

ELLEN F. ROSENBLUM
Attorney General
SHANNON M. VINCENT #054700
Senior Assistant Attorney General
Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
Telephone: (503) 947-4700
Fax: (503) 947-4791
Email: Shannon.M.Vincent@doj.state.or.us

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DAVID D. VANVALKENBURG,

Plaintiff,

v.

OREGON DEPARTMENT OF
CORRECTIONS, a state agency,

Defendant.

Case No. 3:14-cv-00916-BR

DEFENDANT OREGON DEPARTMENT OF
CORRECTIONS' PARTIAL MOTION TO
DISMISS PLAINTIFF'S COMPLAINT

Oral Argument Requested

Fed. R. Civ. P. 12(b)(6)

CERTIFICATE OF CONFERRAL

Pursuant to L.R. 7-1(a)(1)(A), counsel for defendant Oregon Department of Corrections (ODOC) certifies that the parties made a good faith effort to resolve the dispute in this motion—discussing each defense at issue below—but were unable to do so.

MOTION

Plaintiff David D. VanValkenburg, an inmate in ODOC's custody, has alleged three categories of claims for relief in this case: (1) federal disability discrimination claims; (2) state disability discrimination claims; and (3) *quantum meruit*/unjust enrichment claims.

ODOC moves for partial dismissal of plaintiff's claims pursuant to Federal Rule of Civil Procedure 12(b)(6) as follows:

1. First, ODOC moves for an order dismissing plaintiff's *quantum meruit*/unjust enrichment claims because the State has not waived its sovereign immunity for quasi-contractual claims.

2. Second, ODOC moves for an order dismissing plaintiff's state disability discrimination claims to the extent that they involve allegations falling outside the 180-day tort claim notice period.

3. And finally, ODOC moves for an order dismissing plaintiff's federal disability discrimination claims to the extent that they are rooted in conduct that occurred more than two years before plaintiff filed this lawsuit, because those claims are time-barred.

This motion is supported by the memorandum of law below, as well as the pleadings on file with the Court.

MEMORANDUM OF LAW

I. Plaintiff's Allegations.

Plaintiff filed this lawsuit on May 5, 2014, and he served it on ODOC on May 9, 2014. [Notice of Removal, Dkt. #1, ¶ 1].

In this lawsuit, plaintiff alleges that he "is a deaf individual who has been an inmate incarcerated at correctional institutions managed by defendant Oregon Department of Corrections since 2000," [Compl., Dkt. #1, ¶ 1], and plaintiff's lawsuit arises out of ODOC's alleged failures to accommodate his disability. The allegations relevant to ODOC's partial motion to dismiss plaintiff's complaint are outlined below.

A. Plaintiff's federal and state disability discrimination claims.

Plaintiff's federal and state disability discrimination claims arise out of his allegations that ODOC has failed to accommodate his disability. Plaintiff alleges a series of failures to accommodate over the fourteen year period that plaintiff has been in custody.

1. Alleged failures from November 2000-December 2000.

Plaintiff alleges that he was housed at Oregon State Penitentiary (OSP) for processing from November 2000 through December 2000 [*id.* at ¶ 9], and plaintiff alleges the following failures to accommodate during his stay at OSP:

- Plaintiff alleges that OSP did not provide a qualified American Sign Language (ASL) interpreter for him during intake, orientation, or processing, so he “was not able to understand any part of the orientation or effectively communicate with defendant while at OSP” [*id.* at ¶¶ 11-12];
- Plaintiff alleges that OSP did not provide him with qualified interpretive services for his counselor assessment at OSP, so he “did not understand defendant’s counselor and defendant’s counselor was not able to properly assess” him [*id.* at ¶¶ 15-16]; and
- Plaintiff alleges that OSP did not provide him with qualified interpretive services for his initial medical exam, so he “did not understand defendant’s medical personnel and defendant’s medical personnel were not able to properly assess” him [*id.* at ¶¶ 17-19].

2. Alleged failures from December 2000 through July 2001.

Plaintiff alleges that he was housed at Oregon State Correctional Institution (OSCI) from December 2000 through July 2001 [*id.* at ¶ 21], and plaintiff alleges the following failures to accommodate during his stay at OSCI:

- Plaintiff alleges that OSCI did not provide him with a qualified interpreter during intake interviews and orientation, so he could not engage in effective communication during his intake and orientation [*id.* at ¶¶ 22-23]; and
- Plaintiff alleges that OSCI did not provide him with an interpreter for medical services, dental services, religious services, program counseling, education, training, classes, and other programs at OSCI [*id.* at ¶¶ 24-30].

3. Alleged failures from July 2001 through May 2012.

Plaintiff alleges that he was housed at Snake River Correctional Institution (SRCI) from July 2001 through May 2012 [*id.* at ¶ 31], and plaintiff alleges the following failures to accommodate during his stay at SRCI:

- Plaintiff alleges that SRCI did not provide a qualified interpreter for him during intake interviews and orientation, so he could not engage in effective communication during his intake and orientation [*id.* at ¶¶ 32-33];
- Plaintiff alleges that SRCI did not provide him with an interpreter for medical services, dental services, religious services, program counseling, education, training, classes, and other programs [*id.* at ¶¶ 34-40].
- Plaintiff alleges that SRCI used “non-confidential, untrained and primarily unqualified inmates as interpreters, including known gang members” and required plaintiff “to teach inmates ASL” [*id.* at ¶ 41]; and
- Plaintiff alleges that SRCI’s failure to provide him with a qualified interpreter and the practice of using inmate interpreters caused plaintiff to be disciplined and sent to solitary confinement, and “[h]ad qualified, confidential interpreters been provided during the discipline process, and during the occurrences giving rise to the discipline process, [plaintiff] would not have been disciplined” [*id.* at ¶ 42].

4. Alleged failures from May 2012 forward.

Plaintiff alleges that he was housed in Santiam Correctional Institution (SCI) from May 2012 through January 2014, and he alleges various failures to accommodate during his stay at SCI. [*Id.* at ¶¶ 44-56]. Plaintiff alleges that he was transferred to Columbia River Correctional Institution (CRCI) in January 2014. [*Id.* at ¶¶ 57-59]. Because ODOC is not moving against plaintiff’s disability discrimination claims to the extent that they arise out of plaintiff’s stay at SCI and CRCI, ODOC will not summarize plaintiff’s related allegations here.

B. Plaintiff’s *quantum meruit* and unjust enrichment claims.

Plaintiff alleges that he “conferred a benefit upon defendant by providing a service beneficial to defendant”—namely, allegedly “teaching defendant’s inmates limited ASL and training defendant’s inmates to serve as inmate interpreters on a limited basis.” [*Id.* at ¶ 92]. Plaintiff alleges that ODOC “knew” that plaintiff was “conferring that benefit” on ODOC, and that “[i]t would be unjust” to allow ODOC to “retain that benefit” without requiring ODOC to pay for it. [*Id.* at ¶ 94]. Plaintiff claims that he is entitled to at least \$10,000 in restitution.

II. Applicable Legal Standard.

Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a complaint for failure to state a claim upon which relief can be granted. In considering a Rule 12(b)(6) motion to dismiss, the court must accept all of the plaintiff’s material factual allegations as true and view all facts in the light most favorable to the plaintiff. *Reynolds v. Giusto*, No. 08–CV–6261, 2009 WL 2523727, at *1 (D. Or. Aug. 18, 2009). The Supreme Court addressed the proper pleading standard under Rule 12(b)(6) in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *Twombly* established the need to include facts sufficient in the pleadings to give proper notice of the claim and its basis: “While a complaint attacked [under] Rule 12(b)(6) . . . does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Id.* at 555 (brackets omitted).

III. Legal Argument.

ODOC moves the Court for an order dismissing plaintiff’s complaint in part for failure to state a claim. Plaintiff’s complaint fails to state a claim as follows: (1) plaintiff cannot state a claim for *quantum meruit* or unjust enrichment against ODOC, because the State has not waived its sovereign immunity for quasi-contractual claims; and (2) plaintiff’s disability discrimination claims are time-barred to the extent that they arise out of conduct occurring outside of the applicable tort claim notice period and statute of limitations.

A. The State has not waived sovereign immunity for quasi-contractual claims.

Plaintiff alleges that he “conferred a benefit upon defendant” by “teaching defendant’s inmates limited ASL and training defendant’s inmates to serve as inmate interpreters on a limited basis,” thus—according to plaintiff—“sav[ing] defendant from the expense of paying for a qualified interpreter, training its own employees to become a qualified interpreter, or training its inmates to become qualified interpreters.” [Compl., Dkt. # 1, ¶ 92]. Plaintiff asserts that he performed at least \$10,000 worth of work for the State, and he is entitled to recovery under the quasi-contractual theories of *quantum meruit* and unjust enrichment. [*Id.* at ¶¶ 91-95]. As set forth below, the State has not waived its sovereign immunity for these types of claims, so plaintiff’s claims fail as a matter of law.

1. Plaintiff’s *quantum meruit* claim fails because the State has not waived sovereign immunity.

“That a sovereign state cannot be sued without its consent is a cardinal principle of law so well established as to require no citation.” *Rogers v. Holmes*, 332 P.2d 608, 611 (Or. 1958). In *Rogers v. Holmes*, the Supreme Court of Oregon stated that the sovereign prescribes the manner in which it is to be sued, and any statute derogating the sovereign’s immunity from suit “must be given a strict construction.” *Id.*; see also Or. Const., Art. IV, § 24 (stating that sovereign immunity may only be waived by legislative action). Although the Oregon legislature has waived sovereign immunity for contract claims and tort claims, it has not waived the State’s sovereign immunity for quasi-contract claims—which are neither contract claims nor tort claims. See ORS 30.320 (waiving sovereign immunity for certain contract and tort claims).

a. A *quantum meruit* claim is not a contract claim.

Quantum meruit is a form of restitution that allows a plaintiff to recover the fair value of services rendered to a defendant when no contract exists between the parties. *Kashmir Corp. v. Patterson*, 602 P.2d 294, 296 (Or. Ct. App. 1979), *aff’d*, 616 P.2d 468 (Or. 1980). When a plaintiff has performed services for a defendant, “[t]he law, in appropriate situations, will imply

a quasi-contact. . . . ***It is not a contract.*** It is a remedial device which the law affords to accomplish justice and prevent unjust enrichment.” *Id.* (emphasis added). Thus, quasi-contracts are legally distinct from contracts. *Id.* at 296.

b. A *quantum meruit* claim is not a tort claim.

Under ORS 30.320, “An action may be maintained against any governmental unit mentioned in ORS 30.310 for liability in tort only as provided in ORS 30.260 to 30.300.” ORS 30.320. Under ORS 30.260(8), “Tort means the breach of a legal duty that is imposed by law, ***other than a duty arising from contract or quasi-contract***, the breach of which results in injury to a specific person or persons for which the law provides a civil right of action for damages or for a protective remedy.” ORS 30.260(8) (emphasis added). Thus, quasi-contracts are legally distinct from torts.

In sum, although the Oregon legislature has waived Oregon’s sovereign immunity for contract claims and tort claims, it has not waived sovereign immunity for quasi-contracts. Because the legislature has not waived sovereign immunity for quasi-contracts, plaintiff’s *quantum meruit* claim against ODOC fails as a matter of law.

2. Plaintiff’s unjust enrichment claim fails because the State has not waived sovereign immunity.

“Unjust enrichment is a theory of ‘quasi-contract’ that depends on the existence of an implied contract.” *Stovall v. State*, 922 P.2d 646, 665 (1996). As such, for the same reasons as stated immediately above in regard to plaintiff’s *quantum meruit* claim, plaintiff’s unjust enrichment claim against ODOC fails as a matter of law.

B. Plaintiff’s state law disability discrimination claims are time-barred to the extent that they arise out of conduct occurring outside of the applicable tort claim notice period.

Under the Oregon Tort Claims Act, in order to bring a tort claim against the State, a plaintiff must provide notice of his claim to the State within 180 days of the loss or injury. O.R.S. 30.275(2)(b). A plaintiff may maintain a lawsuit without the actual or formal notice

required by the Oregon Tort Claims Act, but only by filing and serving this suit within the requisite 180 days of the actions complained of. ORS 30.275(3).

Here, there is no allegation in plaintiff's complaint that plaintiff gave tort claim notice beyond the complaint itself. ODOC was served with this lawsuit on May 9, 2014. [Notice of Removal, Dkt. #1, ¶ 1]. Accordingly, plaintiff's state law disability discrimination claims are time-barred to the extent they arise out of conduct causing plaintiff harm before November 10, 2013.

The majority of the events alleged in plaintiff's complaint occurred before November 10, 2013. On its face, plaintiff's complaint contains allegations of discrete failures to accommodate at different ODOC institutions that plaintiff was housed at for periods pre-dating November 10, 2013, including: (1) alleged failures during plaintiff's stay at OSP from November 2000 through December 2000; (2) alleged failures during plaintiff's stay at OSCI from December 2000 through July 2001; and (3) alleged failures during plaintiff's stay at SRCI from July 2001 through May 2012.¹ Accordingly, ODOC moves to dismiss plaintiff's claims arising out of alleged failures to accommodate his disability at OSP, OSCI, and SRCI as time-barred.

1. The continuing tort doctrine does not apply to plaintiff's claims.

Although plaintiff alleges that ODOC's conduct was "continuing and ongoing" [Compl., Dkt. #1, ¶ 61], ODOC's alleged discrete failures to accommodate plaintiff's disability—each of which allegedly harmed plaintiff—are not a continuing tort. If a plaintiff alleges a continuing tort, "a notice of claim filed at any time during the continuance of the conduct or within 180 days after the conduct has ceased is timely." *Barns v. City of Eugene*, 52 P.3d 1094, 1096 (Or. Ct. App. 2002).

¹ ODOC is not moving to dismiss plaintiff's state disability discrimination claims arising out of plaintiff's stay at SCI from May 2012 through January 2014 or plaintiff's state disability discrimination claims arising out of his stay at CRCI from January 2014 to the present, because it is not clear from the face of the complaint that the conduct plaintiff is complaining about occurred outside of the tort claim notice period.

The continuing tort doctrine is based on “the concept that recovery is for the cumulative effect of wrongful behavior, not for *discrete elements* of that conduct.” *Davis v. Bostick*, 580 P.2d 544, 547 (1978) (emphasis added). A continuing tort occurs when each incident of a series did not by itself support a claim but the incidents as a whole were a “systemic pattern of conduct that led to a specific injury.” *Barrington v. Sandberg*, 991 P.2d 1071, 1074 (Or. Ct. App. 1999). A series of discrete acts—even if “connected in design or intent”—are not a continuing tort. *Richer v. Poisson*, 903 P.2d 932, 934 (Or. Ct. App. 1995); see also *Holdner v. Columbia County*, 627 P.2d 4 (Or. Ct. App. 1981). When each of a defendant’s acts is separately actionable because they individually caused harm, then a plaintiff is not entitled to “ride out the storm and lump sum her grievances.” *Davis*, 282 Or. at 674. Instead, the statute of limitations begins to run when each incident occurred. *Id.*

The purpose behind the Oregon Tort Claims Act notice and statute of limitations provisions are to “give the public body timely notice of the tort and allow its officers an opportunity to investigate the matters promptly and ascertain all the necessary facts.” *Urban Renewal Agency v. Lackey*, 275 Or. 35, 41, 549 P.2d 660 (1976). A plaintiff cannot end-run that policy by designating a series of acts as continuous. *Davis*, 282 Or. at 674. Therefore, plaintiff’s claim will only constitute a continuing tort if: (1) ODOC’s course of conduct was not individually actionable; and (2) the resulting injury was caused by the cumulative effect of ODOC’s actions. *See Davis*, 580 P.2d at 547.

Here, plaintiff alleges that his disability was not accommodated at different state prisons he has been housed in over the course of 14 years in custody, but alleged refusals to grant accommodations—each of which allegedly harmed plaintiff—are discrete, separately actionable claims. *See, e.g., Barrett v. Marion County*, Case No. 07-6337-TC, 2008 WL 4221544, *5 (D. Or. Sept. 15, 2008) (“[R]efusal to grant accommodations and retaliation events are discrete, separately actionable claims and are thus subject to the OTCA.”); *Thunderbird v. O.D.O.C.*, Case No. CV-08-1404-PK, 2011 WL 2971798, * (D. Or. June 28, 2011) (continuing tort theory did

not apply to ODOC's alleged failure to make its facilities accessible for people with disabilities). Plaintiff's claims arising out of his time in custody at OSP, OSCI, and SRCI are time-barred on their fact, because plaintiff has alleged discrete wrongful acts, each of which allegedly harmed plaintiff, and not a "continuing tort." Accordingly, the Court should dismiss plaintiff's claims to the extent that they arise out of his time in custody at OSP, OSCI, and SRCI.

C. Plaintiff's federal law disability discrimination claims are time-barred to the extent that they arise out of conduct occurring outside of the applicable statute of limitations.

Plaintiff's federal law disability discrimination claims should be dismissed to the extent that the claims are barred by the statute of limitations. Plaintiff's claims under the Americans with Disabilities Act (ADA) are governed by a two-year statute of limitations. *Benton v. Doe I*, Case No. 03:13-cv-00613-ST, 2014 WL 1383606, *4 (D. Or. April 7, 2014). Here, plaintiff filed his complaint on May 5, 2014. Thus, any claims arising before May 5, 2012, are barred by the statute of limitations.²

Most of the events mentioned in plaintiff's complaint occurred outside of the two-year statute of limitations. Plaintiff's claims based on those events—specifically, plaintiff's claims arising out of his time in custody at OSP, OSCI, and SRCI—are barred by the statute of limitations. For the reasons discussed above, the conduct alleged in this case is not a "continuing tort" for purposes of the statute of limitations, because plaintiff has alleged a series of discrete acts (*i.e.*, failures to accommodate his disability), each of which allegedly harmed plaintiff.

IV. Conclusion.

For the foregoing reasons, defendants move the Court for an order dismissing plaintiff's complaint in part as follows: (1) defendants move the Court for an order dismissing plaintiff's *quantum meruit*/unjust enrichment claim because the State has not waived its sovereign

² Defendants note that plaintiff's claims arising out of his time in custody at OSP and OSCI over ten years before he filed his complaint in this case are barred by the statute of ultimate repose. ORS 12.115.

immunity for quasi-contractual claims; and (2) defendants move the Court for an order dismissing plaintiff's state and federal disability discrimination claims to the extent they arise out of plaintiff's time in custody at OSP, OSCI, and SRCI, because those claims are time-barred.

DATED June 13, 2014.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General

s/ Shannon M. Vincent
SHANNON M. VINCENT #054700
Senior Assistant Attorney General
Trial Attorney
Tel (503) 947-4700
Fax (503) 947-4791
Shannon.M.Vincent@doj.state.or.us
Of Attorneys for Defendant