

STEPHEN D. SPERA,
E1317 Larson Rd.
Waupaca, WI 54981

Plaintiff,

v.

Case No. _____
Case Code: 30107
(Personal Injury, Other)

**ORTHOPAEDIC ASSOCIATES
OF MILWAUKEE, S.C.,**
2350 N. Lake Dr.
Milwaukee, WI 53211-4507

Defendant,

and

JAMES E. CAIN, M.D.,
2350 N. Lake Dr.
Milwaukee, WI 53211-4507

Defendant.

COMPLAINT

Plaintiff Stephen D. Spera files this Complaint against Defendants Orthopaedic Associates of Milwaukee, S.C. and James E. Cain, M.D. (hereinafter collectively referred to as “Defendants”) and respectfully alleges the following:

PARTIES

1. Plaintiff Stephen D. Spera is, and was at all times mentioned herein, an adult resident of Wisconsin. Between 2000 and 2002, the relevant period during which Mr. Spera sought treatment from Defendants, Mr. Spera was a resident of this judicial district. Mr. Spera currently resides at E1317 Larson Rd., Waupaca, Wisconsin 54981.

2. Defendant James E. Cain, M.D. (hereinafter “Defendant Cain”) is an orthopedic surgeon licensed by the State of Wisconsin to practice medicine with his principal place of medical practice located at 2350 N. Lake Drive, Milwaukee, Wisconsin 53211-4507. On information and belief, Defendant Cain operates a medical practice and has been, at all relevant times mentioned herein, an employee, shareholder, director and/or partner of Defendant Orthopaedic Associates. Also on information and belief, Defendant Cain receives or is authorized to receive federal financial assistance relating to the operation of his and Orthopaedic Associates’ medical practice.

3. Defendant Orthopaedic Associates of Milwaukee, S.C. (hereinafter “Orthopaedic Associates”) is a health care corporation with its principal place of business at 2350 N. Lake Drive, Milwaukee, Wisconsin 53211-4507. On information and belief, Orthopaedic Associates receives federal financial assistance relating to the operation of its health care corporation and medical practice.

PRELIMINARY STATEMENT

4. This is a civil rights action brought under the Rehabilitation Act of 1973, 29 U.S.C. § 791, *et seq.* (hereinafter “the Rehabilitation Act”) and the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.* (hereinafter “the ADA”) for redress of unlawful discrimination on the basis of disability. This action is also brought under Section 252.14 of the Wisconsin Statutes to remedy Defendants’ unlawful, discriminatory treatment of Mr. Spera solely because of Mr. Spera’s infection with the human immunodeficiency virus (hereinafter “HIV”).

5. As explained more fully below, this action arises out of Defendants’ unwarranted and discriminatory refusal to perform surgery on Mr. Spera because of Mr. Spera’s HIV infection. In 2000, Mr. Spera sought treatment from Defendants’ orthopedic medical practice to treat his increasingly severe and debilitating back pain. Between February and August 2002,

Defendants treated Mr. Spera with epidurals and facet shots designed to alleviate his pain. When these pain management techniques failed, Defendant James E. Cain recommended spinal fusion surgery. Mr. Spera and Defendant Cain agreed that surgery was the best treatment option, and Defendants scheduled the surgery for November 14, 2002.

6. When, approximately one week prior to the scheduled surgery date, Defendants and Mr. Spera learned that Mr. Spera is infected with HIV, Defendants abruptly cancelled Mr. Spera's surgery. Defendants continued to refuse to perform surgery on Mr. Spera even after medical providers at a respected infectious disease clinic cleared Mr. Spera for surgery and advised Defendants that Mr. Spera's HIV status would not impair his ability to successfully recover from the recommended spinal fusion.

7. Defendants' conduct constitutes unlawful discrimination within the meaning of the Rehabilitation Act, the ADA and Wisconsin Statutes Section 252.14.

FACTS

8. Mr. Spera realleges paragraphs 1 through 7 of this Complaint as if fully set forth herein.

9. Stephen Spera is infected with HIV. Mr. Spera's HIV infection substantially limits one or more of his major life activities such as caring for himself, sleeping, eating, interacting with others, and sexual reproduction and intimacy. Additionally, upon information and belief, Defendants regarded Mr. Spera as an individual with a disability.

10. Beginning in or about 2000, Mr. Spera experienced pain in his back. Over the course of the following several years, Mr. Spera's pain became more severe. He frequently felt sharp pain in his back, and commonly lost feeling in his legs. Because of the pain and accompanying numbness, Mr. Spera sometimes fell down while standing and occasionally had to

lie down at work to ease his discomfort. At the height of his pain, Mr. Spera felt as if he had been stabbed in the spine with an ice pick.

11. As his back pain became more severe, Mr. Spera sought treatment from Defendants beginning in or about July 2000. During initial consultations with Mr. Spera, Defendant Cain adopted a conservative pain management treatment approach.

12. Over the next two years, Mr. Spera's pain became increasingly unbearable. In or about February 2002, Defendants treated Mr. Spera by prescribing the first of a series of epidural injections designed to relieve his pain.

13. Between February and September 2002, Defendants treated Mr. Spera's pain by prescribing epidural injections, facet injections and physical therapy, and instructing Mr. Spera regarding proper exercise, posture and stretching.

14. Despite Defendants' efforts to manage the pain, Mr. Spera continued to experience persistent and agonizing pain. On or about September 25, 2002, Defendant Cain advised that Mr. Spera undergo orthopedic surgery to treat his back injury. Defendant Cain advised a one-level decompression and fusion to be performed on Mr. Spera by Defendants. At or about that time, Mr. Spera agreed to this surgery and Defendant Cain informed Mr. Spera that Defendants would schedule a date for surgery.

15. Defendants scheduled back surgery for Mr. Spera for November 14, 2002.

16. Prior to the scheduled date of the surgery, Mr. Spera consented to an HIV test at Defendant Cain's advice as part of a pre-operative exam. At the time, Mr. Spera did not know he was HIV-positive.

17. On information and belief, on or before November 6, 2002, Defendants became aware that Mr. Spera had tested positive for antibodies to HIV.

18. On or about November 6, 2002, Mr. Spera called Defendant Cain to obtain the results of his pre-operative tests.

19. Defendant Cain began this phone conversation with Mr. Spera by asking whether Mr. Spera knew that he was HIV-positive. When Mr. Spera answered that he had not known, Defendant Cain stated that he was going to cancel the scheduled surgery. Defendant Cain recommended that Mr. Spera return to a pain management program and advised Mr. Spera to contact his physician.

20. During the November 6 phone conversation, Defendant Cain provided no counseling about HIV or referral for appropriate health care and support services.

21. In or about December 2002, Mr. Spera visited the infectious disease clinic at Froedtert & Medical College (“Froedtert”). Healthcare providers at Froedtert met with Mr. Spera, reviewed the laboratory analysis of his blood tests, and concluded that his infection with HIV did not pose a barrier to successful orthopedic surgery.

22. On or about December 17, 2002, a nurse employed at Froedtert contacted Defendant Cain by telephone. During that conversation, the nurse informed Defendant Cain that, in light of Mr. Spera’s laboratory results and overall health, the infectious disease specialists at Froedtert had cleared Mr. Spera for surgery.

23. After receiving this information, Defendant Cain indicated that he still would not perform surgery on Mr. Spera, instead advising that Mr. Spera return to a pain management program.

24. In or about January 2003, Mr. Spera’s healthcare providers at Froedtert referred him to another orthopedic surgeon, who agreed to perform an operation to treat Mr. Spera’s back pain. Mr. Spera underwent surgery on March 10, 2003.

25. Mr. Spera has required follow-up care and may need treatment, including but not limited to additional orthopedic surgery, in the future.

26. After speaking with Defendant Cain on November 6, 2002, Mr. Spera was devastated and emotionally distraught. Moreover, because of Defendants' actions, Mr. Spera lived for several months in severe physical pain, which caused additional emotional and psychological distress. As a result of Defendants' conduct, which included refusing to perform surgery, providing discriminatory care, and failing to provide HIV counseling or appropriate referrals, Mr. Spera suffered extreme emotional distress.

27. Defendants' conduct as described herein was malicious, willful or wanton in reckless disregard of Mr. Spera's rights.

COUNT ONE

SECTION 504 OF THE REHABILITATION ACT – DISABILITY DISCRIMINATION

28. Mr. Spera realleges paragraphs 1 through 27 of this Complaint as if fully set forth herein.

29. Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), prohibits any program or activity that receives federal financial assistance from excluding from participation, denying benefits to, or subjecting to discrimination any individual with a disability solely on the basis of that disability.

30. Defendants' medical practice constitutes a program or activity within the meaning of the Rehabilitation Act.

31. On information and belief, Defendants received federal financial assistance within the meaning of the Rehabilitation Act during the period relevant to the allegations herein.

32. Due to his HIV status, Mr. Spera has a physical impairment that substantially limits one or more of his major life activities, such that he is an individual with a disability within the meaning of the Rehabilitation Act.

33. Additionally, because of Mr. Spera's infection with HIV, Defendants regarded Mr. Spera as an individual with a disability within the meaning of the Rehabilitation Act.

34. Between November 2002 and March 2003, Mr. Spera was otherwise qualified to undergo spinal fusion surgery. As a nurse at Froedtert explained to Defendants in December 2002, Mr. Spera's HIV status did not render him unqualified for surgery at that time.

35. Defendants violated the Rehabilitation Act by intentionally discriminating against Mr. Spera solely on the basis of HIV status and excluding him from the benefits of, and participation in, their services.

36. As a result of Defendants' conduct, Mr. Spera needlessly suffered additional months of excruciating physical pain and severe psychological and emotional distress.

37. Because Mr. Spera likely will require additional treatment, there exists a real or immediate threat of future injury if Defendants are not enjoined from discriminating against him based on his infection with HIV.

COUNT TWO

ADA – DISABILITY DISCRIMINATION

38. Mr. Spera realleges paragraphs 1 through 37 of this Complaint as if fully set forth herein.

39. Title III of the ADA, 42 U.S.C. §§ 12181, *et seq.*, prohibits discrimination on the basis of disability in the full and equal enjoyment of the goods, services, privileges, advantages, or accommodations in any place of public accommodation by a person who owns, leases, or operates a place of public accommodation.

40. On information and belief, at all times relevant hereto, each Defendant owned, operated or leased a professional office of a health care provider affecting commerce. Accordingly, Defendants owned, operated or leased a place of public accommodation within the meaning of the ADA, 42 U.S.C. § 12181(7)(F).

41. Due to his HIV status, Mr. Spera has a physical impairment that substantially limits one or more of his major life activities, such that he is an individual with a disability within the meaning of the ADA.

42. Additionally, because of Mr. Spera's infection with HIV, Defendants regarded Mr. Spera as an individual with a disability within the meaning of the ADA.

43. Defendants violated Title III of the ADA by intentionally discriminating against Mr. Spera on the basis of HIV status. Further, Defendants imposed or applied eligibility criteria that screened out Mr. Spera because he was a person with HIV, and denied Mr. Spera the full and equal enjoyment of their services because of his HIV status, in violation of the ADA.

44. Because Mr. Spera likely will require additional treatment, there exists a real or immediate threat of future injury if Defendants are not enjoined from discriminating against him based on his infection with HIV.

COUNT THREE

**WISCONSIN STATUTE SECTION 252.14(2)(a)-
HIV DISCRIMINATION FOR REFUSING TO TREAT PLAINTIFF**

45. Mr. Spera realleges paragraphs 1 through 44 of this Complaint as if fully set forth herein.

46. Section 252.14(2)(a) of the Wisconsin Statutes prohibits health care providers from, solely on the basis of HIV status, refusing to treat an individual if his or her condition is within the scope of licensure or certification of the health care provider.

47. At all times relevant hereto, Defendants were health care providers within the meaning of Section 252.14.

48. On information and belief, Mr. Spera's condition and the scheduled spinal decompression and fusion surgery was within Defendants' scope of licensure or certification.

49. On information and belief, on or before November 6, 2002, Defendants became aware or believed that Mr. Spera had tested positive for antibodies to HIV.

50. Defendants violated Wisconsin Statute Section 252.14(2)(a) by refusing to treat Mr. Spera for the scheduled spinal decompression and fusion surgery on at least two separate occasions solely because Mr. Spera is HIV-positive.

COUNT FOUR

WISCONSIN STATUTE SECTION 252.14(2)(b)-
HIV DISCRIMINATION FOR PROVIDING
A LOWER STANDARD OF CARE TO PLAINTIFF

51. Mr. Spera realleges paragraphs 1 through 50 of this Complaint as if fully set forth herein.

52. Section 252.14(2)(b) of the Wisconsin Statutes prohibits health care providers from, solely on the basis of HIV status, providing care to an individual at a standard lower than that provided to other individuals with like medical needs.

53. At all times relevant hereto, Defendants were health care providers within the meaning of Section 252.14.

54. On information and belief, on or before November 6, 2002, Defendants became aware or believed that Mr. Spera had tested positive for antibodies to HIV.

55. Defendants recommended back surgery for Mr. Spera and cancelled it only after discovering that he was HIV-positive. In one telephone conversation, Defendants callously informed Mr. Spera that he had tested positive for HIV and cancelled Mr. Spera's scheduled

surgery. Defendants' decision to cancel Mr. Spera's surgery lacked any legitimate justification, and Defendants failed to provide Mr. Spera any counseling about HIV or referral for appropriate health care and support services, in violation of Wisconsin Statute Section 252.14(3).

56. Defendants violated Wisconsin Statute Section 252.14(2)(b) by providing a lower standard of care to Mr. Spera than that provided to other individuals with like medical needs solely because Mr. Spera is HIV-positive.

COUNT FIVE

WISCONSIN STATUTES SECTION 252.14(2)(c)- HIV DISCRIMINATION FOR SUBJECTING PLAINTIFF TO INDIGNITY

57. Mr. Spera realleges paragraphs 1 through 56 of this Complaint as if fully set forth herein.

58. Section 252.14(2)(c) of the Wisconsin Statutes prohibits health care providers from, solely on the basis of HIV status, subjecting an individual to indignity, including humiliating, degrading or abusive treatment.

59. At all times relevant hereto, Defendants were health care providers within the meaning of Section 252.14.

60. On information and belief, on or before November 6, 2002, Defendants became aware or believed that Mr. Spera had tested positive for antibodies to HIV.

61. Defendants recommended back surgery for Mr. Spera and cancelled it only after discovering that he was HIV-positive. In one telephone conversation, Defendants callously informed Mr. Spera that he had tested positive for HIV and cancelled Mr. Spera's scheduled surgery. Defendants' decision to cancel Mr. Spera's surgery lacked any legitimate justification, and Defendants failed to provide Mr. Spera any counseling about HIV or referral for appropriate health care and support services, in violation of Wisconsin Statute Section 252.14(3).

62. Defendants violated Wisconsin Statute Section 252.14(2)(c) by subjecting Mr. Spera to indignity solely because Mr. Spera is HIV-positive.

PRAYER FOR RELIEF

WHEREFORE, Mr. Spera respectfully requests that this Court:

a) Permanently enjoin Defendants, their agents and employees, and all other persons in active concert or participation with them, from refusing to provide treatment to persons who have tested positive for HIV, including Mr. Spera, on the same terms and conditions as patients who have not tested positive for HIV;

b) Order an award of actual damages and punitive or exemplary damages to Mr. Spera pursuant to the Rehabilitation Act and Wisconsin Statutes Section 252.14(4);

c) Order an award of reasonable attorney's fees and costs and expenses of suit pursuant to the Rehabilitation Act, the ADA, and Wisconsin Statutes Section 252.14; and

d) Order such additional and further relief that it deems just and proper.

Dated this ____ day of October 2004.

Respectfully Submitted,

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