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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT (JUNE 14, 2021)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RALPH KELLER,

Plaintiff-Appellant,

v.

CHIPPEWA COUNTY, MICHIGAN BOARD OF COMMISSIONERS; CHIPPEWA COUNTY, MICHIGAN SHERIFF'S DEPARTMENT,

Defendants-Appellees.

No. 20-2086

On Appeal from the United States District Court for the Western District of Michigan

Before: CLAY, McKEAGUE, and LARSEN, Circuit Judges.

LARSEN, Circuit Judge. After Ralph Keller was arrested on an outstanding warrant, he was detained for three nights in the Chippewa County Jail, where officers took custody of his breathing inhalers and his prosthetic leg. Keller sued the Chippewa County Board of Commissioners and the Chippewa County Sheriff's Department, alleging disability discrimination

under Title II of the Americans with Disabilities Act (ADA), *see* 42 U.S.C. § 12132, and § 504 of the Rehabilitation Act of 1973, *see* 29 U.S.C. § 794(a). The district court awarded summary judgment to the defendants. We AFFIRM.

I.

Around 3:30 a.m. on January 16, 2016, Ralph Keller was booked into the Chippewa County Jail. He had been arrested on an outstanding warrant for a misdemeanor controlled-substance offense. During booking, officers made two confiscations that are central to Keller's suit.

First, they took custody of Keller's inhalers. Keller suffers from stage-four chronic obstructive pulmonary disease (COPD), which is the final and most severe stage. He uses three inhalers to manage his condition. The first, Proair, is a short-acting rescue inhaler. The other two, Symbicort and Tudorza, are long-acting.

According to the jail administrator, Lieutenant Paul Stanaway, the jail has a policy against allowing detainees to keep prescription medications in their cells due to the risk of overdose or sharing with other inmates. When told of this policy, Keller did not ask to keep the inhalers with him. He handed them over and informed the officers how often he takes them each day. However, because Keller did not have the original boxes with the prescription information, an officer contacted the jail's physician, Dr. Dood, to determine the appropriate dosage. Dr. Dood advised that Keller should be given Proair four times daily as needed, Symbicort twice per day, and Tudorza once per day. Keller expressed disagreement with the Tudorza

recommendation. Keller maintains that he should have been given Tudorza twice per day because that is the dosage that his personal pulmonologist, Dr. Amarjeet Sethi, has chosen for him. For Dr. Sethi's part, he later testified that "once a day" is "normally standard" for Tudorza and that he did not have an issue with Dr. Dood's decision not to prescribe two doses per day.

Second, at the end of the booking process, officers told Keller to remove his prosthetic leg. Keller "told them that [he] need[s] [his] leg" but complied with the instructions to remove it. According to Lieutenant Stanaway, the jail confiscated the prosthesis because it "could be used as a weapon to harm others" and because Keller had a sore where it attached to his leg. The prosthesis was made of hard plastic and metal. Keller testified that it weighed "about 10 to 15 pounds." Stanaway represents that confiscating the leg was in accordance with the jail's "booking policies and procedures." The defendants also submitted an affidavit from an expert witness, who agreed that this decision "was reasonably related to a legitimate detention objective of maintaining security within the facility." Keller says when he was detained at the same jail in 2010, he had been allowed to keep his prosthetic. The record is otherwise silent on the circumstances of Keller's 2010 incarceration.

After giving up his prosthesis, Keller asked the deputies, "How am I going to get around?" According to Keller, a deputy responded, "hop around or crawl." Despite this callous remark, Keller was not, in fact, always required to get around on his own. Keller acknowledges that officers placed him in a wheelchair to bring him to his holding cell after booking. Indeed, the

record never suggests that Keller was required to move outside his cell without the use of a wheelchair. For example, Keller says that officers wheeled him to and from the jail's recreation area and transported him in a wheelchair to receive medical treatment.

Immediately after booking, officers brought Keller to a holding cell. Officers wheeled Keller to the cell's doorway. When Keller got out of the wheelchair, he "scooted along with [his] one leg" as he "[h]eld [himself] against the wall or something" until he arrived at a bench where he could sit. The cell was about twenty-by-twenty feet in size. It was equipped with a bench, toilet, sink, and telephone, as well as an intercom system, which allows inmates to contact corrections officers. Officers hand-delivered three meals per day to the cell, and Keller was able to eat them. Officers would bring meals to the door of the holding cell, and Keller's two young cellmates would carry the food to him. The jail also provided Keller with a cup so that he could have warm water from the sink, which helps with his COPD. Keller testified that he was able to use the toilet and the sink in the holding cell, but he had a "hard time" getting there. Without his prosthetic leg, he had to "shuffle[ ]" to the toilet, but nothing in the record reveals how far he had to go or whether he had access to any handrails for assistance.

On his second or third day in jail, Keller was moved to an "observation cell" to facilitate medical treatment and monitoring of his COPD. The observation cell was smaller than the previous holding cell. While he was in this new cell, officers handed Keller his meals directly. Keller also had access to an emergency call button that could be used whenever he needed

assistance. Keller does not assert that the absence of his prosthetic leg caused him any difficulty in the new cell.

Jail records show—and Keller does not contest—that he received his inhaler treatments as prescribed by Dr. Dood. However, his COPD still caused him great difficulty breathing. When Keller was having trouble catching his breath, he was able to inform jail personnel, and he received treatment. On more than one occasion, officers administered Keller's rescue inhaler when he requested help via the intercom system or emergency button in his cell. When treatments did not produce the desired effect, officers contacted Dr. Dood, who would advise them on how to proceed. In response, Dood prescribed prednisone and nebulizer treatments; Keller agrees that the jail administered these treatments.

During one COPD flare-up, Keller asked officers to take him to the hospital, and the officers contacted Dr. Dood for guidance. Dood responded that Keller was only to be taken to the hospital if "he [was] turning blue" or his "temperature [was] low," neither of which occurred. Tests revealed that Keller's blood oxygen level was at 96 percent and that his temperature was 98.1 degrees. So, rather than taking Keller to the hospital, officers gave him another nebulizer treatment. After the treatment, Keller was "breathing normally" and "felt much better" according to the jail incident report. Keller admitted at his deposition that this treatment made him feel "[a] little better."

On Keller's fourth day in jail, he pleaded guilty to his outstanding charges. He was sentenced to time served and a $120 fine. The jail released Keller that morning and returned his inhalers and prosthetic leg. Keller indicated that he was going to call an ambulance

to take him to the hospital, but one of the officers volunteered to drive him there. Keller accepted the offer. The deputy drove him to the hospital and accompanied him inside.

After his release from jail, Keller sued the Chippewa County Board of Commissioners (the County) and the Chippewa County Sheriff's Department, alleging disability discrimination in violation of both the ADA and Rehabilitation Act. Specifically, he alleged that the defendants discriminated against him "by removing his prosthetic leg" and "by not allowing [him] to retain the use of his breathing aid." He alleged that it was necessary for him "to have the use of his prosthetic leg and inhaler for him to effectively obtain his meals, comply with orders, have his meals, maintain hygiene and otherwise have full access to the Chippewa County Jail facilities and services."

After discovery, the County and the Sheriff's Department moved for summary judgment. The district court dismissed Keller's claims against the Sheriff's Department on the ground that the department is one-and-the-same with the county government and is not a separate entity capable of being sued—a decision that Keller does not contest. The district court then granted summary judgment to the County on the merits of Keller's ADA and Rehabilitation Act claims. Keller timely appeals.

II.

We review the district court's grant of summary judgment de novo. *Anderson v. City of Blue Ash*, 798 F.3d 338, 350 (6th Cir. 2015). A "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the

movant is entitled to judgment as a matter of law" based on specific facts in the record. Fed. R. Civ. P. 56(a), (c); *see Cincinnati Bell Tel. Co. v. Allnet Commc'n Servs. Inc.*, 17 F.3d 921, 923–24 (6th Cir. 1994). The nonmoving party must show that the record contains sufficient evidence for a reasonable jury to rule in his favor on each "element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). We view the record and draw all reasonable inferences in the manner most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

III.

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[1] 42 U.S.C. § 12132. We recognize two types of claims under Title II of the ADA: (1) failure-to-accommodate claims and (2) intentional-discrimination claims. *Roell v. Hamilton County*, 870 F.3d 471, 488 (6th Cir. 2017) (citing *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 907 (6th Cir. 2004)). A failure-to-

[1] The ADA defines "public entit[ies]" to include "any State or local government" or "any department, agency, . . . or other instrumentality of a State or . . . local government." 42 U.S.C. § 12131(1). The parties do not dispute that the Chippewa County Board of Commissioners, which operates the county jail, meets this definition. *See also Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998) (holding that the ADA definition of "public entity" covers state prisons).

accommodate claim asserts that the defendant "could have reasonably accommodated [the plaintiff's] disability, but refused to do so." *McPherson v. Mich. High Sch. Athletic Ass'n*, 119 F.3d 453, 460 (6th Cir. 1997) (en banc). An intentional-discrimination claim asserts that the plaintiff's "disabilities were actually considered by the [defendant] in formulating or implementing" the harmful policies or conduct. *Id.*

While less than clear, Keller appears to assert both types of claims. The County treats him as doing so, as did the district court. We do the same and hold that Keller cannot succeed under either one.

A.

We first consider Keller's reasonable-accommodation claims. Title II of the ADA "does not expressly define 'discrimination' to include a refusal to make a reasonable accommodation for a person with a disability." *Madej v. Maiden*, 951 F.3d 364, 372 (6th Cir. 2020). Rather, Title II's implementing regulations set forth the reasonable-accommodation requirement. *See* 28 C.F.R. § 35.130(b)(7)(i) ("A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."). We have previously recognized that refusal to provide a reasonable accommodation can serve as direct evidence of disability discrimination. *See Roell*, 870 F.3d at 488; *Ability Ctr. of Greater Toledo*, 385 F.3d at 907–08. To recover on a failure-to-accommodate claim, the plaintiff must show the following: (1) he is disabled; (2) he

was "qualified" to take part in the "services, programs, or activities" of the public entity; (3) he was "excluded from participation in" or "denied the benefits of" such "services, programs, or activities"; and (4) this exclusion or denial occurred "by reason of" his disability. 42 U.S.C. § 12132; *see Ability Ctr. of Greater Toledo*, 385 F.3d at 909–10.

As the district court correctly found, Keller has not offered sufficient evidence to establish a genuine dispute as to whether he was "excluded from participation in" or "denied the benefits of" any "services, programs, or activities" while in jail. 42 U.S.C. § 12132. We have interpreted this portion of Title II to require that covered entities provide "meaningful access" to their services, programs, and activities. *Ability Ctr. of Greater Toledo*, 385 F.3d at 909; *accord Wright v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 831 F.3d 64, 72 (2d Cir. 2016). And we have held that "the phrase 'services, programs, or activities' encompasses virtually everything that a public entity does." *Johnson v. City of Saline*, 151 F.3d 564, 569 (6th Cir. 1998) (quoting 42 U.S.C. § 12132). Therefore, the denial of meaningful access to medical care, bathroom facilities, or meals could support the required prima facie showing. *See United States v. Georgia*, 546 U.S. 151, 157 (2006); *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998) ("Modern prisons provide inmates with many recreational 'activities,' medical 'services,' and educational and vocational 'programs,' all of which at least theoretically 'benefit' the prisoners (and any of which disabled prisoners could be 'excluded from participation in')." (quoting 42 U.S.C. § 12132)); *Stansell v. Grafton Corr. Inst.*, No. 18-4009, 2019 WL 5305499, at *1 (6th Cir. Aug. 16, 2019) (order); *Wright*,

831 F.3d at 72– 74; *Jaros v. Ill. Dep't of Corr.*, 684 F.3d 667, 672 (7th Cir. 2012). Keller has been unable to provide evidence that he was denied meaningful access.

1.

Start with the jail's decision to take custody of Keller's inhalers. Officers contacted Dr. Dood so that he could prescribe what he believed to be the appropriate dosage for each of the three inhalers. Jail records reflect the daily administration of each inhaler as directed by Dood, and Keller admits that he received Dood's prescribed treatment. Even though Keller maintains that he should have been given two doses—as opposed to just one—of the Tudorza inhaler each day, Keller's own physician said that one dose per day was the "standard" for this type of inhaler and indicated that he had no issue with Dood's prescription. Though Keller did not have immediate access to his fast-acting inhaler, he was able to use the intercom and emergency call button available in his cells to seek help when he needed treatment. The record is devoid of any evidence suggesting that jail personnel engaged in undue delay when responding to Keller's calls.

Furthermore, officers consistently reported Keller's breathing episodes to Dr. Dood, who prescribed additional medications as necessary. Keller admits that the nebulizer treatments helped his breathing. And even though officers denied Keller's request to be taken to the hospital before his release, it appears that they took the concern seriously. They consulted Dr. Dood, who advised them not to take Keller to the hospital unless his temperature was low or unless he

was turning blue. After receiving that instruction, officers tested Keller's oxygen levels and temperature and found that these metrics were in a safe range. Though Keller may not have received the precise type of medical treatment that he would have preferred, undisputed facts show that he received "meaningful access" to medical treatment. *See Ability Ctr. of Greater Toledo*, 385 F.3d at 907, 909; *see also Keever v. City of Middletown*, 145 F.3d 809, 813 (6th Cir. 1998) (finding that an accommodation was reasonable even though it was not the accommodation that the plaintiff would have most preferred); *Wright*, 831 F.3d at 72 (explaining that a reasonable accommodation "need not be 'perfect' or the one 'most strongly preferred' by the [ ] plaintiff" (alteration in original) (citation omitted)).

2.

Next, consider the dispute surrounding Keller's prosthetic leg. We agree with the district court that the closest Keller comes to establishing a genuine dispute about whether he was deprived of jail services is his asserted difficulty using the toilet in his holding cell. The County points out that Keller admits that he was actually able to use the toilet and sink; but the simple fact that he successfully used them does not necessarily mean that he had meaningful access. Other courts have recognized that a plaintiff who succeeds in using a prison restroom only through an excessive or painful effort may have a valid ADA claim. *See, e.g.*, *Wright*, 831 F.3d at 70, 73; *Jaros*, 684 F.3d at 672; *Schmidt v. Odell*, 64 F. Supp. 2d 1014, 1033 (D. Kan. 1999).

Keller's case is lacking, however, because, as the district court correctly observed, Keller "provided very little information" about any difficulty accessing the toilet. Keller's limited testimony on this topic relates solely to the holding cell; he offers no evidence that he had trouble reaching the toilet after he was moved to the medical observation cell. Keller testified that he "shuffled" to get to the toilet and sink in the holding cell, but he never explains what that means. Keller's only description of his holding cell was the following:

> It was about the size of this room, with I think only one bench in it. . . . And the bench didn't—like say over there there's maybe like—maybe ten feet or something there was the wall and then the bathroom right there.

Keller does not clarify what "ten feet" refers to, or what it means that the bathroom was "right there." And, as the district court correctly noted, the record does not reveal whether the cell contained any handrails or other assistive devices. Keller's vague description of the holding cell is insufficient to meet his burden of "set[ting] forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (citation omitted). We are left only with Keller's bare assertion that he had a "hard time" getting to the toilet. But "[c]onclusory statements unadorned with supporting facts are insufficient to establish a factual dispute that will defeat summary judgment." *Alexander v. CareSource*, 576 F.3d 551, 560 (6th Cir. 2009); *cf. Cotter v. Ajilon Servs.*, 287 F.3d 593, 598 (6th Cir. 2002) (explaining that plaintiff's "perfunctory statement" that "his colitis restricts his ability to perform

manual tasks such as lifting, bending, standing and carrying things" could not allow "a reasonable jury [to] infer that" he was disabled under the ADA), *abrogated in part on other grounds by Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 314–15 (6th Cir. 2012) (en banc); *Penny v. United Parcel Serv.*, 128 F.3d 408, 415 (6th Cir. 1997) (similar).

The record is similarly lacking in evidence that Keller was denied meaningful access to any other jail services, programs, or activities. Keller notes that his cellmates brought his meals to him after an officer handed them the trays at the door of the holding cell. To be sure, a public entity that forced a plaintiff to rely on the good graces of a third party in order to enjoy program benefits might run afoul of the ADA. *See, e.g.*, *Wright*, 831 F.3d at 74; *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1259 (D.C. Cir. 2008). But Keller's testimony does not suggest such a scenario. He offers no evidence that officers would not have handed him meals directly if he had been alone in the holding cell or if his cellmates had not been willing or able. *Cf. Kiman v. N.H. Dep't of Corr.*, 451 F.3d 274, 285 (1st Cir. 2006) (finding no exclusion from prison programs or services where the plaintiff's "medical need for [a] cane was not obvious and. . . corrections officers would have been available to help [the plaintiff] on his walk to his shower, if he had requested their assistance"). Indeed, the record shows that, when Keller was in the medical observation cell without any cellmates, officers handed him his meals directly. Nor does the record indicate that Keller was ever required to move outside his cell without the use of a wheelchair.

Simply put, Keller has not created a genuine issue of material fact regarding whether the County denied him meaningful access to "the services, programs, or activities" available to detainees. *See Baribeau v. City of Minneapolis*, 596 F.3d 465, 484–85 (8th Cir. 2010); *Moore v. Curtis*, 68 F. App'x 561, 562–63 (6th Cir. 2003). Therefore, the district court properly awarded summary judgment to the County on his failure-to-accommodate claims.

B.

We now turn to Keller's claim that the County intentionally discriminated against him based on his disabilities. To evaluate a claim of intentional disability discrimination that is based on circumstantial evidence, we apply the *McDonnell Douglas* burden-shifting framework. *Anderson*, 798 F.3d at 356 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). First, the plaintiff is required to establish a prima facie case of discrimination. *Id.* at 356–57. To make out a prima facie case, the plaintiff "must show that: (1) [he] has a disability; (2) [he] is otherwise qualified; and (3) [he] was being excluded from participation in, denied the benefits of, or subjected to discrimination under the program because of [his] disability." *Id.* at 357 (footnote omitted). If the plaintiff makes this prima facie showing, the defendant "must then offer a legitimate, nondiscriminatory reason for its challenged action." *Id.* (internal quotation marks and citation omitted). "If [the defendant] does so—and its burden is merely one of production, not persuasion—[the plaintiff] must then present evidence allowing a jury to find that the [defendant's] explanation is a pretext for unlawful discrimination." *Id.* (alterations in original) (citation omitted).

As already described, Keller has not offered evidence that the County excluded him from, or denied him the benefits of, any jail services by confiscating his inhalers and prosthetic leg. Thus, Keller has failed to make a showing that could establish the existence of this essential element of his case, *see Anderson*, 798 F.3d at 357, and the County was entitled to summary judgment on his intentional-discrimination claims. *See Celotex*, 477 U.S. at 322–23.

IV.

Similar to the ADA, § 504 of the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). Keller's Rehabilitation Act claims fail for the same reasons as his ADA claims. *See Doe v. Woodford Cnty. Bd. of Educ.*, 213 F.3d 921, 924–26 (6th Cir. 2000) (recognizing similarities between the ADA and Rehabilitation Act claims); *McPherson*, 119 F.3d at 460, 463 (same). As explained above, Keller has not shown a genuine factual dispute about whether he was excluded from or denied the benefits of jail programs or activities, and he has not otherwise shown that he experienced prohibited discrimination. The district court properly granted summary judgment to the County on Keller's Rehabilitation Act claims.

[* * *]

We AFFIRM.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION (OCTOBER 7, 2020)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

RALPH KELLER,

Plaintiff,

v.

CHIPPEWA COUNTY BOARD OF COMMISSIONERS, ET AL.,

Defendants.

Case No. 2:19-cv-00011

Before: Hon. Maarten VERMAAT,
U.S. Magistrate Judge.

I. Introduction

Plaintiff Ralf Keller filed this action against the Chippewa County Board of Commissioners and the Chippewa County Sheriff's Department on January 16, 2019. Keller suffers from stage four chronic obstructive pulmonary disease (COPD) and has had part of his left leg amputated. Keller was arrested on an outstanding warrant the night of January 15,

2016, and booked into the Chippewa County jail around 3:00 A.M. the next morning. When arrested, Keller was carrying three prescribed inhalers to treat his COPD and wearing a prosthetic leg. He remained in the jail for three days. The Deputy Sheriff who booked Keller into the jail seized his prosthetic leg and the three inhalers. These seizures were made pursuant to jail policy.

Keller alleges that Defendants violated his rights under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131, *et seq*., and Section 504 of the Rehabilitation Act (RA), 29 U.S.C. § 794, *et seq*. He alleges that Defendants intentionally discriminated against him due to his disabilities and failed to provide reasonable accommodations.

Defendants have moved for summary judgment. (ECF No. 71.) As an initial matter, Defendants assert that Keller's claim against the Sheriff's Department should be dismissed because the Sheriff's Department is not a legal entity that may be sued. Defendants argue that there are no genuine issues of material fact as to Keller's ADA and RA claims because the undisputed facts show (1) that Keller has not shown that he was not denied any program, service, or activity that the jail offers inmates, (2) that Keller has not shown intentional discrimination, (3) that Defendants had legitimate, non-discriminatory reasons for seizing Keller's prosthetic leg and inhalers, and (4) that Defendants provided reasonable accommodations to address Keller's disabilities.

Keller does not dispute the facts as asserted by Defendants, but argues that Defendants reach the wrong legal conclusions. He says that Defendants' actions show that they discriminated against him

due to his disabilities and that Defendants failed to provide reasonable accommodations. (ECF No. 74.)

Defendants have filed a reply. (ECF No. 75.)

On June 10, 2020, the Court held a hearing on Defendants' motion for summary judgment. (ECF No. 81.)

After the hearing, Keller filed a post hearing supplemental response. (ECF No. 83.)

After reviewing the briefs, arguments, and exhibits provided by the parties, the Court respectfully concludes that dismissal of this case is appropriate. The evidence before the Court fails to show a genuine issue of material fact as to Keller's ADA and RA claims. Thus, Defendants' motion for summary judgment is GRANTED and this case is DISMISSED.

II. Facts

A. Facts Not in Dispute

The facts of this case are generally undisputed.

Keller was arrested on an outstanding warrant around 11:00 P.M. on January 15, 2016. (ECF No. 71-2, PageID.373 (jail incident report); ECF No. 71-17, PageID.488-89 (deposition of Keller).) Special Deputy Shentele Apps began booking Keller into the Chippewa County Correctional Facility (CCCF or "the jail") at 3:27 A.M. on January 16, 2016. (ECF No. 71-2, PageID.373.)

According to Keller's pulmonologist–Dr. Sethi–Keller suffers from stage four COPD. (ECF No. 71-19, PageID.507, 508, 511.) Dr. Sethi noted that stage four COPD is the final stage and the most severe. (*Id.*,

PageID.511.) According to Dr. Sethi, Keller was an active smoker at the time of the events in this case. (*Id.*) Dr. Sethi testified that he has advised Keller to stop smoking. (*Id.*) Dr. Sethi was also aware that Keller smoked marijuana, and he has advised Keller to stop this practice as well. (*Id.*, PageID.512.)

When booked, Keller had in his possession three inhalers containing medications to treat his COPD. These medications were Proair, Symbicort and Tudorza. (ECF No. 71-2, PageID.373.) Proair is a rescue inhaler. Symbicort and Tudorza are long-acting medications. (ECF No. 71-19, PageID.513.) Deputy Apps took custody of these inhalers. (ECF No. 71-2, PageID.373.)

Apps noted that Keller did not have the original prescription boxes for these medications with directions. (*Id.*) Accordingly, she called Dr. Dood, the jail's contract physician, to determine the correct dosages. (*Id.*) Dr. Dood informed Apps that Keller should receive Proair four times per day as needed, Symbicort two times per day, and Tudorza one time per day. (*Id.*)

A portion of Apps's jail incident report regarding her contact with Dr. Dood is shown below.

> INCIDENT DETAILS
>
> On above data and approximate time, U/O began the initial book-in process with Ralph Keller. Keller brought three inhalers with him which were a Proair inhaler, a Symbicort inhaler, and a Tudorza Pressair inhaler. Dr. Dood was advised of the three inhalers and approved all three. Dr. Dood also advised the appropriate dosage for the inhalers, as they did not come in the original prescription box with the directions. Dr. Dood advised the

> Proair for 4x daily as needed, the Symbicort 2x daily, and the Tudorza Pressair once daily.
>
> IMMEDIATE OFFICER ACTIONS
>
> Accepted inhalers
> Called Dr. Dood
> Set up personal med sheet
> Placed inhalers in C side topical bin
> Placed report and Medication verification sheet in Book-n cabinet

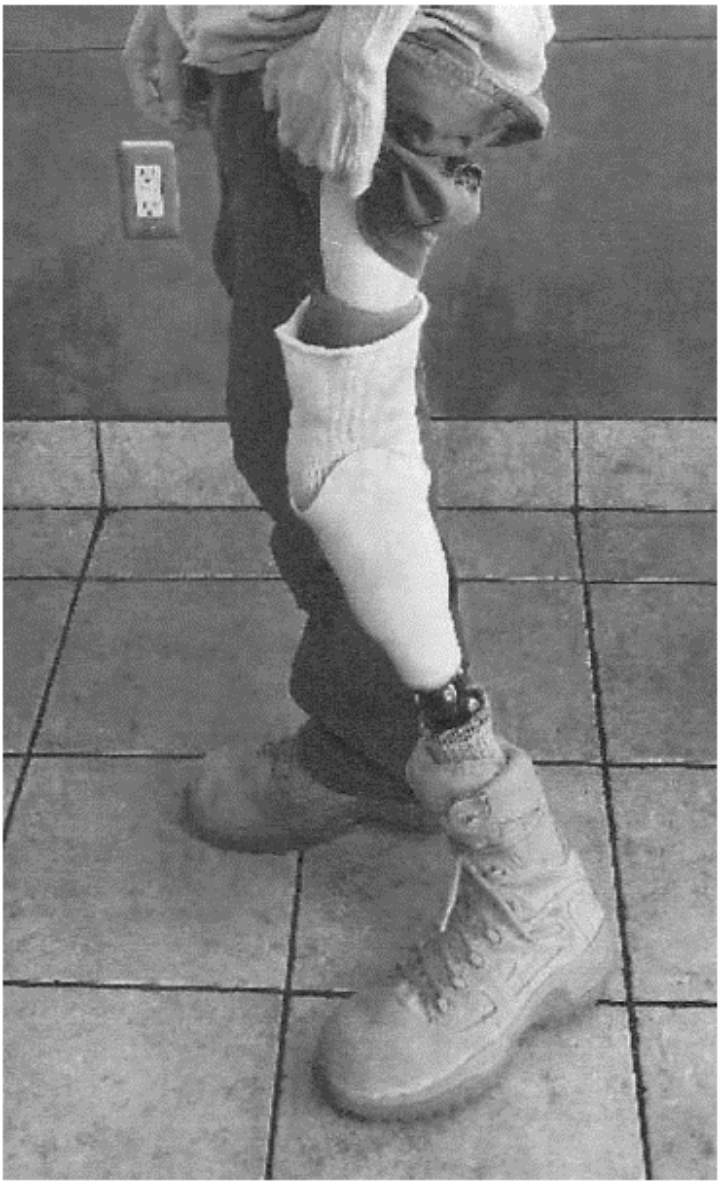
(*Id.*)

During the booking process, Apps asked Keller a number of questions about his health. She filled out jail forms documenting his responses. (*See* ECF No. 71-4 (inmate questionnaire); ECF No. 71-5 (jail medical comments); ECF No. 71-6 (medical screening report); and ECF No. 71-7 (inmate alcohol/drug usage questionnaire).) Keller reported that he had a sore on his left leg, a sore throat, and a hip issue. Apps documented all of these issues. (ECF No. 71-4, Page ID.378.) Keller also reported that he smoked three to four marijuana "joints" daily and that had last used marijuana at 9 P.M. on January 15, 2016. (ECF No. 71-7, PageID.385.)

Apps secured the inhalers because inmates are prohibited from keeping medications in their cells due to the potential for overdose and sharing medication with other inmates. (ECF No. 71-1, PageID.366 (affidavit of Lt. Stanaway).)

As noted in the medical screening report, Deputy Apps learned that Keller had a prosthetic left leg. (ECF No. 71-6, PageID.383.) An image of a prosthetic

leg that Keller had at the time of his deposition in 2019 is shown below.



(ECF No. 71-18.) In his deposition, Keller noted that the prosthetic leg shown above is similar to the prosthetic leg he had in 2016 in that both legs were made from hard plastic and metal, and weighed 10 to 15 pounds. (ECF No. 71-17, PageID.485-86.) Keller also said that he takes off this leg four to six times per day. (*Id.*, PageID.484.)

As soon as Keller finished booking, he had to turn over his prosthetic left leg. (ECF No. 71-17, Page ID.491.) The prosthetic leg is listed in the inventory of property taken from Keller. (ECF No. 71-8.) Lt. Stanaway explained that Keller's leg was taken because "Plaintiff had a sore on his left leg and the prosthetic could be used as a weapon to harm others." (ECF No. 71-1, PageID.367.) Lt. Stanaway also stated that it was jail policy to confiscate the prosthetic leg. (*Id.*)

After booking, Keller was taken by wheelchair to holding cell H-1 in the jail. (*Id.*) Two other inmates were in holding cell H-1 at the time. (*Id.*, PageID.367-68.) Holding cell H-1 is located near the jail's control room and is equipped with a toilet, bench, sink, water, access to an intercom system that a prisoner may use to speak to staff, and a telephone. (*Id.*, PageID.368.)

Keller acknowledges that he was taken by wheelchair to the doorway of the holding cell. (ECF No. 71-17, PageID.492.) He also said that he asked jail staff how he would get around, and they said he should "hop or crawl." (*Id.*) In the cell, Keller "scooted along with [his] one leg" while holding the wall. (*Id.*)

Keller said the holding cell had one bench, and he said the bathroom was "right there." (*Id.*, PageID.493.)

Keller said that he was able to use the sink and toilet in the holding cell. (*Id.*, PageID.492-93.) He also said he "shuffled" to get to the sink and toilet. (*Id.*, PageID.493.)

Meals were hand-delivered to Keller in this cell. (*Id.*, PageID.493.) Other inmates also helped deliver food to Keller. (*Id.*, PageID.494.)

Keller did not shower during his three days in the jail. (*Id.*, PageID.493.)

Keller said that a Deputy took him to the recreation area by wheelchair. (*Id.*, PageID.494.) Keller said that when he was transported by wheelchair, he was able to get himself into the wheelchair without assistance. (*Id.*)

Keller does not allege that he did not receive his prescribed medications on the schedule approved by Dr. Dood. The jail's medication administration record (ECF No. 71-16), although incomplete, shows regular administration of Keller's medications. Keller, nevertheless, experienced a number of breathing problems during his time in the jail. The jail incident report from January 17, 2016 is shown below.

DATE TIME REQUESTED CHIPPEWA COUNTY SHERIFF PAGE 1 JBS338
1/17/16 16:03:51 RUDYH JAIL INCIDENT REPORT

INCIDENT #: 8340-16 INCIDENT DATE: 1/17/16 INCIDENT TIME: 13:57

VIOLATION : 36 AFTER HOURS CONSULT WITH JAIL DR CLASS: MIN

REPORTED BY 515 HYVARINEN, RUDY

OFFENDER

KELLER, RALPH GEORGE LEMS ID: 15830 LOCAL ID: A0000233180F
036 AFTER HOURS CONSULT WITH CLASS: MIN CELL: 1 H1 ENTERED JAIL: 1

INCIDENT DETAILS

On 01/17/16 inmate Kellar, Ralph complained he can't catch his breath. Deputy Robinson had given his ProAir inhaler to Keller at 0930 hrs and 1341 hrs and it hasn't helped. Cpl Spencer asked me Deputy Hyvarinen to call and advise Dr Dood of Kellers breathing issues. Dr Dood advised to give Keller medication Prednisone 20 mg once daily. Deputy Robinson did give Keller perdnisone 20 mg for today.

At 1530 hrs Keller complained to control through emergency button in O-2 that he was having breathing trouble again. Deputy Stark went to O-2 and assesed Keller and advised Cpl Spencer and me of Keller's diffeculty breathing. Cpl Spencer had me call Dr Dood and advise him of Keller. Dr Dood said give him two puffs of his pro-air and give a nebulizer treatment and check his oxygen level and temperature. Dr Dood said Keller is not tobe sent to hospital unless he is turning blue or discolored and temperature is low. Kellers pulse ox level was 96 and temperature was 98.1. Cpl Spencer gave nebulizer treatment in medical exam room and after treatment Keller was breathing normally and said felt much better.

REPORTING OFFICER 1 : _____ DATE: 1-17-16
515 SPECIAL DEPUTY RUDY HYVARINEN

CORRECTIONS SUPERVISOR : _____ DATE: _____

(ECF No. 71-14.) [See Text Translation at App.50a]

Lt. Stanaway provided a summary of what happened in his affidavit. He attested that Keller attempted to make a 9-1-1 call due to breathing difficulties on January 17. (ECF No. 71-1, PageID.369.) He was given Ventolin[1] by an officer. (*Id.*) Later that day, Keller used the jail intercom system to complain that he was having difficulty breathing. (*Id.*) Deputy Robinson responded and gave him Proair at 9:30 A.M. and at 1:41 P.M. (*Id.*)

[1] Dr. Sethi, Keller's pulmonologist, testified that Proair and Ventolin are both bronchodilators that provide quick, short-term relief when a person experiences breathing difficulties. (ECF No. 71-19, PageID.513.)

Deputy Hyvarinen contacted Dr. Dood, who authorized 20mg of Prednisone daily. (*Id*.) Keller used the emergency button at 3:30 P.M. and complained to a deputy that he was having breathing problems. (*Id*.) Deputy Stark contacted Dr. Dood, who authorized two puffs of Proair and a nebulizer treatment. (*Id*.) Keller received the nebulizer treatment in the jail's medical room. (ECF No. 71-17, PageID.496.) He was transported there by wheelchair. (*Id*.) Dr. Dood also directed the Deputy to check Keller's oxygen level and temperature. (ECF No. 71-1, PageID.369.) Dr. Dood also instructed the Deputy to take Keller to the hospital if he was turning blue, was discolored, or if his temperature was low. (*Id*.) After Keller received the Proair and nebulizer treatment, he reported he was feeling better. (*Id*., PageID.370.)

On January 17, 2016, Keller was moved to observation cell O-2 and remained in that cell until his release on January 19. (*Id*., PageID.367.) Keller said that the observation cell was smaller than the holding cell. (ECF No. 71-17, PageID.495.)

On January 18, 2016, Keller again had breathing difficulties. The medical incident report from that day is shown below.

DATE 1/18/16 TIME 01:58:54 REQUESTED CODY

CHIPPEWA COUNTY SHERIFF
JAIL INCIDENT REPORT

PAGE 1 JBS338

INCIDENT #: 8341-16 INCIDENT DATE: 1/17/16 INCIDENT TIME: 20:30

VIOLATION : 36 AFTER HOURS CONSULT WITH JAIL DR CLASS: MIN

REPORTED BY 584 MAYER, CODY

OFFENDER

KELLER, RALPH GEORGE LEMS ID: 15830 LOCAL ID: A0000233180F
036 AFTER HOURS CONSULT WITH CLASS: MIN CELL: 1 02 ENTERED JAIL: 1

INCIDENT DETAILS

On the above date at approx time U/O called Dr. Dood with CHC. U/O did this due to inmate Keller, Ralph George DOB: 12/02/60 pressing the emergency button and stating he was having a hard time breathing. Dr. Dood said to have Keller relax and to rest. Dr. Dood said if any other problem came up to call him back.

IMMEDIATE OFFICER ACTIONS

called Dr. Dood.

REPORTING OFFICER RECOMMENDATION

Medical to review.

REPORTING OFFICER 1 : 584 DEPUTY CODY MAYER DATE: 1/18/16

CORRECTIONS SUPERVISOR : DATE:

(ECF No. 71-15.) [See Text Translation at App.52a]

Lt. Stanaway also summarized the events of January 18. He noted that Keller used the emergency button in the observation cell at 1:58 A.M. to complain that he was having difficulty breathing. (ECF No. 71-1, PageID.370.) Deputy Mayer contacted Dr. Dood. Dr. Dood indicated that Mayer needed to instruct Keller to relax and rest. (*Id.*) Deputy Mayer requested a jail medical follow-up review. (*Id.*)

Nurse Lightfoot performed a health assessment that morning at 10:45 A.M. (*See* ECF No. 71-10 (Correctional Health Companies (CHC) records).) She noted that Keller coughs when his breathing is difficult and that he reportedly is a heavy smoker of both marijuana and tobacco. (ECF No. 71-1, PageID. 370.)

After his release from CCCF, Keller went to the local hospital for continued treatment. (ECF No. 71-17, PageID.502.)

B. Potentially Relevant Evidence Not Addressed in the Record

The evidence provided by the parties did not address whether either of the cells in which Keller was held complied with the requirements of the ADA. Keller provided a 217-page document entitled "American with Disabilities Act Title II Regulations." (ECF No. 74-2.) He did not provide analysis of the facts of the case in light of these regulations.

In addition, Keller did not provide information regarding the layout of either of the cells in which he was held. According to the Defendants' expert, holding cell H-1 was 20 feet by 20 feet in size. (ECF No. 71-12, PageID.407.) Keller testified that the observation cell was smaller than the holding cell. (ECF No. 71-17, PageID.495.) Although Keller stated that he shuffled or scooted to the toilet and sink in holding cell H-1 (ECF No. 71-17, PageID.492-93), he did not state how far he had to shuffle or scoot. Keller also gave no indication of how he transported himself in observation cell O-2, where he was held from January 17 to January 19, 2016. Furthermore, the record does not indicate whether the cells were equipped with handrails or handholds.

C. Opinion Evidence

Defendants' expert–Darrell L. Ross, PhD.–opined that the jail followed accepted booking protocols. (ECF No. 71-12, PageID.407.) More specifically, Dr. Ross concluded that the seizure of Keller's prosthetic

leg was appropriate for security reasons. (*Id.*, PageID.410.) His opinion on this point is shown below.

> Third, it was appropriate and reasonable to confiscate Mr. Keller's prosthetic leg and it was done for security purposes. From a review of the Photo of Mr. Keller wearing the prosthetic (Exhibit #1, Keller Dep.) it showed that the components are hard plastic combined with metal. Mr. Keller testified in his deposition that the prosthetic was made of hard plastic and metal and weighed about 10 to 15 pounds (Dep. Pgs. 41-42). The durable materials of the prosthetic are capable of supporting Mr. Keller's weight. Based on its design it was also capable of serving as a weapon which could inflict harm and injury on other detainees and supervising deputies. Given that the prosthetic leg had the potential of causing harm to others as a dangerous weapon, deputy Apps' decision to confiscate it was appropriate. The decision to confiscate the prosthetic was not made to punish Mr. Keller or taken for vindictive purposes but rather for legitimate detention safety and security objectives to ensure the safety of the facility.

(*Id.*)

Dr. Ross also opined that the jail provided a reasonable accommodation to address Keller's physical disability. That opinion is shown below.

> Fourth, the detention deputies provided an

> accommodation for Mr. Keller after confiscating his prosthetic. After the completion of the booking process Mr. Keller testified that he was placed in a wheelchair and wheeled him to H-1 holding cell by a deputy (Dep. Pg. 66). Holding cell H-1 is a large multiple-detainee cell (about 20 x 20 foot). The cell comprised: a toilet, bench, sink with water, access to a phone, and an intercom system in which detainees may speak with detention deputies. The cell is near the deputies control center. During the time that Mr. Keller was housed in H-1, there were two other younger detainees also housed in the cell. Mr. Keller testified that he received his meals and ate in the cell which were brought to the cell by the deputies, that he received a cup so that he could drink warm water due to his COPD, and also had juice or milk with his lunch (Dep. Pgs. 72-73). Mr. Keller testified that he was able to use the facilities while housed in H-1 (Dep. Pgs. 68, 70, 74, 111-112). Mr. Keller also testified that the deputies would push him around in the wheel chair outside of the H-1 and wheeled him to the recreation room (Dep. Pgs. 75-78).

(*Id.*)

Dr. Ross opined that Keller had adequate access to medical care while in CCCF. (*Id.*, PageID.412-13.)

The Court previously struck Keller's expert because Keller's expert disclosures failed to meet the requirements of Fed. R. Civ. P. 26(a)(2)(B)(i).[2] (ECF No. 67.)

III. Dismissal of Chippewa County Sheriff's Department

Defendant Chippewa County Sheriff's Department argues that it should be dismissed from this case because it is not a legal entity capable of being sued. The ADA defines "'public entity'" to include "any State or local government" and "any department, agency, . . . or other instrumentality of a State." 42 U.S.C. § 12131(1). The Supreme Court has held that this term includes state prisons. *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998) (noting that the phrase "services, programs, or activities" in § 12132 includes recreational, medical, educational, and vocational prison programs).

The proper defendant under a Title II claim is a public entity or an official acting in his or her official capacity. *Carten v. Kent State Univ.*, 282 F.3d 391, 396– 97 (6th Cir. 2002). In the state of Michigan, "[t]he sheriff department does not exist as a separate legal entity; it is simply an agent of the county." *Tullos v. Balk*, No. 1:18-cv-883, 2018 WL 5306906, at *2–3 (W.D. Mich. Oct. 26, 2018).

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[2] Keller's expert—Dr. Kennedy—opined that Keller's prosthetic leg did not constitute a security threat and that it was "not unusual" for prisoners with chronic medical issues to be allowed to keep a medication in his or her possession. (ECF No. 49-1, PageID.181-82.)

Defendants contend the Chippewa County Sheriff's Department is not a legal entity subject to suit. Indeed, this Court has ruled that a County Sheriff's Department was not a legal entity capable of being sued. *Hughson v. County of Antrim,* 707 F.Supp. 304, 306 (W.D. Mich. 1988). And, in 1995, this Court explained that Michigan Sheriff's Departments, by state Constitution, are not separate legal entities from their respective Counties:

> Michigan is a jurisdiction in which the sheriff and prosecutor are constitutional officers, and there does not exist a sheriff's department or prosecutor's office. Instead the sheriff and the prosecutor are individuals, elected in accordance with constitutional mandates. Mich. Const. art. 7, § 4. Since the sheriff's department and the prosecutor's office do not exist, they obviously cannot be sued.
>
> The *Hughson* ruling is consistent with *Bayer v. Macomb County Sheriff,* 29 Mich. App. 171, 175, 180, 185 N.W.2d 40 (1970), where the Michigan Court of Appeals summarily concluded that the Macomb County Sheriff Department was simply an agency of the county, not a separate legal entity.

Vine v. Cnty. of Ingham, 884 F. Supp. 1153, 1158 (W.D. Mich. 1995). More recently, this Court held that the St. Joseph County Sheriff Department was not a legal entity capable of being sued in a prisoner action brought under the ADA, RA, and 42 U.S.C. § 1983. *Tullos v. Balk*, No. 1:18-cv-883, 2018 WL 5306906

(W.D. Mich. Oct. 26, 2018).[3] Instead, in *Tullos*, Judge Maloney concluded, liberally construing the complaint, that the proper party was not the Sheriff's Department but rather the County. *Id.* at *2.

Keller named the Chippewa County Sheriff's Department and the Chippewa County Board of Commissioners as Defendants in this case. The Chippewa County Sherriff's Department is not an appropriate Defendant in the state of Michigan, because it can only act through the County. Therefore, the Chippewa County Board of Commissioners is the proper Defendant, and claims against the Sheriff's Department are dismissed.

IV. Summary Judgment Standard

Summary judgment is appropriate when the record reveals that there are no genuine issues as to any material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Kocak v. Comty. Health Partners of Ohio, Inc.*, 400 F.3d 466, 468 (6th Cir. 2005). The standard for determining whether summary judgment is appropriate is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *State Farm Fire & Cas. Co. v. McGowan*, 421 F.3d 433, 436 (6th Cir. 2005) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)). The court must consider all pleadings, depositions,

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[3] Similarly, under Ohio law, a Sheriff's Department is not a legal entity capable of being sued under the ADA or RA. *Lake v. Board of County Commissioners of Clark County*, 2020 WL 1164778, *3 (S.D. Ohio W.D., Mar. 11, 2020).

affidavits, and admissions on file, and draw all justifiable inferences in favor of the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Twin City Fire Ins. Co. v. Adkins*, 400 F.3d 293, 296 (6th Cir. 2005).

V. Analysis of Keller's ADA and RA Claims

During oral argument, Keller asserted that the intent of the ADA was to require society to be blind to disabilities. Accordingly, he asserted that Keller should have been allowed to keep his inhalers and his prosthetic leg while in custody in the jail. Furthermore, he asserted that the jail's decision to seize these items showed intentional discrimination. The Court disagrees with Keller's view of the law. First, jails cannot be blind to medications that inmates have in their possession and must always be concerned about the security implications of allowing an inmate to keep any item, including prosthetic devices, that could potentially be used as a weapon by the inmate who initially had the item or another person. Furthermore, although the Court appreciates Keller's description of the purpose of the ADA, the Court must also apply precedent, which balances the ADA's purpose against institutional imperatives, to determine whether a genuine issue of material fact exists in this case.

Title II of the ADA provides, in pertinent part, that no qualified individual with a disability shall, because of that disability, "be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." *Mingus v. Butler*, 591 F.3d 474, 481-82 (6th Cir. 2010) (citing 42 U.S.C. § 12132). To establish a claim under Title II of the ADA, Keller must show:

(1) that he is a qualified individual with a disability[4];

(2) that defendants are subject to the ADA; and

(3) that he was denied the opportunity to participate in or benefit from defendants' services, programs, or activities, or was otherwise discriminated against by defendants, by reason of plaintiff's disability.

Tucker v. Tennessee, 539 F.3d 526, 532-33 (6th Cir. 2008) *overruled in part by Anderson v. City of Blue Ash*, 798 F.3d 338, 357 n.1 (6th Cir. 2015)[5]; *Jones v. City of Monroe*, 341 F.3d 474, 477 (6th Cir. 2003).

Similarly, Section 504 of the RA protects any "otherwise qualified individual" from "be[ing] excluded from the participation in, be[ing] denied the benefits of, or be[ing] subjected to discrimination" under specified programs "solely by reason of her or his disability." 29 U.S.C. § 794(a). An RA claim is based on the following elements:

(1) that the plaintiff is a handicapped person under the Act;

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[4] The term "qualified individual with a disability" includes "an individual with a disability who, with or without . . . the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). It should also be noted that the parties do not dispute that Keller's COPD and amputation constitute disabilities.

[5] The third element in *Tucker* required a showing that the discrimination be "solely" because of the disability. *Tucker*, 539 F.3d at 535. *Anderson* simply removed the sole-causation requirement. 798 F.3d at 357 n. 1.

(2) that the plaintiff is otherwise qualified for participation in a program;

(3) that the plaintiff is being excluded from participation in, being denied benefits of, or being subjected to discrimination under the program solely due to a handicap; and

(4) the program or activity is receiving federal financial assistance.

Sanderson v. Mich. High Sch. Athletic Ass'n, 64 F.3d 1026, 1030-31 (6th Cir. 1995.) Given the similarity between the ADA and the RA, the claims may be analyzed together. *Thompson v. Williamson Cnty*, 219 F.3d 555, 557 (6th Cir. 2000).

For a claim of intentional discrimination under the ADA, the Court uses the familiar burden-shifting analysis established by *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). "Under *McDonnell Douglas,* [a] [p]laintiff must first establish a prima facie case of discrimination." *Turner v. City of Englewood,* 195 F. App'x 346, 353 (6th Cir. 2006). To establish a prima facie case of intentional discrimination under the ADA, the plaintiff must show that he has a disability, that he is otherwise qualified, and that he was "excluded from participation in, denied the benefits of, or subjected to discrimination under the program because of her disability." *Anderson,* 798 F.3d at 357 (footnote omitted). In establishing a prima facie case, a plaintiff must present evidence showing intentional discrimination because of his disability. *Id.* at 356-357. "In other words, the plaintiff must show that the defendant took action because of the plaintiff's disability, *i.e.*, the '[p]laintiff must present evidence

that animus against the protected group was a significant factor in the position taken by the municipal decision-makers themselves or by those to whom the decision-makers were knowingly responsive.'" *Id.* (citing *Turner*, 195 F. App'x at 353).

After a plaintiff establishes a prima facie case of discrimination, the burden shifts to defendant to establish a legitimate, nondiscriminatory reason for the conduct taken. *Id.* (citing *Sjostrand v. Ohio State Univ.,* 750 F.3d 596, 599 (6th Cir. 2014)). After a defendant presents a legitimate and nondiscriminatory reason for the challenged action, "one of production, not persuasion—[the plaintiff] must then present evidence allowing a jury to find that the [defendant's] explanation is a pretext for unlawful discrimination." *Id.* (citation omitted).

Keller argues that this is "primarily a discrimination case" and characterizes the actions of Defendants as "clear discrimination." (ECF No. 74, PageID.526.) Nevertheless, the Court recognizes two additional ways that Keller could assert liability under the ADA and RA. Keller could allege and prove (1) a disparate-impact arising from the enforcement of the jail policies, or (2) the failure to provide a reasonable accommodation. *Burley v. Quiroga*, No. 16-CV-10712, 2019 WL 4316499, at *3 (E.D. Mich. June 6, 2019), *report and recommendation adopted*, No. 16-CV-10712, 2019 WL 3334810 (E.D. Mich. July 25, 2019). Keller has also asserted that the jail failed to reasonably accommodate his disabilities.

A plaintiff raising an ADA claim based on failure to provide reasonable accommodation must first establish a prima facie case of discrimination under

the requirements of the ADA or RA. *Id.* at *4. A "deliberate refusal of prison officials to accommodate [an inmate's] disability related needs in such fundamentals as mobility, hygiene, medical care, and . . . prison programs" may constitute a violation of Title II." *United States v. Georgia,* 546 U.S. 151, 157 (2006). Reasonable accommodations must give a disabled inmate meaningful access to the program in question. *Alexander v. Choate,* 469 U.S. 287, 301 (1985). Public entities must make reasonable accommodations for disabled individuals to provide them with the same meaningful access to the benefits of the services as nondisabled individuals. *Burley*, 2019 WL 4316499, at *4 (citing *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 907 (6th Cir. 2004)).

In *Wright* v. *New York State Department of Corrections*, 831 F.3d 64 (2d Cir. 2016), the Court of Appeals for the Second Circuit discussed the ADA concepts of "reasonable accommodation" and "meaningful access" in the prison context, stating the following:

> A reasonable accommodation must provide effective access to prison activities and programs. That is, the accommodation must overcome structural impediments and non-trivial temporal delays that limit access to programs, services, and activities. An accommodation is not plainly reasonable if it is so inadequate that it deters the plaintiff from attempting to access the services otherwise available to him. In short, providing meaningful access requires just that—granting inmates meaningful participation in prison activities and programs.

Id. at 73 (internal citations and quotes omitted). The court also stated that a defendant is entitled to summary judgment only if the undisputed record revealed that the plaintiff was accorded a "plainly reasonable" accommodation. *Id*. at 73 (citation omitted).[6]

If the plaintiff meets the requirements of the ADA and RA and establishes a prima facie case of discrimination, "the burden shifts to the defendant to show that the accommodation provided was either effective, or that the accommodation sought and not provided would have resulted in a fundamental alteration of the procedures or an undue financial or administrative burden." *Tucker*, 539 F.3d at 532-33. The requirements under these acts "are subject to the bounds of reasonableness. *Id.* at 532.

A. Keller's ADA/RA Claim Based on the Seizure of his Inhalers and Meaningful Access to Treatment for his COPD

The Court must consider Defendants' seizure of Keller's inhalers and the access they subsequently provided to medical care to treat his COPD. The Court finds that Keller has failed to present evidence

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[6] The plaintiff in *Wright* was confined to a wheelchair. He challenged the mobility assistance program implemented state-wide by the New York State Department of Corrections and Community Supervision (DOCCS). The program contained a blanket proscription on motorized wheelchairs. *Wright*, 831 F.3d at 68. The court of appeals concluded that genuine disputes of fact remained concerning whether the program provided meaningful access to DOCCS services, and whether allowing the plaintiff to use a motorized wheelchair would amount to an undue burden to prison officials. *Id.* at 68-69. The Court noted that a blanket ban, without any individualized inquiry, violated the ADA and the Rehabilitation Act. *Id.*

establishing a genuine issue of material fact as to this aspect of his case. First, Keller has failed to establish a prima facie case of discrimination under the ADA. As noted above, Keller must show that he has a disability, that he is otherwise qualified, and that he was "excluded from participation in, denied the benefits of, or subjected to discrimination under the program because of her disability." *Anderson*, 798 F.3d at 357 (footnote omitted). Defendants concede the first two points, but present evidence showing that Keller was not excluded from participation in a CCCF program, denied the benefits of a CCCF program, or subjected to discrimination because of his disability. The issue here is Keller's access to medical treatment in the jail. Although Keller argues that he was denied individualized treatment, the record before the Court shows the exact opposite. As detailed above, Keller was given a detailed medical review upon booking. (*See* ECF No. 71-4 (inmate questionnaire); ECF No. 71-5 (jail medical comments); ECF No. 71-6 (medical screening report); and ECF No. 71-7 (inmate alcohol/drug usage questionnaire).) Deputy Apps consulted with the CCCF's contract physician–Dr. Dood–during the booking process to discuss the specifics of Keller's prescriptions. (ECF No. 71-2, PageID.373.) Keller was initially housed in holding cell H-1, which is near the control room and is equipped with an intercom allowing communications with jail staff and a telephone. (ECF No. 71-1, PageID.368.) And when Keller began experiencing breathing issues on January 17, the CCCF staff responded, and also consulted with Dr. Dood to address these issues, which resulted in supplemental treatments. (ECF Nos. 71-14 (documenting additional treatment provided on January 17), 71-15, 71-10 (documenting treatment provided

on January 18 by CHC).) After Keller experienced breathing issues, jail staff moved him to observation cell O-2 for medical reasons. (ECF No. 71-1, PageID. 367.) Furthermore, jail staff appear to have provided medication to Keller on the prescribed schedule. (ECF No. 71-16 (medication administration record).) And Nurse Lightfoot performed a health assessment on January 18. (*See* ECF No. 71-10 (Correctional Health Companies (CHC) records).) It is clear that Keller had access to the medical services offered by the CCCF. (*See* ECF Nos. 71-1 (affidavit of Lt. Stanaway, summarizing treatment provided to Keller in the jail), 71-12, PageID.412-13 (Dr. Ross's expert report, discussing medical treatment provided to Keller.) Indeed, Keller has provided no evidence showing that he was denied medical care.

Second, the evidence in the record fails to show a genuine issue of material fact regarding discriminatory intent. The record before the Court shows an absence of discriminatory intent. Keller's main contention is that the CCCF's decision to seize his medications, pursuant to jail policy (*see* ECF 71-1, PageID.366), was discriminatory. Keller seems to misunderstand the policy. The jail's policy, as described by Lt. Stanaway, was that *inmates* were not allowed to keep medications. (*Id.*) A reasonable reading of Lt. Stanaway's affidavit was that this policy applied to *all inmates*, not just disabled inmates. Keller has provided no evidence showing that the CCCF seized medications only from disabled inmates. Thus, this policy did not specifically target disabled persons. Furthermore, Keller has provided no evidence jail staff seized his inhalers due to animus specifically directed at him, or specifically related to his disabilities.

Third, Defendants have provided a legitimate, non-discriminatory reason for seizing Keller's inhalers. As Lt. Stanaway explained, the jail does not allow inmates to keep medications due to the potential for overdose and sharing medication with other inmates.[7] (ECF No. 71-1, PageID.366.) Dr. Sethi, Keller's pulmonologist, testified that a rescue inhaler (*i.e.*, an inhaler containing Proair) could cause tachycardia and palpitations. (ECF No. 71-19, PageID.518.) Sethi's statement supports the jail's policy of seizing medications, or at least rescue inhalers. Keller has failed to offer evidence showing that this explanation was a pretext for discrimination, as required under *McDonnell-Douglas*. *See Anderson*, 798 F.3d at 357 (stating the *McDonnell-Douglas* burden-shifting requirements).

Fourth, the evidence in the record fails to show a genuine issue of material fact regarding Keller's meaningful access to a reasonable accommodation for his disability. As discussed above, a plaintiff who asserts that defendants failed to provide reasonable accommodation must first make out a prima facie case showing a violation of the ADA. Keller has failed to present evidence making out a prima face case. Nevertheless, the Court is compelled to consider the reasonable accommodation issue in this case. A jail always has an obligation to address an inmate's medical needs.[8] But, access to timely medical care

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[7] It should be noted that jail keep-on-person (KOP) policies have led to lawsuits. *See e.g.*, *Andrews v. Wayne Cty., Michigan*, 957 F.3d 714, 717 (6th Cir. 2020) (pretrial detainee at Defendant-Appellee Wayne County's Jail was allowed to keep 45 blood pressure medication pills, and subsequently overdosed on this medication and died).

[8] "While the Eighth Amendment does not apply to pre-trial

became essential in this case because the jail seized Keller's inhalers, including his Proair rescue inhaler. This is not a matter to be taken lightly. Here, however, the evidence in the record shows that Keller had effective access to a reasonable accommodation to address his COPD. Dr. Sethi, Keller's pulmonologist, testified that a person with COPD should have a rescue inhaler close to his/her person or "available with somebody around them who can bring for them . . . right away, in close vicinity." (ECF No. 71-19, PageID.518-19.) The evidence here indicates that Keller had ready access to jail staff, who had custody of his inhalers. As Lt. Stanaway stated in his affidavit, Keller was initially held in holding cell H-1, which "is located right near the control room" and had an intercom that allowed communications with the control room, and then moved to observation cell O-2 on January 17 for medical reasons. (ECF No. 71-1, PageID. 367.) Lt. Stanaway's affidavit indicates that cell O-2 also had an emergency button. (*Id*., PageID.369.) In addition, the medical records in this case show that the jail staff did respond to Keller's breathing issues. (*See* ECF Nos. 71-14 (documenting additional treatment provided on January 17), 71-15, 71-10 (documenting treatment provided on January 18 by CHC).) Furthermore, jail staff appear to have provided medication to Keller on the prescribed schedule. (ECF No. 71-16 (medication administration record).)

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detainees, the Due Process Clause of the Fourteenth Amendment does provide them with a right to adequate medical treatment that is analogous to prisoners' rights under the Eighth Amendment." *Gray v. City of Detroit*, 399 F.3d 612, 615–16 (6th Cir. 2005).

The Court has assessed Keller's COPD-based claim by analyzing the seizure of Keller's inhalers and the subsequent accommodation provided to address his disability. The Court concludes that the evidence in the record fails to show a genuine issue of material fact regarding the seizure of the inhalers and the accommodation provided. In summary, the evidence shows that the jail seized Keller's inhalers for a legitimate, non-discriminatory reason, and then provided effective access to a reasonable accommodation to address his COPD.

B. Keller's ADA/RA Claim Based on the Seizure of his Prosthetic Leg and Meaningful Access to a Reasonable Accommodation for his Disability

The Court must consider Defendants' seizure of Keller's prosthetic and the access they subsequently provided to address Keller's disability. The Court finds that Keller has failed to present evidence establishing a genuine issue of material fact as to this aspect of his case.

As an initial matter, the Court concludes that the decision to seize Keller's prosthetic leg was objectively reasonable and was not a violation of the ADA. As noted in the statement of undisputed facts, Keller's prosthetic leg weighed 10 to 15 pounds and was made of hard plastic and metal. (ECF No. 71-17, PageID.485-86.) Keller also said that he took off this leg four to six times per day. (*Id.*, PageID.484.) Although Keller is a slight man, the jail also had to consider the possibility that another inmate might use this leg as club. The Court of Appeals for the

Eighth Circuit considered a similar scenario, and found that seizure of the prosthetic was reasonable:

> we believe that the decision to confiscate Sternberg's prosthetic leg was reasonable. The prosthetic leg consisted of a mannequin-like foot, a carbon-fiber socket contoured to fit Sternberg's knee, and numerous metal parts, including two bolts near the heel, two more at the ankle, a cylindrical clamp, a receiving catch, and a stainless steel post. Constructed of hard, durable materials, the prosthetic leg was capable of supporting Sternberg's weight. Precisely because of its heavy-duty design, however, the prosthetic leg was also capable of serving as a weapon for harming others. "A detention facility is a unique place fraught with serious security dangers," and "the Government must be able to take steps to maintain security and order at the institution and make certain no weapons . . . reach detainees." Given the potential that Sternberg's prosthetic leg could be used as a dangerous weapon, the decision to confiscate his prosthetic leg was objectively reasonable, despite the intrusion on his personal privacy. Summary judgment in favor of the county employees was therefore proper on Sternberg's Fourth Amendment claim.

Baribeau v. City of Minneapolis, 596 F.3d 465, 483 (8th Cir. 2010) (internal citations omitted).

Although the *Baribeau* case considered the seizure of a prosthetic leg in the context of a Fourth Amendment claim, the reasoning applies here. Keller's leg

was a potential weapon, and the jail was justified in seizing it.

The reasoning in *Baribeau* does not, however, end the inquiry here. This is an ADA/RA case. The real issue here is whether Keller had meaningful access to jail programs and facilities. Defendants point out that Keller received meals, used the toilet and sink, used the intercom telephone, and was brought to the recreation area. (ECF No. 71, PageID.357.) Defendants are certainly correct that the record supports these conclusions. Defendants then argue that because Keller had access to the service programs and activities of the jail, that he cannot make out a prima facie case for a violation of the ADA/RA. The Court is not willing to go this far.

In the Court's view, a disabled inmate will likely go to extreme lengths to go to the bathroom and to get food and water. But an inmate does not lose an ADA claim simply because he is willing to go to extreme lengths to obtain the basic necessities. Thus, the layouts of the holding cell and the observation cell are important.

Keller's ADA and RA claims fail because he has not shown that he was denied meaningful access to any of the Chippewa Jail's services, programs, or activities during his three days of confinement. The closest Keller gets to establishing this element of his prima facie case is his assertion that he had difficulty using the toilet. Keller stated during his deposition that he was told by a deputy to "hop around or crawl." (ECF No. 71-17, PageID.492.) This is certainly a disturbing statement coming from a deputy, one that the Court cannot condone. *See Schmidt v. Odell*, 64 F. Supp. 2d. 1014, 1033 (D. Kan. 1999) (providing

a double amputee knee pads for mobility, denying access to a wheelchair, and requiring the jail inmate to crawl to the shower, with limited or no access to the toilet, recreational areas, or the ability to obtain meals created a genuine issue of material fact to preclude summary judgment on the ADA claim by showing a basic denial of the benefits and services provided at the jail facility). But beyond this point, Keller provided very little information. He explained that, in the cell, he "scooted along with [his] one leg" while holding the wall. (*Id.*) He also said the holding cell had one bench, and he said the bathroom was "right there." (*Id.*, PageID.493.) Keller said that he was able to use the sink and toilet in the holding cell. (*Id.*, PageID.492-93.) He also said he "shuffled" to get to the sink and toilet. (*Id.*, PageID.493.) But Keller provided no other information on the nature of the cells. He did not describe the layout of the cells, the location of the toilet, the distance he needed to travel to use the toilet, or whether handrails or assistive devices

were present.[9] Keller provides no evidence explaining any difficulty that he experienced in moving around his jail cells.

The lack of evidence in the record is significant. On the scant record here, the Court concludes that Keller failed to satisfy his burden showing a genuine issue of fact regarding whether he was denied any benefits of programs or services available at the jail because of his disability. There simply is no evidence in the record that Keller was denied any program or service due to his disability or the jail's failure to reasonably accommodate his disability. The Court needs some evidence that could potentially create a genuine issue of fact on this issue to rule in Keller's favor on this motion. The failure to support his claims with admissible evidence is fatal to Keller's ADA and RA claims.

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[9] During argument Plaintiff's counsel made a statement that the cells were not ADA compliant. Defense counsel responded that the claim the cells are not ADA compliant is false. Nevertheless, the Court cannot accept counsels' statements as fact. It is Plaintiff's obligation to support his claims with factual evidence. The Court has no idea whether the jail cells are ADA compliant or not. This is because the record is silent as to this issue, and Plaintiff undertook virtually no pretrial discovery in this case. Moreover, Plaintiff made no effort to develop an argument concerning whether the jail was ADA compliant or to provide the Court with any evidence concerning the layout of the jail or jail cells, such as diagrams or photographs, or even an affidavit. This is due, at least in part, to the likelihood that this was never the claim that Plaintiff intended to assert. Keller seems to focus only on the fact that his prosthetic leg and inhalers were taken from him. But that fact alone is not enough to establish his prima facie burden under the ADA or RA.

In addition, the Court concludes that Keller has failed to provide evidence showing animus against him or evidence showing that he was discriminated against on the basis of his disabilities. Defendants provided two legitimate, non-discriminatory reasons for their decision to seize Keller's prosthetic leg: "Plaintiff had a sore on his left leg and the prosthetic could be used as a weapon to harm others." (ECF No. 71-1, PageID.367.) Keller has failed to offer evidence showing that this explanation was a pretext for discrimination, as required under *McDonnell-Douglas*. *See Anderson*, 798 F.3d at 357 (stating the *McDonnell-Douglas* burden-shifting requirements).

VI. Conclusion

The Court understands that Keller's three-day incarceration in the Chippewa County Jail was not a pleasant or comfortable experience. The Court is aware that Keller lost part of his left leg and has pulmonary issues that will not improve. The Court is sympathetic to Keller's medical condition and concerns.

Keller, however, failed to present evidence to establish a genuine issue of material fact regarding his ADA and RA claims. The evidence before the Court establishes legitimate, non-discriminatory reasons for the jail to seize Keller's prosthetic leg and his inhalers. The evidence also shows that the jail provided reasonable accommodations to address Keller's disabilities. Keller has not presented countervailing evidence on these points that creates a genuine issue of material fact.

For these reasons, Defendants' motion for summary judgment is respectfully GRANTED and this case is dismissed.

/s/ Maarten Vermaat
U.S. Magistrate Judge

Dated: October 7, 2020

TEXT TRANSLATION OF INCIDENT REPORTS

EXHIBIT ECF NO. 71-14

CHIPPEWA COUNTY SHERIFF
JAIL INCIDENT REPORT

Date: 1/17/16
Time: 16:03:51
Requested: Rudyh
Incident#: 8340-16
Incident Date: 1/17/16
Incident Time: 13:57
Violation: 36 After Hours Consult with Jail Dr.
Class: Min
Reported By: 515 Hyvarinen, Rudy

Offender

Keller, Ralph George
LEMS ID: 15830
Local ID: A0000233180F
036 After Hours Consult With
Class: Min
Cell: 1 H1
Entered Jail: 1

Incident Details

On 01/17/16 inmate Kellar, Ralph complained he can't catch his breath, Deputy Robinson had given his ProAir inhaler to Keller at 0930 hrs and 1341 hrs and it hasn't helped, Cpl Spencer asked me Deputy Hyvarinen to call and advise Dr. Dood of Kellers breathing issues. Dr. Dood advised to give Keller

medication Prednisone 20 mg once daily. Deputy Robinson did give Keller perdnisone 20 mg for today.

At 1530 hrs Keller complained to control through emergency button in 0-2 that he was having breathing trouble again. Deputy Stark went to 0-2 and assessed Keller and advised Cpl Spencer and me of Keller's difficulty breathing. Cpl Spencer had me call Dr. Dood and advise him Keller. Dr. Dood said give him two puffs of his pro-air and give a nebulizer treatment and check his oxygen level and temperature. Dr. Dood said Keller is not to be Sent to hospital Unless he is turning blue or discolored and temperature is low. Keller's pulse ox level was 96 and temperature was 98.1. Cpl Spencer gave nebulizer treatment in and said felt much better.

Reporting Officer 1

/s/ Rudy Hyvarinen
515 Special Deputy

Date: 1-17-16

EXHIBIT 2

EXHIBIT ECF NO. 71-15

CHIPPEWA COUNTY SHERIFF
JAIL INCIDENT REPORT

Date: 1/18/16
Time: 01:58:54
Requested: Cody
Incident#: 8341-16
Incident Date: 1/17/16
Incident Time: 20:30
Violation: 36 After Hours Consult With Jail Dr.
Class: Min
Reported By: 584 Mayer, Cody

Offender

Keller, Ralph George
LEMS ID: 15830
Local ID: A0000233180F
036 After Hours Consult with
Class: Min
Cell: 1 02
Entered Jail: 1

Incident Details

On the above date at approx time U/O called Dr. Dood with CHC. U/O did this due to inmate Keller, Ralph George DOB: 12/02/60 pressing the emergency button and stating he was having a hard time breathing. Dr. Dood said to have Keller relax and to rest. Dr. Dood said if any other problem came up to call him back.

Immediate Officer Actions

Called Dr. Dood.

Reporting Officer Recommendation

Medical to review.

Reporting Officer 1

/s/ Cody Mayer
584 Deputy

Date: 1-18-16

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION (OCTOBER 7, 2020)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

RALPH KELLER,

Plaintiff,

v.

CHIPPEWA COUNTY BOARD OF COMMISSIONERS, ET AL.,

Defendants.

Case No. 2:19-cv-00011

Before: Hon. Maarten VERMAAT,
U.S. Magistrate Judge.

In accordance with the Opinion issued herewith, IT IS ORDERED that this case is DISMISSED.

/s/ Maarten Vermaat
U.S. Magistrate Judge

Dated: October 7, 2020

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING (JULY 15, 2021)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RALPH KELLER,

Plaintiff-Appellant,

v.

CHIPPEWA COUNTY, MICHIGAN BOARD OF COMMISSIONERS; CHIPPEWA COUNTY, MICHIGAN SHERIFF'S DEPARTMENT,

Defendants-Appellees.

No. 20-2086

Before: CLAY, McKEAGUE, and LARSEN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

Entered by Order of the Court

/s/ Deborah S. Hunt
Clerk

PHOTOGRAPH OF PLAINTIFF / PETITIONER RALPH KELLER FILED IN DISTRICT COURT