
8 limitation, okay?

9 MR. TALBOT: Okay.

10 THE COURT: Now, that leads us to getting these other
11 people served. She is going to give you that within seven
12 days. And you need to go serve them. Okay. Even the guy
13 that you served by publication. Try to serve him by
14 having a process server serve him. Okay?

15 MR. TALBOT: Okay. Yes, Your Honor.

16 THE COURT: You know, I hate to have -- I don't want
17 to enter a default judgment against the guy based on
18 publication because, let's face it, nobody reads those
19 publications. And I used to be in practice. I would pick
20 some obscure papers to advertise in, like when I was doing
21 domestic cases so that nobody would answer. We would go
22 ahead with the divorce, but -- all right. So let's see.

23 Let's go to whatever is next here. Four and five.
24 You have really haven't alleged any facts in this. So
25 here is what I think you need to do.

1 You may tell me I am wrong about that. That is okay.
2 Tell me what other -- you are okay on three. Tell me how
3 four and five consist of anything more than a formulae
4 recitation of the elements of the cause of action.

5 MR. TALBOT: So, Your Honor, I would respectfully
6 submit that counts four and five are sufficient for the
7 same reasons as the supervisory liability, excessive force
8 claim. We do allege in the complaint that there have been
9 wide-spread incidents of EDOC medical personnel providing
10 inadequate medical care and reasonable disability
11 accommodations. This is at paragraph 178 and 188. We
12 allege --

13 THE COURT: Well, that is what the cases say that you
14 have to allege. You know, you haven't really put much
15 meat on the bones on that.

16 MR. TALBOT: I understand. If The Court has concerns
17 about the sufficiency, we would be happy to amend.

18 THE COURT: Well, you know, anything -- if you have
19 any facts that support that there are wide-spread
20 deficiencies that these people knew about? You don't have
21 them yet, do you? That is what discovery is about in a
22 case like this.

23 MR. TALBOT: Right.

24 THE COURT: That is the problem with Iqbal in civil
25 rights cases. In a civil rights case the government has

1 all of the evidence. And the only way that the plaintiff
2 can get it is through the discovery. But Iqbal says you
3 can't get discovery because you have to allege the facts
4 that you don't know in order to get there. Another way in
5 which the Supreme Court has been less than charitable with
6 plaintiffs in these type cases.

7 MR. TALBOT: Your Honor, I would just say we do have
8 information about specific other K-9 attacks where
9 inadequate medical care was provided.

10 THE COURT: You can bring that forward and flesh out
11 three and four. Okay? Or four and five, rather. All
12 right.

13 Now, that brings us to six. You can't sue the
14 Department of Corrections. Do you agree with that?

15 MR. TALBOT: I agree as to the 1983 complaint. I
16 think under the ADA it is --

17 THE COURT: Under ADA. Under 1983 you can't do it.

18 MR. TALBOT: I agree.

19 THE COURT: Seven you are out of luck on negligence.
20 Do you agree on that?

21 MR. TALBOT: Yes, Your Honor.

22 THE COURT: Okay.

23 Well, we are on a roll here.

24 MR. TALBOT: Your Honor, may I confer?

25 MS POPKIN: May I respond to just the negligence

1 claim?

2 THE COURT: Ma'am, I'm sorry. I can't hear you.

3 MS POPKIN: Oh.

4 THE COURT: I can't hear you because you are not
5 standing up. In our court, ma'am, we are not doing a tag
6 team here. If you have something you want him to say,
7 give him a note. He is doing a great job.

8 MS POPKIN: Okay.

9 MR. TALBOT: May I confer, Your Honor?

10 THE COURT: Of course you have may.

11 MR. TALBOT: So I think, Your Honor, what we would
12 say in response to the negligence claim, and we addressed,
13 we referred to this in our brief, that we are alleging a
14 duty aside from simply the duty to supervise, so it's not
15 simply a negligence supervision claim.

16 THE COURT: I understand that. That is gone. It is
17 failure to run the program correctly. But, how do you get
18 around sovereign immunity?

19 MR. TALBOT: Well, Your Honor, I think, as we
20 addressed in our brief, while there may be some discretion
21 involved in creating policies there is no discretion
22 involved that, you know, in taking complete inaction
23 response to pervasive K-9 attack --

24 THE COURT: That is the same as saying gross
25 negligence. I am sorry. You don't get that. You can

1 re-plead if you want to, but I will tell you that simple
2 negligence claim isn't going to go anywhere on this
3 because, you know, clearly how you train, how you direct
4 your employees to work, is discretionary. You may have a
5 Constitutional claim. I guess you may have a gross
6 negligence claim, but --

7 MR. TALBOT: Your Honor, if may. If we do have gross
8 negligence that would not be covered by the Virginia
9 sovereign immunity claim.

10 THE COURT: Well, that's right. Gross negligence is
11 not covered by sovereign immunity. That is how you get
12 around it. Say what they did was grossly negligent. It
13 is absolute subterfuge, but that is what happens.

14 All right. What else do you have to say?

15 How long have you been at Arnold and Porter?

16 MR. TALBOT: Third year associate.

17 THE COURT: Where did you go law school?

18 MS MAUGHAN: University of Virginia.

19 THE COURT: WaHooWa. Did you go to undergraduate
20 there as well?

21 MR. TALBOT: I did, yes.

22 THE COURT: Double Hoo.

23 MR. TALBOT: That is right.

24 THE COURT: Well, good for you.

25 What section are you in at Arnold and Porter?

1 MR. TALBOT: General litigation. I focus on civil
2 antitrust and white collar investigations.

3 THE COURT: Well, you know, this is a case where you
4 might get to ask some people some questions in court.
5 Have you done that yet?

6 MR. TALBOT: No, sir.

7 THE COURT: Well, this is this a big moment. Keep
8 this thing alive and you will get to ask questions in
9 court, and it will be like why you went to law school.

10 MR. TALBOT: Exactly. Yes, sir.

11 THE COURT: All right.

12 So, what else do you have to say?

13 MR. TALBOT: Well, Your Honor, I think with respect
14 to the count three and count six dealing with the attacks,
15 as long as I understand that Your Honor is inclined to --

16 THE COURT: Inclined to deny the motion to dismiss,
17 but you are welcome to change my mind.

18 MR. TALBOT: I would not be inclined to change your
19 mind.

20 THE COURT: All right.

21 MR. TALBOT: So I don't think I have anything else to
22 add.

23 THE COURT: Thank you very much.

24 All right.

25 So I will -- what I am going to do is I will give you

1 an opinion and an order and hopefully the opinion will
2 give you a road map of what you need to plead. And I hope
3 you will kind of fill in the blanks a little bit in your
4 amended complaint if you can. If you can't, then don't.
5 When you get discovery in this case you may want to do
6 things that will allow you to amend.

7 Let me say to my friends from Arnold and Porter, Ms
8 Popkin, I expect that you think that at the end of this
9 you will win something and get some attorney's fees, but
10 you are not going to get attorney's fees for three lawyers
11 coming down to argue a 12(b)(6) motion. Okay?

12 MR. TALBOT: Yes, Your Honor. I understand.

13 THE COURT: Looks like you are the boss in this
14 thing. Do you understand what I am saying?

15 MR. FREEDMAN: Absolutely, Your Honor.

16 THE COURT: Okay. Anything else?

17 MS MAUGHAN: Not from defendants, Your Honor.

18 THE COURT: All right.

19 Anything else? You don't have anything else? All
20 right.

21 MR. TALBOT: No, Your Honor.

22 THE COURT: All right. Thank you very much.

23 Let's recess or adjourn.

24 THE CLERK: Recess.

25 THE COURT: Recess court.

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HEARING ADJOURNED

GILBERT F. HALASZ, OCR
Official Court Reporter