IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

LOUIS HENDERSON, DANA HARLEY, DARRELL ROBINSON, DWIGHT SMITH, ALBERT KNOX, JOHN HICKS, MELINDA WASHINGTON, DAVID SMITH and JAMES DOUGLAS,	)	
Plaintiffs,	)	
v.	)	**Civil action no.: 2:11-CV-00224**
ROBERT BENTLEY, KIM THOMAS, BILLY MITCHEM, FRANK ALBRIGHT, BETTINA CARTER and EDWARD ELLINGTON,	)	
Defendants.	)	

DEFENDANTS' REPLY IN OPPOSITION TO PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Defendants ROBERT BENTLEY ("Governor Bentley"), KIM THOMAS ("Mr. Thomas"), BILLY MITCHEM ("Mr. Mitchem"), FRANK ALBRIGHT ("Mr. Albright"), BETTINA CARTER ("Ms. Carter") and EDWARD ELLINGTON ("Mr. Ellington," or collectively with Governor Bentley, Mr. Thomas, Mr. Mitchem, Mr. Albright and Ms. Carter, the "State"), pursuant to Rules 8(a)(2), 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure and the Order of this Court dated May 27, 2011 (Doc No. 36), submit this Reply to the Memorandum of Law in Opposition to Defendants' Motion to Dismiss (the "Response," Doc. No. 37) filed by Plaintiffs LOUIS HENDERSON, DANA HARLEY, DARRELL ROBINSON, DWIGHT SMITH, ALBERT KNOX, JOHN HICKS, DAVID SMITH, JAMES DOUGLAS and

MELINDA WASHINGTON (the "Named Plaintiffs").[1]

INTRODUCTION

The Named Plaintiffs, in a desperate endeavor to escape the operation of *res judicata*, attempt to offer inadmissible evidence and rely on contradictory arguments about a "change in circumstances" related to the developments in HIV care. However, as addressed in the State's Motion to Strike, the purported evidence is inadmissible and, as discussed below, there is no "change of circumstances" warranting the re-hashing of the Named Plaintiffs' claims which were previously **presented, tried, appealed and decided** in Onishea v. Hopper, 171 F. 3d 1289 (11th Cir. 1999) (*en banc*). The Named Plaintiffs central position is as follows: developments in medicine have increased the lifespan of those HIV-positive individuals who have access to and cooperate with an appropriate course of medical treatment. While we must assume the truth of this position for purposes of the State's Motion to Dismiss, this alleged fact changes nothing in the operation of *res judicata*. The fundamental analysis employed in Onishea remains unchanged. HIV remains an incurable, chronic medical condition, which can be transmitted from inmate-to-inmate through at-risk behavior, which was thoroughly addressed in Onishea as rendering the Named Plaintiffs "unqualified" for protection under the ADA or Rehabilitation Act. Moreover, even if (a) a change of circumstances has occurred overcoming the bar of *res judicata*, and (b) the Named Plaintiffs could establish that they were "otherwise qualified," there has been no "change of circumstances" related to the penological concerns identified in Onishea

[1] **RESERVATION OF OBJECTIONS REGARDING CLASS CERTIFICATION:** The State hereby respectfully reserves any and all objections which it currently possesses with respect to the Named Plaintiffs' request for permission to pursue the claims set forth in their First Amended Complaint on behalf of "approximately 250 prisoners in ADOC custody who have tested positive for HIV." (First Amended Complaint, Doc. No. 31 at ¶ 8). Moreover, in the event that the Court determines that this matter should proceed to discovery as to any of the claims and/or issues set forth in the First Amended Complaint, the State respectfully requests that the Court exercise its authority and discretion pursuant to Rule 23(d) of the Federal Rules of Civil Procedure and set forth certain deadlines and discovery guidelines and otherwise determine the appropriate course of proceedings with respect to the issue of class certification.

which negated any entitlement to relief for HIV-positive inmates under the ADA or Rehabilitation Act.

However, even if *res judicata* does not preclude the Named Plaintiffs' claims, their Response to the State's Motion to Dismiss fails to address the inadequacy of their pleadings or their failure to exhaust their administrative remedies. As such, the Named Plaintiffs' First Amended Complaint is due to be dismissed.

ARGUMENT

I. THE NAMED PLAINTIFFS' RELIANCE UPON A "CHANGE OF CIRCUMSTANCES" IS MISPLACED.

In their Response to the State's Motion to Dismiss, the Named Plaintiffs cannot and do not dispute three of the four necessary elements of *res judicata*. They essentially concede these points and give up their attempts to re-litigate the issues. Indeed, the Response filed by the Named Plaintiffs avoids any discussion of the fact that (1) a prior final judgment on the merits of their claims was entered, (2) the judgment was rendered by a court of competent jurisdiction, or (3) the parties were identical in this suit and the prior actions. See e.g. In re Piper Aircraft Corp., 244 F. 3d 1289 (11th Cir. 2001); Hart v. Yamaha-Parts Distrib., Inc., 787 F. 2d 1468 (11th Cir. 1986). The Named Plaintiffs' silence on these issues alone demonstrates the absolute absence of any credible argument in opposition to these three elements. Therefore, the Named Plaintiffs' opposition to the State's Motion to Dismiss limits the *res judicata* discussion to a single issue: whether this case involves the "same cause of action" originally presented, tried and decided in Onishea v. Hopper, 171 F. 3d 1289 (11th Cir. 1999) (*en banc*). See Hart, 787 F. 2d at 1470. According to the Named Plaintiffs, "[*r*]*es judicata* does not apply here: the claims are materially different because of a significant change in circumstances since Onishea and Edwards were decided." (Response, Doc. No. 37 at pp. 1-2). In their Response, the Named Plaintiffs quote one

sentence from the Onishea opinion, in which the Eleventh Circuit wrote, "[i]n the state of medical knowledge and art at the time of trial, HIV infection inevitably progressed to AIDS. AIDS always led to death, often after lengthy suffering.' Onishea, 171 F. 3d at 1293 (emphasis added)." (Id. at p. 2). The Named Plaintiffs also reference two other statements in the Onishea opinion referencing the "catastrophic severity of the consequences" of HIV/AIDS transmission and the Court's understanding that "transmitting [HIV/AIDS] inevitably entails death." (Id. at pp. 2-3).

In an effort to capitalize on these scattered statements in Onishea, the Named Plaintiffs allege and improperly attempt to offer documentation to support their argument that HIV/AIDS "no longer 'inevitably entails death'" and advancements in medical therapies "have changed HIV from a fatal disease to a chronic condition that can be successfully treated." (Id. at p. 3). Contemporaneous with this Reply, the State has requested that this Court strike all of the extraneous materials submitted by the Named Plaintiffs as improperly posited "facts." Even assuming the truth of such facts, the Named Plaintiffs have not established the necessary "change of circumstances" to circumvent the operation of *res judicata*. As set forth herein, the Named Plaintiffs completely missed the mark.

A. THE REQUIREMENTS FOR A "CHANGE OF CIRCUMSTANCES."

The Named Plaintiff's Response lacks any citation to any applicable authority regarding their proposed theory of a "change of circumstances." Though Plaintiffs attempt to articulate a legal argument based upon decisions rendered by the First and Seventh Circuits, the Named Plaintiffs' attempted use of these decisions is wholly misplaced. Rather than focusing on the actual standard for a "change of circumstances," the Named Plaintiffs cite language from this Court's opinion in Edwards v. Alabama Department of Corrections, 81 F. Supp. 2d 1242 (M.D.

Ala. 2000), where this Court identified the failure of the purported plaintiff class to assert any arguments related to change of circumstances as a bar to *res judicata* and clarified its opinion as not touching on this issue. (See Response, Doc. No. 37 at p. 5). Based upon this language, the Named Plaintiffs argue that their "claims are not precluded [because the Edwards Court] . . . reserve[d their] right to bring those claims in a later action." (Id.). This argument is wholly misplaced. The State has demonstrated that the Named Plaintiffs' claims are barred by the doctrine of *res judicata* because of the decision rendered in Onishea. The Edwards opinion merely confirmed the continued operation of *res judicata* with respect to the claims of the Named Plaintiffs. While this Court clearly indicated the ability of the Named Plaintiffs to argue a "change of circumstances" at some point in the future, this Court did not simply swing open the door for Plaintiff to attempt to re-litigate any and all claims which were previously resolved in Onishea. Hence, the suggestion by the Named Plaintiffs that this Court somehow negated the doctrine of *res judicata* for all subsequent ADA claims by HIV-positive inmates in Alabama is fundamentally wrong and without any legal basis of any kind.

In terms of the "change of circumstances" exception to *res judicata*, there are only a handful of decisions out of the Eleventh Circuit (or the former Fifth Circuit) addressing this particular issue. In fact, the State has not yet identified any reported opinion wherein the Court addressed a particular circumstance that is sufficiently similar in terms of the factual allegations and/or procedural history to provide any specific guidance on the issue. Nevertheless, the Eleventh Circuit has recognized that "[t]he doctrine of *res judicata* bars all subsequent suits raising allegedly new theories, unless a *substantial change* in the underlying facts or law has transpired." Jaffree v. Wallace, 837 F. 2d 1461, 1469 (11th Cir. 1988) (relying upon 1B Moore's Federal Practice para. 0.415, at 504-12 (stating the rule and listing cases); Jackson v. DeSoto

Parish School Bd., 585 F. 2d 726, 729 (5th Cir. 1978)). In the former Fifth Circuit's opinion in Jackson, the Court advised, "*res judicata* is no defense where, between the first and second suits, there has been an intervening change in the law or modification of significant facts creating new legal conditions." 585 F. 2d at 729. More recently, the Eleventh Circuit declared that a "change of circumstances" exists only when "the factual premise of the present lawsuit differs significantly from the prior one." Southeast Florida Cable, Inc. v. Martin County, Fla., 173 F. 3d 1332, 1336 (11th Cir. 1999). In sum, the few decisions addressing this "change of circumstances" argument clearly mandate that the Named Plaintiffs must demonstrate a "significant change in the underlying fact," whereby the factual premise of the current action differs "significantly" from that of Onishea and Edwards. As discussed below, the Named Plaintiffs have failed to meet this burden.

B. THE FUNDAMENTAL PRINCIPLES OF ONISHEA.

The Named Plaintiffs' "change of circumstances" argument can be summarized as follows: According to the Named Plaintiffs, the Onishea decision turned entirely upon the fatal consequences of HIV transmission in 1999 and, because HIV is no longer an inevitably fatal disease in 2011, Onishea does not bar this action. Unfortunately for the Named Plaintiffs, the Onishea Court revealed its view of these circumstances in its opinion. In addressing the "significant risk" standard employed by the Court in evaluating whether the Onishea plaintiffs were "otherwise qualified," the Court wrote as follows:

> But this is a *not* a "somebody has to die first" standard, either: **evidence of actual transmission of the fatal disease in the relevant context is not necessary to a finding of significant risk.**

Onishea, 171 F. 3d at 1299. In other words, Onishea does not stand for the proposition that inevitable death is required in order to satisfy the "significant risk" standard employed by the Court. Rather, the Court in Onishea held that the Named Plaintiffs cannot be characterized as

"otherwise qualified" under § 504 of the Rehabilitation Act if transmission of HIV remains a "significant risk," as defined by the Court. As discussed in greater detail below, the Named Plaintiffs—by their own admission—acknowledge the continuing risks associated with the transmission of HIV among the Alabama prison population. Therefore, there can be no "significant" change in the factual underpinnings of Onishea so long as the Named Plaintiffs continue to acknowledge the inevitable harm that will result from the transmission of HIV among the prison population.

Based upon the description of Onishea by the Named Plaintiffs, one might believe that the Onishea decision rose and fell based entirely upon a singular factual determination that HIV inevitably resulted in death. It did not. In fact, the language in Onishea cited by the Named Plaintiffs constitutes only one factual issue addressed by this Court and the Eleventh Circuit. Indeed, this Court made numerous other factual findings all of which were essential to its conclusion that the Onishea plaintiffs were not "otherwise qualified." Such findings include:

(1) "sex, intravenous drug use and bloodshed are a perpetual possibility in prison . . .";

(2) "prison life is inherently unpredictable—especially when large-scale mixing of HIV-positive and HIV-negative prisoners in Alabama is untried";

(3) "HIV is transmitted by sex, intravenous drug use, and blood-to-blood contract"; and

(4) "the transmission risk is significant in all programs."

Onishea, 171 F. 3d at 1294-1295. Nothing in the pleadings or Response submitted by the Named Plaintiffs indicates any change of circumstances regarding any of these essential factual findings.

More importantly, the Named Plaintiffs' "change of circumstances" argument fails to address one critical portion of this Court's decision in Onishea. As part of its program-by-program analysis, this Court considered "the Department of Corrections' penological concerns."

Id. at p. 1295. The Court undertook this analysis pursuant to the United States Supreme Court's decision in Turner v. Safley, 482 U.S. 78 (1987). In Turner (a case involving questions related to the First Amendment rights of prisoners), the United States Supreme Court expressed the following concern:

> Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. . . . [**Therefore, w]here a state penal system is involved, federal courts have. . . . additional reason to accord deference to the appropriate prison authorities**.

Id. at 84-85 (emphasis supplied and citations omitted). Based upon this precept, the Turner Court acknowledged the right of prison officials to abridge a prisoner's constitutional rights in those instances when the state action "logically advances the goals of institutional security and safety identified by [] prison officials, and it is not an exaggerated response to those objectives." Id. at 93.

Consistent with the Supreme Court's guidance in Turner, this Court made several critical findings relative to the State's "legitimate penological interests." Onishea, 171 F. 3d at 1299. The Eleventh Circuit summarized these findings as follows:

> In almost every program, the court concluded that the Department of Corrections could legitimately seek to prevent violence and epidemic HIV by the measures it has taken. In one program, interstate prisoner exchange, the court found that penological concerns alone—the cost of medical care for the HIV-positive—sufficed to excuse the exclusion of HIV-positive inmates.

Id. at 1295. On appeal, the Eleventh Circuit did not reverse this Court's employment of the Turner standard. In fact, the Court held that "determining whether penological concerns impose requirements for program participation [was] not error." Id. at 1300.

The consideration of the State's penological concerns in Onishea constitutes a critical issue with respect to the Named Plaintiffs' "change of circumstances" argument. Nothing in the pleadings or Response of the Named Plaintiffs even remotely addresses these penological issues that were presented and decided in Onishea. Problematically for the Named Plaintiffs—even if they are 100 percent correct in their arguments related to a "change of circumstances" regarding the prognosis of HIV-positive inmates in 2011—such facts (if proven) would only go to establish that they were "otherwise qualified." Even if the Named Plaintiffs were "otherwise qualified," their claims still fail because of the Onishea ruling that the State's penological concerns outweigh any rights of the Named Plaintiffs. In other words, given Onishea's findings relative to the penological concerns of the State, the change in the medical therapies available to HIV-positive inmates cannot constitute a change in the "significant" factual underpinnings of the case because the Onishea plaintiffs' claims failed independently of this issue. The Onishea plaintiffs' claims failed because of the security risks and expense associated with their alleged "accommodations." The same holds true today and, therefore, the Named Plaintiffs have failed to present any allegations or evidence of any significant change in the facts critical to the rulings in Onishea.

C. THE GLARING DEFECTS IN THE NAMED PLAINTIFFS' ARGUMENT.

Reduced to its simplest form, the Named Plaintiffs devote the first five (5) pages of their Response arguing that infection with HIV is nothing of great concern, constituting nothing more than a "chronic condition that can be successfully treated." (Response, Doc. No. 37, at p. 3). Oddly, the Named Plaintiffs then devote the following fourteen (14) pages arguing that HIV-positive individuals are "disabled" under the ADA and Rehabilitation Act. (Id. at pp. 6-20). On the one hand, the Named Plaintiffs insist that "HIV is no longer a death sentence" in attempting

to avoid dismissal of this action on the basis of *res judicata*. (Id. at p. 9). However, on the other hand, in order to avoid dismissal under Iqbal, Plaintiffs then insist HIV constitutes a "substantial limitation on the operation of the immune system." (Id. at p. 7). The Named Plaintiffs are literally talking out of both sides of their mouth – HIV "can be successfully treated" but also "substantially limits the operation of the immune system"? Indeed, it is difficult to reconciled these two competing arguments.

Nevertheless, if the Court assumes that the allegations of the Named Plaintiffs are true (i.e. that HIV constitutes a "disability" because it results in a "substantial limitation on the operation of the immune system"), then there can be no "change of circumstances" following Onishea because there remains a significant known harm expressly alleged by the Named Plaintiffs that results directly from the contraction of HIV (i.e. a lifetime disability). Given this express admission by the Named Plaintiffs as to the harm resulting directly from the transmission of HIV, the Named Plaintiffs' arguments regarding a wholesale change of circumstances related to HIV are meritless and, as such, they cannot escape the holding of Onishea.

Finally, to the extent that the Court elects to consider any of the purported "exhibits" submitted with the Named Plaintiffs' Response, such documents do not present the rosy picture of HIV painted by the Named Plaintiffs in their Response. More importantly, the Named Plaintiffs' inadmissible, unauthenticated, hearsay documents do not undermine or disprove the fundamental concern expressed by the Eleventh Circuit in Onishea related to the risks and consequences of inmate-to-inmate transmission of HIV. The purported documentation submitted by the Named Plaintiffs, and marked as Exhibit 1 to their Response, states each of the following:

(1) an HIV-positive individual will, as a carrier of the disease, live with the possibility of passing "the virus along to others including [his or her] sexual partners";

(2) an HIV-positive female can "also pass [the virus] along to [her] unborn child";

(3) "[t]here is no cure for HIV";

(4) HIV "is a serious, infectious disease that can lead to death if it isn't treated"; and

(5) "Proper treatment" is necessary to prevent the development of AIDS.

(Response, Exhibit 1 at p. 1). Additionally, it is also worth noting that page 3 of Exhibit 1 to the Named Plaintiffs' Response includes the following question: "Am I going to die of AIDS?" The response to this question does not include a definitive "yes" or "no," but does state that "complications from HIV infection remain a possibility." Therefore, to the extent that the Court considers the purported evidence submitted by the Named Plaintiffs, such purported documentation does not provide any basis for Named Plaintiffs' suggestion that the Onishea Court was incorrect or misguided in any way in reaching the conclusion that the HIV-positive inmates in Onishea, like the Named Plaintiffs here, were not "otherwise qualified" for purposes of Section 504 of the Rehabilitation Act. In sum, while the names and nature of medication for the treatment of HIV have changed over the last decade, the circumstances have not. By the express admission of the Named Plaintiffs, HIV/AIDS remains an incurable infectious disease requiring the provision of medical care over the lifetime of an infected individual. Assuming the truth of the Named Plaintiffs' allegations for purposes of the State's Motion to Dismiss, the general lifespan of an individual with HIV may have changed over the last 10 years, but the Named Plaintiffs have not leveled any allegation that the "significant risks" identified in Onishea have so dramatically diminished as to alter the Eleventh Circuit's basic analysis. For these

reasons, there is no "change of circumstances" and the Named Plaintiffs' claims remain barred under the doctrine of *res judicata*.

II. THE NAMED PLAINTIFFS' RESPONSE DIRECTLY UNDERMINES ANY CLAIM UNDER THE ADA OR THE REHABILITATION ACT.

Notwithstanding the Named Plaintiffs' attempts to re-characterize the allegations pled in their Amended Complaint, the fact remains that the Named Plaintiffs failed to meet the Twombly / Iqbal pleading standard. As stated in the State's Motion to Dismiss, the Named Plaintiffs fail to state a plausible claim for relief under either the ADA or the Rehabilitation Act because they have not alleged sufficient facts showing they are "qualified individuals with disabilities." (See Memorandum of Law in Support of Motion to Dismiss, Doc. No. 35, at p. 25). Moreover, the Named Plaintiffs claim an entitlement to rights (i.e. preferential housing and confidentiality of their HIV status) that are clearly not given under either statute. (See Id. at pp. 29-33). Nothing submitted in the Named Plaintiffs' Response refutes or rebuts these arguments. In lieu of taking the State's arguments head-on, the Named Plaintiffs have merely re-characterized their own allegations, as well as the State's arguments, in an attempt to formulate a meaningful response to the State's Motion to Dismiss. Irrespective of this futile attempt, the Named Plaintiffs have *still* failed to state a claim against the State for which relief can be granted. And, for the following reasons, the Named Plaintiffs' claims are due to be dismissed.

A. THE NAMED PLAINTIFFS' STATUS AS HIV-POSITIVE DOES NOT AUTOMATICALLY EQUATE TO A "DISABILITY".

The Named Plaintiffs contend that the ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at 42 U.S.C. § 12101) (West 2009), expands the definition of "disability" under the ADA. (Response, Doc. No. 37, at p. 6). Even if this is true, there is nothing in the amended Act that suggests that the Named Plaintiffs are no longer

required to sufficiently plead facts that they are "qualified individuals with disabilities." As amended, a plaintiff has a disability under the ADA if he (1) has a physical or mental impairment that substantially limits a "major life activity;" (2) has a record of such an impairment; or (3) is regarded as having such an impairment. Id. § 12102(2) (2011). While the State does not dispute that HIV (whether symptomatic or asymptomatic) qualifies as a physical impairment under the ADA, see 28 C.F.R. § 35.104 (2011), the Named Plaintiffs must present an individualized assessment of whether HIV substantially limits a "major life activity" of a particular plaintiff. See Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 194 (2002) ("[H]aving an impairment does not make one disabled for purposes of the ADA. Claimants also need to demonstrate that the impairment limits a *major life activity*.") (emphasis added); Adams v. City of Chicago, 706 F. Supp. 2d 863, 876 (N.D. Ill. 2010) (citing E.E.O.C. v. Lee's Log Cabin, Inc., 546 F. 3d 438, 445 (7th Cir. 2008)) ("Positive HIV status is not a 'per se disability' under the ADA, . . . and a person who is HIV positive must present evidence that his status impaired a major life activity."); Green v. Roberts, ("Since § 12102(2) defines disability 'with respect to an individual,' the existence of a disability is to be determined by a 'case-by-case manner.'").

Even after amending their Complaint, the Named Plaintiffs have not pled sufficient facts to establish that major life activities such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working have been substantially limited by their HIV-positive status. See 29 C.F.R. § 1630.2(i) (2011). Instead, the Named Plaintiffs seem to suggest that *any* person with HIV meets the disability requirement under the ADA without having to ever prove that a "major life activity" is substantially limited. And, they do so without citing to any case law in support of their argument. Having an impairment only creates the *possibility* of being disabled as that term is defined under the ADA. Absent any set of

well-pleaded facts to allow the Court to infer more than the mere possibility that they are disabled under the ADA, the Named Plaintiffs have failed to state a plausible claim for relief. See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009); Bell Atlantic v. Twombly, 550 U.S. 544, 555 (2007).

B. THE NAMED PLAINTIFFS CANNOT IGNORE OR ESCAPE THE "DIRECT THREAT" EXCEPTION TO TITLE II OF THE ADA.

Even if the Named Plaintiffs meet the disability requirement under the ADA, they must also plead sufficient facts making it plausible that they are "qualified individuals." See Marinelli v. City of Erie, Pa., 216 F. 3d 354, 359 (3d Cir. 2000) ("In order to state a cognizable cause of action under the ADA, a putative plaintiff must establish that he is a 'qualified individual with a disability.'"). Instead, the Named Plaintiffs attempt to side-step this requirement by arguing that Onishea is not applicable law because it relies upon an "inevitably entails death" standard and, therefore, they are not required to prove or even allege that there is no "significant risk" of harm to other prisoners with whom they wish to reside in the same dormitory or participate in prison programs and activities. This argument fails because Onishea relies upon the four Arline factors which are now codified as an exception to Title II. As such, the Named Plaintiffs cannot conveniently ignore the requirement that they allege sufficient facts making it plausible that they are "qualified individuals."

Title II defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable modifications . . . or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2); Bircoll v. Miami-Dade County, 480 F. 3d 1072, 1081 (11th Cir. 2007). However, the United States Supreme Court and the Eleventh Circuit have recognized an exception to this general

requirement. The Eleventh Circuit in Onishea held that the HIV-positive status of inmates, in and of itself, posed a *significant risk* in any program in which prisoners participated. See Onishea, 171 F. 3d at 1298-99. In making this determination, the Court relied upon the four factors set forth in School Board of Nassau County v. Arline, 480 U.S. 273 (1987):

> (a) the nature of the risk, (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.

Onishea, 171 F. 3d at 1297 (citing Arline, 480 U.S. at 288). These four factors, although judicially created, are now codified at 42 U.S.C. § 12182(b)(3) and commonly referred to as the "direct threat" exception. Section 12182(b)(3) provides:

> Nothing in this subchapter shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a *direct threat* to the health or safety of others. *The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.*

42 U.S.C. § 12182(b)(3) (2011) (emphasis added).

Onishea and its progeny have consistently applied these factors to determine whether an individual with HIV poses a "direct threat" to others in both the employment and prison contexts. For example, in Waddell v. Valley Forge Dental Associates, Inc., 276 F. 3d 1275 (11th Cir. 2001), the Eleventh Circuit addressed whether the risk of an HIV-positive dental hygienist "transmitting HIV in the course of treatment poses a direct threat to others . . . ." Id. at 1279-80. The Court defined a "direct threat" as "a *significant risk* to the health or safety of others that cannot be eliminated by reasonable accommodation." Id. at 1280 (quoting 42 U.S.C. § 12111(3)) (emphasis added). Similar to Onishea, the Court in Waddell applied the four Arline

factors. In doing so, the Eleventh Circuit held that a person who poses a significant risk of communicating an infectious disease (e.g., HIV) to others will not be "otherwise qualified" for a job. Id. at 1284.

The State has not misapplied Onishea but, instead, has asserted arguments consistent with the "direct threat" exception that has now been codified as part of Title II of the ADA and its supporting regulations. The Named Plaintiffs' contention that they "are not required to allege or prove that there is no risk of HIV transmission in ADOC facilities," (Response, Doc. No. 37, at p. 9), is inconsistent with the holdings in Twombly and Iqbal. While Defendants are not asking the Named Plaintiffs to *prove* that they are otherwise "qualified individuals," the Named Plaintiffs are required to *allege* minimal facts from which this Court could infer that they are "qualified individuals" that do not pose a "significant risk" to other inmates with whom they would like to participate in prison programs and activities.

The Named Plaintiffs maintain that "[a] review of the Complaint makes it plain, however, that Plaintiffs have met the requirements of Rule 12(b)(6), pleading enough factual content to allow the Court to draw the reasonable inference that Plaintiffs are otherwise qualified for the programs, services, and activities identified in the Complaint . . . ." (Response, Doc. No. 37, at p. 11). This argument necessarily fails. In an unsuccessful attempt to prove that they have met the Twombly/Iqbal plausibility standard, the Named Plaintiffs include four, single-spaced pages of references to the Amended Complaint that do not in *any* manner speak to the issue of whether or not the Named Plaintiffs pose a "significant risk" to others. Instead, the Named Plaintiffs take up unnecessary space to merely reassert the conclusory allegations that the Named Plaintiffs are excluded from various prison programs and activities solely because they have HIV.

In short, the Named Plaintiffs confuse the notion of being "qualified" to participate in various prison activities and programs based on criteria such as custody level, good behavior, and release date with the meaning of "qualified individual with a disability" as it relates to an individual with an infectious disease. While the Named Plaintiffs totally disregard the "direct threat" exception, the Eleventh Circuit has made it clear that the *only* criterion used to determine whether an individual with an infectious disease is "qualified" are the four factors set forth in Arline. These factors make no mention of custody level, good behavior, or release date. Instead, these factors speak to whether an individual poses a significant risk to those around him or her. The Amended Complaint is entirely void of any allegations tending to establish that there is no "significant risk" of communicating HIV to other inmates or prison officials. Accordingly, the Named Plaintiffs have not successfully alleged that they are "otherwise qualified individuals" and, therefore, fail to state a claim against the State under both the ADA and Rehabilitation Act.

C. THE NAMED PLAINTIFFS' DEMANDS FOR SELF-DETERMINED WORK RELEASE LOCATIONS AND DORM ASSIGNMENTS ARE WITHOUT ANY LEGAL BASIS.

The Amended Complaint is replete with requests that the Named Plaintiffs be transferred to specific work release locations or particular ADOC facilities based on their personal preferences to work and/or reside closer to their hometowns and family members. (See First Amended Complaint, Doc. No. 31, at ¶¶ 19, 21, 22, 27, 29, 32; see also Memorandum of Law in Support of Motion to Dismiss, Doc. No. 35, at pp. 29-31). Yet, the Named Plaintiffs contend in their Response that they "do not demand placement in any particular facilities or locations." (Response, Doc. No. 37, at p. 20). Rather, they are merely asking to be housed with all other prisoners. (Id.). Endeavoring to rewrite the allegations in their Amended Complaint, the Named Plaintiffs have completely contradicted themselves.

The Named Plaintiffs further argue that "the fact that a job or some other benefit is not constitutionally guaranteed does not mean that it can be denied for improper reasons . . . ." (Response, Doc. No. 37, at p. 21). In support of this argument, the Named Plaintiffs cite two cases—Curl v. Reavis, 740 F. 2d 1323 (4th Cir. 1984) and Hishon v. King & Spalding, 467 U.S. 69 (1984). These cases are not on point and deal with entirely different sets of facts. As previously stated in the State's Motion to Dismiss, prisoners do not have any right, whether constitutional or statutory, to confinement in a particular location. (See Memorandum of Law in Support of Motion to Dismiss, Doc. No. 35, at 31). This is true for all prisoners, regardless of their HIV status. Neither the ADA nor the Rehabilitation Act provide the relief sought by the Named Plaintiffs.

III. THE NAMED PLAINTIFFS' ARGUMENTS RELATED TO THE PLRA'S EXHAUSTION REQUIREMENT ARE MISPLACED.

The Named Plaintiffs contend that "there has been no failure to exhaust administrative remedies because no administrative remedy was available to the Plaintiffs." (Response, Doc. No. 37, at p. 28). In its Motion to Dismiss, the State clearly set forth the exact scope of the grievance process which was available to the Named Plaintiffs, i.e. a grievance process related to medical complaints. Medical complaints are those related to decisions and/or acts by the facilities' medical staff or with respect to the Named Plaintiffs' medical condition or medical treatment. The State does not in any manner attempt to redefine the medical grievance process as a "general-purpose" administrative remedy process and the mere suggestion of this intention on the part of the State is wholly disingenuous.

In an effort to pull the wool over the Court's eyes, the Named Plaintiffs have re-characterized each medical grievance cited by the State as a non-medical grievance for which there is no administrative remedy. As previously set forth in their Motion to Dismiss, the State

highlighted the following medical grievances for which the Named Plaintiffs failed to seek a remedy:

> (1) Disapproval of the type and quality of medical treatment received in the HIV dorm or "healthcare unit" at Tutwiler (Memorandum of Law in Support of Motion to Dismiss, Doc. No. 35, at pp. 35-36); and
>
> (2) Disapproval of the medical clearance criteria imposed on prisoners with HIV who have a desire to participate in work release which includes:
>
> i. The duration of the six-month "Keep On Person" medication program; and
>
> ii. The duration between consecutive viral load readings conducted by the HIV specialist at both Limestone and Tutwiler (Memorandum of Law in Support of Motion to Dismiss, Doc. No. 35, at p. 36).

In support of their mischaracterization of the State's arguments, the Named Plaintiffs have submitted two self-serving affidavits from prisoners, one of which is a Named Plaintiff in this lawsuit. These affidavits suggest that the Named Plaintiffs' grievances are in no way medical in nature but, rather, are grievances about classification, housing, work release, access to prison programs, discrimination, or denial of rights under the ADA. However, the affidavit of Tonitta Reese, a non-party to this action, clearly indicates that the medical grievance process is in place to address "issues related to their medical treatment, medical conditions or *anything related to the medical staff*." (Reese Aff. ¶ 5 (emphasis supplied)). The grievances listed above are either related to medical treatment, medical conditions, or the medical staff. The Named Plaintiffs cannot dispute this fact by merely re-characterizing their grievances as general non-medical grievances (for which there is no remedy) in order to escape the exhaustion requirement under the PLRA. Moreover, it is of no consequence that ADOC's medical grievance procedures are implemented and enforced by Correctional Medical Services, Inc., which is clearly acting

pursuant to the contractual authority granted by the State. Federal courts require that the Named Plaintiffs grieve their complaints about such medical issues up through the highest level of administrative review. The Named Plaintiffs have neglected to do so and their failure to exhaust administrative remedies is grounds for dismissal of their claims.[2]

CONCLUSION

Based upon the foregoing, Defendants ROBERT BENTLEY, KIM THOMAS, BILLY MITCHEM, FRANK ALBRIGHT, BETTINA CARTER and EDWARD ELLINGTON respectfully request that this Court dismiss *with prejudice* the claims asserted by the Named Plaintiffs LOUIS HENDERSON, DANA HARLEY, DARRELL ROBINSON, DWIGHT SMITH, ALBERT KNOX, JOHN HICKS, JAMES DOUGLAS, DAVID SMITH and MELINDA WASHINGTON pursuant to Rules 8(a)(2), 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, and whatever additional relief to which they may be entitled.

Respectfully submitted on this 8th day of July, 2011,

/s/ Anne Adams Hill
One of the Attorneys for Defendants

/s/ William R. Lunsford
One of the Attorneys for Defendants

[2] The State reasserts and incorporates by reference Section IV of the Memorandum of Law in Support of Motion to Dismiss to support the argument that they are immune from being sued in their official capacities under the Eleventh Amendment.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and service will be perfected by email to the CM/ECF participants or by postage prepaid first class mail to the following this the 8th day of July, 2011:

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