STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
No. 216-6-20 Wncv

LATONIA CONGRESS,
Plaintiff,

v.

STATE OF VERMONT et al.,
Defendants.

DECISION ON CENTURION'S MOTION FOR SUMMARY JUDGMENT

This case arises out of alleged deficiencies in audiology care that Ms. Latonia Congress received while incarcerated in Vermont state prison. The Vermont Human Rights Commission (HRC) and Ms. Congress, separately represented, filed separate lawsuits against, variously, the State and several of its agents, and Centurion of Vermont LLC and one of its agents, Dr. Fisher. By contract, Centurion provided medical care to Vermont inmates at the time of the underlying events. The two lawsuits were consolidated and have proceeded since under the docket number for this case. Centurion and Dr. Fisher jointly filed a motion for summary judgment on August 30, 2021, addressing all claims against them. The State Defendants did not join that motion, brief it, or file their own motion. Ms. Congress later stipulated to dismiss all her claims against them on February 17, 2022. On April 18, 2022, Ms. Congress further stipulated to dismiss all her claims against Dr. Fisher. Because the HRC has asserted its claims against Centurion exclusively, and Ms. Congress has dismissed all claims against all other parties, Centurion is sole remaining defendant in this case.

The claims

Ms. Congress asserts a cogent medical malpractice claim against Centurion related to needing bilateral hearing aids, not having access to *any* hearing aids for an exceptionally long time, and eventually being given access to one functioning hearing aid only. Due to her uncorrected hearing loss and its duration, Ms. Congress alleges that she unnecessarily experienced difficulty communicating with others, difficulty in some of the classes she took while incarcerated, distress, and self-isolation. Beyond this core claim, the HRC and Ms. Congress have raised several other claims that are less readily understandable, both as pleaded and as argued in opposition to summary judgment, at least as they may apply to Centurion.[1] The court understands the remaining claims to be as follows:

[1] Ms. Congress's medical malpractice claim, though cogent, has not been presented with the clarity one ordinarily would expect in a case of this nature. The court has been unable to locate anywhere in the record an affidavit, report, or disclosure meaningfully describing her two medical expert's opinions, in their words, on the specifically

HRC Ct. 1: failure to make reasonable modifications to policies and practices pursuant to the Vermont Unfair Housing and Public Accommodations Act, 9 V.S.A. §§ 4501–4507. The policies and practices are not specified. The thrust of this claim, as alleged against Centurion, appears to be that any deficient medical care that it provided to Ms. Congress doubles as a failure to modify a practice or policy.[2]

HRC Ct. 2: failure to provide auxiliary aids (hearing aids) as a public accommodation so Ms. Congress could access the services being offered. As related to Centurion, however, there has never been any allegation that Ms. Congress needed any hearing or other auxiliary aids to access the services—medical care—that Centurion was under contract to provide.

Congress Ct. 1: violation of both federal and state constitutional rights to due process (including substantive due process) and to be free from cruel and unusual punishment. The due process claim is that "depriving Ms. Congress of her hearing aids under the guise of making ordinary decisions on the provision of care . . . infringed on a fundamental liberty interest," amounting to a "gross abuse of governmental authority." As for cruel and unusual punishment, Ms. Congress asserts generally that Centurion acted "with deliberate indifference, [and] knowingly and willfully deprived [her] of necessary medical care."

Congress Ct. 2: violation of the federal Equal Protection Clause. This claim is asserted against Centurion, but the allegations are directed at State defendants only. Nevertheless, so far as the court can discern, the thrust appears to be that diminished hearing was not taken seriously as compared to other types of healthcare needs experienced by other inmates.

Congress Ct. 5: failure to provide reasonable accommodations under the Vermont Public Accommodations Act. The thrust of this claim, as alleged against Centurion, appears to be that any deficient medical care that it provided to Ms. Congress doubles as a violation of the Act. As relates to Centurion, however, there has never been any allegation that Ms. Congress needed hearing or any other auxiliary aids to access the services—medical care—that Centurion was under contract to provide.

Congress Ct. 6: medical malpractice and "negligent undertaking." The malpractice claim is described above. The negligent undertaking claim presumably is a reference to Restatement (Second) of Torts § 324A (liability to third person for negligent performance of undertaking), but Ms. Congress never explains how it might apply to Centurion if she intended it to amount in substance to something different from medical negligence.

All these claims are asserted against Centurion exclusively in its respondeat

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applicable standards of care and alleged breaches attributable to Centurion other than as teased out at length in questioning by opposing counsel during their depositions.

[2] The HRC's claims are asserted against both Centurion and the State (no longer a party) as though they and their agents are wholly interchangeable. It has never, whether in its complaint or in briefing, attempted to explain factually or legally how its claims apply to either defendant as opposed to the other.

superior (employer) capacity in relation to the conduct of its employees.

The basic undisputed facts

The basic progression of events giving rise to this litigation is undisputed. In its factual statements and briefing, Centurion has devoted a great deal of energy to detailing the evidence that, in its view, supports the inferences it thinks the finder of fact should draw in this case, all of which prompted Ms. Congress and the HRC to respond in kind, resulting in a factual record that does more to distract than focus on what matters under Rule 56. As the parties know, the court does not draw factual inferences in favor of the party seeking summary judgment; it draws them exclusively in favor of the party opposing summary judgment, in this case Ms. Congress and the HRC. See *Carr v. Peerless Ins. Co.*, 168 Vt. 465, 476 (1998).

The basic narrative is as follows. Ms. Congress was in prison before Centurion became the medical provider to inmates in the DOC. Under the supervision of the prior provider, Ms. Congress was seen by an audiologist, determined to have substantial hearing loss in both ears, and was provided bilateral (both ears) hearing aids. In April 2016, after Centurion had become the medical provider, Ms. Congress sought new batteries for her hearing aids, and they were provided. In December 2016, Ms. Congress complained that her hearing aids were not working despite the new batteries. The plan was to send them out "to Audiology for check of functioning." On December 30, 2016, Dr. Fisher examined her ears without indicating anything, such as an obstruction, that might be affecting her hearing. He noted that she "communicates well if I speak with normal voice clearly."

On January 13, 2017, Ms. Congress delivered her hearing aids to the medical unit to be sent out for testing. They were returned to her on October 10, 2017, apparently having never been tested. As far as the record goes, no one knows what had happened to them in the interim. They were lost.

On August 29, 2017, Dr. Holloway referred Ms. Congress for an audiology office visit. He noted that she "functions but reports difficulty hearing conversation." The expected outcome of intervention was noted as "repair of the hearing aids." The request was referred to Dr. Fisher under Centurion's utilization management policy.[3] Dr. Fisher noted: "The request has been reviewed for Audiology OV [office visit] for hearing aid repair. Alternative treatment plan recommended: Per request, patient is functional in the facility, thus does not meet medical need for hearing aids based on Centurion Clinical Guidelines. Please reassure patient." In other words, Dr. Holloway reported that she was functional. Dr. Fisher noted that Centurion policy at the time did not permit an audiology office visit for patients who were functional. Thus, the referral was not approved.

On November 28, 2017, Ms. Congress had a telemedicine appointment with Dr. Fisher. The records indicate that she sought to "have her hearing checked by Audiology."

[3] As the court understands it, utilization management was a process employed by Centurion that, when triggered, caused a second person (often Dr. Fisher in this case) to review a treatment plan ordered by another provider to determine whether it complied with Centurion policy. During much of the course of the underlying events, Centurion policy apparently provided that hearing aids were not indicated if the patient was "functional" in the facility. It apparently said little to nothing as to how such functionality was to be determined.

Dr. Fisher noted that the plan was to have a referral placed for an "Audiology exam on-site." He further noted: "Process explained to patient, but she did not agree with it." It is not precisely clear what the disagreement was. Dr. Holloway placed the referral for on-site testing the same day. Dr. Holloway noted that Ms. Congress had "bilateral hearing loss was wearing hearing aids, however, they were broken. [Patient] not sure if her hearing has worsened." However, a utilization management note says as follows: "Since the [referral] was placed, the patient has requested that her hearing aids be sent out for repair, which can be done without [utilization management] approval. RMD has been informed that the patient's hearing aids have been sent out for repair. If the repaired hearing aids are not satisfactory, please re-submit for on-site Audiology evaluation." It is undisputed that at some point, the hearing aids were sent out for repair and were determined to be functioning properly, mechanically, even if they were not improving Ms. Congress's hearing satisfactorily.

On December 19, 2017, Dr. Holloway placed another referral for an on-site audiology appointment. He noted that "[Patient] REPORTS DIFFICULTY HEARING." He did not indicate her functional status either way. In the course of utilization management review, it was indicated: "This referral does not meet Centurion Clinical Guidelines for this service. . . . Please review Centurion Clinical Guidelines regarding Audiology consultation and hearing aids. Re-submit appropriate referral if guidelines met." No new referral was placed.

On February 14, 2018, Ms. Congress again requested to be "reevaluated for the use of hearing aids." The response: "Upon review of her past medical history, patient [does] not meet the criteria for hearing aids. Medical would however need a confirmation of hearing loss symptom from corrections staff if hearing loss impacts [patient's] functioning in the facility." Confirmation from correctional officers that Ms. Congress "can no longer hear commands and communications from officers in her unit" was reported on February 22, 2018. An audiology appointment thus was ordered.

The audiology appointment occurred on March 21, 2018. The audiologist's conclusions were, in relevant part, as follows: "She has moderate to severe high frequency hearing loss in both ears, slightly worse in her left ear, causing her to have difficulty understanding and misinterpreting words in many environments, especially in environments with background noise. Patient showed improvement with amplification. Hearing aids are recommended." At her "hearing aid fitting" on April 11, 2018, she was given one hearing aid—not two—and instructed on its use. Notes from the fitting include, "Patient liked the way she was hearing" and "A verbal concern from patient as to why only one . . . was being fit, as she previously had hearing aids for both ears."

Ms. Congress was released from prison on October 11, 2019. As far as the record goes, Centurion has not been involved with her medical care since.

Medical malpractice and negligent undertaking, Congress count 6

Ms. Congress has come forward with two medical experts, Drs. Bernstein and Mathis, both of whom were deposed at length. Centurion argues summarily that Dr. Bernstein testified that he is unable to offer any opinion, that neither Drs. Bernstein nor Mathis articulated any standard of care, and that neither testified that Ms. Congress ever

experienced any harm that she would not have regardless of any claimed breach of the standard of care.

As noted above, Ms. Congress has done little in this case to explicate her experts' professional opinions other than to make them available for deposition. Both were in fact deposed at length, however. The court has reviewed in detail their deposition testimony as well as that of Dr. Fisher. The record is clear enough for summary judgment purposes that, between Ms. Congress's experts, their opinions are to the effect that when Ms. Congress first saw Dr. Fisher about her hearing, he should have referred her for a professional audiology test or sent out her hearing aids to be repaired and, if that did not solve the problem, then refer her for a professional audiology examination. Dr. Fisher was willing to have her hearing aids sent out for repair, but without doing any testing of his own or conducting any real inquiry, he developed the view that Ms. Congress was "functional" in the facility because she was able to communicate effectively with him and, as he reports, other medical staff.

Ms. Congress eventually produced the hearing aids to be repaired, but they then became lost for an extended time without effective follow up from the medical providers, leaving Ms. Congress with no hearing aids at all.[4] They were then returned to her without having been "repaired." No audiology test was conducted until later when someone finally sought out and obtained what was always readily available evidence that she was not functional. She was then provided one hearing aid whereas two were indicated. The alleged breaches consisted of: (1) Dr. Fisher's initial approach to Ms. Congress's complaints about her deficient hearing; (2) the lack of follow up leading to a protracted time during which the hearing aids were "lost"; and (3) the provision of one hearing aid when two were medically indicated. They also generally corroborated the sorts of harms that Ms. Congress reports having suffered, much of which is readily understandable by a layperson.

Centurion also argues, in effect, that the court should entirely disregard Dr. Bernstein's deposition because at one point he said generally that he could offer an opinion as to what an otolaryngologist should do but not what a general practitioner should because he is not a general practitioner. Counsel for Centurion did not return to that point in the deposition, and Dr. Bernstein freely offered his opinions and criticized the care provided by Dr. Fisher thereafter. The court declines to ignore Dr. Bernstein's entire deposition based on that one brief statement that was not particular to any specific issue.

Ms. Congress's medical malpractice claim does not lack necessary expert support.

Ms. Congress's negligent undertaking claim, however, has no merit. She nowhere explicates this claim in any meaningful detail, and the court is unable to understand, based

[4] The HRC and Ms. Congress rely on the protracted length of loss as proof that the hearing aids were intentionally withheld to harm Ms. Congress, but they have developed no evidence as to who would have intentionally withheld the hearing aids from Ms. Congress, much less why, and Dr. Fisher and Ms. Congress's other medical providers appear to have subjectively believed at this time that Ms. Congress did not need hearing aids because she was functional. For his part, Dr. Fisher discounts the episode as bureaucratic bungling having nothing to do with any medical decisions about Ms. Congress's care. The record shows that Ms. Congress was not wearing these hearing aids anymore at this point because they did not work for her and had become uncomfortable. Thus, the fact that they were lost, or the length of the loss, appears to have little significance to the progression of events other than that over those many months of loss no forward progress with correcting Ms. Congress's hearing occurred.

on the available facts, how a Restatement (Second) of Torts § 324A claim might apply in this case. Centurion sought summary judgment on this claim and attempted to brief it. Ms. Congress did not respond. In the circumstances, the court construes that silence as a concession that this claim is merely duplicative of the medical malpractice claim or otherwise has no merit. Centurion is entitled to summary judgment on this claim.

All federal claims, Congress counts 1 and 2

With Ms. Congress's stipulated dismissal of Dr. Fisher, the only named defendant who was employed by Centurion, all federal claims, brought under 42 U.S.C. § 1983, can have no merit vis-à-vis Centurion. All these claims are brought against Centurion in its respondeat superior capacity as employer due to the conduct of its employees. However, "[p]rivate employers are not liable under § 1983 for the constitutional torts of their employees unless the plaintiff proves that 'action pursuant to official . . . policy of some nature caused a constitutional tort.'" *Rojas v. Alexander's Dept. Store, Inc*., 924 F.2d 406, 408 (2d Cir. 1990) (citations omitted). At most, the record shows that Dr. Fisher had a persistent belief that Ms. Congress was functional without having made any reasonable inquiry as to functionality. There is no argument that any Centurion policy compelled that outcome. Rather, Ms. Congress is attributing liability to Centurion under the doctrine of respondeat superior, which is not available under § 1983.[5]

Cruel and unusual punishment under the Vermont Constitution, Congress count 1

Assuming that Ms. Congress may assert a state constitutional claim of cruel and unusual punishment against Centurion for the acts of its employees, there is no dispute that the state right, as applied to this case, does not differ from the federal right under the Eighth Amendment. See Vt. Const. ch. I, art. 18 and ch. II, art. 39; *State v. Burlington Drug Co*., 84 Vt. 243 (1911).

The U.S. Supreme Court has recognized that deliberate indifference to a prisoner's serious medical needs violates the Eighth Amendment. See *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976). Not every claim of inadequate medical care is a constitutional violation, however. As the Court described,

> [I]n the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute "an unnecessary and wanton infliction of pain" or to be "repugnant to the conscience of mankind." Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment.

[5] This would appear to dispose of Centurion's argument that it somehow is cloaked in the State's sovereign immunity. That argument appears to be directed at the federal, not state, constitutional claims.

Id. at 105–06. Deliberate indifference means "that the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). "[A]n official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment." *Id*. at 838.

The court has scoured the record. There is no triable issue as to deliberate indifference in this case. Dr. Fisher believed that the standard of care as described in Centurion policy indicated that hearing aids were not necessary so long as the inmate was functional in the facility. Upon meeting with Ms. Congress, Dr. Fisher concluded that she was functional insofar as she could communicate with him effectively. He reports that other medical staff also reported no problem with her ability to communicate. When he first sought an audiology appointment for Ms. Congress, Dr. Holloway described her as functional. As far as the record goes, the first time any clear report emerged that she in fact was not functional, on February 22, 2018, she was promptly scheduled for an audiology appointment and given a new hearing aid.

Dr. Fisher or other agents of Centurion may have been negligent if they misunderstood the correct standard of care, failed to conduct hearing tests of their own, failed to follow up on the lost hearing aids, or failed to seek additional evidence of functionality sooner than they did, but there is no evidence that any of those issues arose out of anything other than negligence. To be clear, there is no evidence at all that Centurion's agents knew that Ms. Congress was not functional in the facility (or otherwise was experiencing substantial pain and distress) and disregarded that knowledge. The alleged negligence in this case may have been persistent, but this is not a case where anyone unnecessarily and wantonly inflicted pain in a manner repugnant to the conscience of mankind. The record demonstrates negligence at most.

Centurion is entitled to summary judgment on this issue.

Due process under the Vermont Constitution, Congress count 1

Assuming that Ms. Congress may assert a state constitutional due process claim against Centurion for the acts of its employees, there is no dispute that the state right, as applied to this case, does not differ from the federal right under the Fourteen Amendment. See Vt. Const. ch. I, art. 4; *Quesnel v. Town of Middlebury*, 167 Vt. 252, 258 (1997) ("We have considered Article 4 the equivalent to the federal Due Process Clause."). It is unclear to the court what harm Ms. Congress is attempting to redress with this claim. While her hearing aids had gone missing for some time, she had stopped wearing them because they did not work for her and were uncomfortable. Moreover, no one "seized" them. They were lost. And so far as the record goes, medical staff, Dr. Fisher in particular, subjectively believed that she did not need hearing aids at this time in any event.

The U.S. Supreme Court has clearly held that the *negligent* loss of property does not amount to a due process violation. See *Daniels v. Williams*, 474 U.S. 327, 330 (1986). Here, it is not even clear that Ms. Congress's hearing aids went missing due to Centurion's negligence. The record is entirely silent as to how or why they went missing and how and

where they subsequently were found. There would have been no point to a pre- or post-deprivation hearing. To the extent that Ms. Congress claims that something about the missing hearing aids "shocks the conscience," the Court has made clear that "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.'" *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (citation omitted). If something conscience shocking had happened here, it would be redressable as a violation of the prohibition against cruel and unusual punishment. There is no understandable due process claim.

Centurion is entitled to summary judgment on this claim.

Public Accommodations Act, HRC Cts. 1 and 2; Congress Ct. 5

The court fails to understand the point of the plaintiffs' Public Accommodations Act claims *as asserted against Centurion*. Both the HRC and Ms. Congress essentially assert that any deficient medical care provided to Ms. Congress by any Centurion providers automatically amounts *ipse dixit* to a violation of the Public Accommodations Act because hearing loss is a disability. This appears to reflect a fundamental misunderstanding of the purpose of the Act.

By its terms, and with several qualifications, the Act requires a public accommodation to make reasonable modifications to its policies, 9 V.S.A. § 4502(c)(5), and to provide reasonable accommodations, *id.* § 4502(c)(6), so that an individual with a *limitation* caused by a disability may participate in a service or other benefit that otherwise would be prevented by that limitation. The key is that the modification or accommodation enables access to the particular service offered; it is not an end in itself. The Act expressly says, "A public accommodation shall not be required to provide to individuals with disabilities personal devices, such as wheelchairs, eyeglasses, *hearing aids*, or readers for personal use or study, or personal services to assist with feeding, toileting, or dressing." 9 V.S.A. § 4502(c)(7) (emphasis added). In other words, the Act does not require anyone to treat the disability or provide medical care at all, including hearing aids for personal use, precisely what Ms. Congress claims should have been provided here.

In this case, the only service provided by Centurion that is apparent in the record is medical care to inmates. There is no dispute that she was entitled to that medical care, but there has never been any allegation whatsoever that Ms. Congress experienced any limitation to any major life activity, caused by a disability, that prevented her from receiving medical care from Centurion. To the contrary, her only claim has always been that Centurion was her medical provider, and it provided negligent medical care, which describes medical malpractice, not disability discrimination.

To the extent that the HRC and Ms. Congress complain that Ms. Congress's limitation (poor hearing) inhibited her access to classes or other services and opportunities provided *by the DOC*, they nowhere explain how those services were within Centurion's control such that Centurion was responsible for noticing Ms. Congress's lack of access and modifying a policy or providing an accommodation (like speaking more loudly or moving her to the front of the class) to enable access. "In determining whether an individual is a

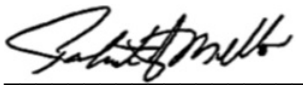
proper defendant under the ADA, the inquiry must focus on the issue of control." *Bowen v. Rubin*, 385 F.Supp.2d 168, 180 (E.D.N.Y. 2005); accord *Bowers v. National Collegiate Athletic Ass'n*, 9 F.Supp.2d 460, 485–86 (D.N.J. 1998) ("To say the least, it would be odd to saddle someone with liability for a certain discriminatory condition at a public accommodation when it is not that person who manages, controls, or regulates the public accommodation for the purpose of that particular condition. If the contrary were the rule, then it is not clear what relief could be obtained from someone who has no power to effect a remedy for the violation. Finally, both the legislative history of the ADA and the regulations make clear that management, control, and regulation of a place of public accommodation may be allocable between parties."). Nor does the HRC or Ms. Congress identify the policy modification or accommodation they think should have been provided other than pointing to the medical care they claim Ms. Congress did not receive. It appears clear that, as against Centurion, the HRC and Ms. Congress are simply, wrongly, equating deficient medical care with violations of the Act.

Centurion is entitled to summary judgment on these claims.

Order

For the foregoing reasons, Centurion's motion is granted in part as to all remaining claims other than medical malpractice, as to which it is denied.

SO ORDERED this 25th day of April, 2022.



Robert A. Mello
Superior Judge