

SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND NIGHT AND DAY DENTAL, INC. UNDER THE AMERICANS WITH DISABILITIES ACT, DJ # 202-54-195

I. BACKGROUND

1. The parties to this Settlement Agreement are the United States of America and Night and Day Dental, Inc.
2. This matter is based upon a complaint filed with the United States Department of Justice (Department), in which the Complainant alleged that Night and Day Dental, a dental practice with multiple offices throughout North Carolina, discriminated against her on the basis of disability in violation of Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12181-12189. Specifically, the Complainant alleges that Night and Day Dental in Raleigh, North Carolina denied routine dental services to her because she is a person with human immunodeficiency virus (HIV).
3. The parties have reached an agreement that to avoid the time, expense, and uncertainty of litigation, it is in the parties' best interests, and the United States believes that it is in the public interest, to resolve this dispute. Night and Day Dental denies that it (a) refused to see the Complainant because she is a person with HIV; (b) denied providing routine dental services to the Complainant because she is a person with HIV; or (c) violated the ADA. The parties agree that neither this Agreement nor any of the provisions hereof shall be construed as an admission of liability. The parties have therefore voluntarily entered into this Agreement as follows:

II. TITLE III COVERAGE AND DETERMINATIONS

4. The Attorney General of the United States is responsible for administering and enforcing Title III of the ADA, 42 U.S.C. §§ 12181-12189, and the relevant regulations implementing Title III, 28 C.F.R. Part 36.
5. O'Brien and West, DMD, PLLC, DBA Night and Day Dental, is a privately owned dental facility that provides dental services throughout North Carolina. It is incorporated at 2945 New Bern Avenue in Raleigh, North Carolina, 27610. Night and Day Dental is a place of public accommodation because it is a professional office of a health care provider. 42 U.S.C. § 12181(7)(F); 28 C.F.R. § 36.104(6). Night and Day Dental is also a private entity that owns, operates, leases or leases to a place of public accommodation within the meaning of 42 U.S.C. § 12182(a), and is thus subject to the requirements of Title III of the ADA.
6. The Complainant is a person with a disability because she has HIV, which is a physical impairment that substantially limits one or more major life activities, including the

operation of major bodily functions. 28 C.F.R. § 36.105(b)(2) (defining physical or mental impairment to include HIV infection, both symptomatic and asymptomatic). HIV is a physical impairment that can substantially limit major life activities, including caring for oneself, performing manual tasks, and working. 42 U.S.C. § 12102(2)(A). HIV also limits the operation of major bodily functions such as the immune system and reproductive functions. 42 U.S.C. § 12102(2)(B); 28 C.F.R. § 36.105(d)(2)(iii)(J). The determination of whether an impairment substantially limits a major life activity is made without regard to the effect that ameliorating measures, including medication, may have on the impairment. 42 U.S.C. § 12102(4)(E)(i).

7. As a result of its investigation, the United States has determined the following:
 - a. On March 5, 2019, Night and Day Dental refused to see the Complainant for a new patient routine dental care appointment scheduled for that day after she disclosed on her patient intake forms that she has HIV.
 - b. Upon the Complainant's arrival for her appointment and after handing in her intake forms, Night and Day Dental asked the Complainant to provide bloodwork laboratory results it perceived to be related to her HIV status. The Complainant asked the office of her treating physician to fax bloodwork laboratory results to Night and Day Dental. After Night and Day Dental reviewed the faxed results, and had the Complainant wait for an extended period, the Complainant was told she could not be seen for her scheduled appointment.
 - c. Night and Day Dental has a policy and practice of requesting bloodwork laboratory results only from patients with HIV in order to review the absolute neutrophil count (ANC) before providing dental care, which Night and Day Dental states is to assess whether to provide an antibiotic prophylaxis prior to dental treatment. This request is typically made after a patient with HIV arrives for a new patient appointment and before providing care.
 - d. There are just a few health conditions for which antibiotic prophylaxis prior to dental treatment is recommended, as confirmed by the American Dental Association. Having HIV is not one of them.
 - e. Night and Day Dental acknowledged to the Department of Justice that if a patient with HIV does not provide ANC results, this is not a reason not to be seen, stating as follows with respect to the Complainant: "The patient's medical history states [the Complainant] has HIV/AIDS and we request patients provide a copy of their most recent labs to determine if an antibiotic premedication is needed prior to treatment, but lack of labs is not a reason to not be seen."
 - f. By refusing to provide dental services to the Complainant because she has HIV, and by requiring the Complainant, as a condition of service, to provide bloodwork laboratory results the practice perceived to be related to her HIV, Night and Day Dental discriminated against her on the basis of disability in the full enjoyment of

the dental practice's goods, services, facilities, privileges, advantages or accommodations. 42 U.S.C. §§ 12182(a), 12182(b)(1)(A)(i); 28 C.F.R. §§ 36.201(a), 36.202(a).

- g. By turning away the Complainant, and any other prospective patients with HIV, Night and Day Dental imposed eligibility criteria that screen out or tend to screen out individuals with HIV. 42 U.S.C. § 12182(b)(2)(A)(i); 28 C.F.R. § 36.301(a).

III. ACTIONS TO BE TAKEN BY NIGHT AND DAY DENTAL

General Obligations

- 8. Night and Day Dental shall comply with the requirements of Title III of the ADA, 42 U.S.C. § 12182, and its implementing regulation, 28 C.F.R. Part 36. That mandate includes, but is not limited to, the following:
 - a. Night and Day Dental shall not discriminate on the basis of disability, including HIV, in the full and equal enjoyment of Night and Day Dental's goods, services, facilities, privileges, advantages, or accommodations. 42 U.S.C. § 12182(a), 28 C.F.R. § 36.201(a).
 - b. Night and Day Dental shall not deny an individual on the basis of disability, including HIV, the opportunity to participate in or benefit from its goods, services, facilities, privileges, advantages, or accommodations. 42 U.S.C. § 12182(b)(1)(A)(i), 28 C.F.R. § 36.202(a).
 - c. Night and Day Dental shall not impose or apply eligibility criteria that screen out, or tend to screen out, an individual with a disability or a class of individuals with disabilities (including HIV) from fully and equally enjoying its goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered. 42 U.S.C. § 12182(b)(2)(A)(i), 28 C.F.R. § 36.301(a).

Non-Discrimination Policies and Procedures

- 9. Within 60 calendar days of the effective date of this Agreement, Night and Day Dental shall submit a draft non-discrimination policy to the United States for its review and approval. Additionally, Night and Day Dental shall amend or remove any existing policies or statements that deny or limit treatment for individuals with HIV, which includes rescinding its policy and practice of routinely requesting bloodwork laboratory results from patients with HIV before providing dental care. Within 60 calendar days of the effective date of this Agreement, Night and Day Dental shall send copies of all revised written materials to the United States for its review and approval.

10. Within 21 days of approval by the United States, Night and Day Dental shall adopt and implement the non-discrimination policy, and any other new and/or modified policies and practices, and shall disseminate a copy of its new and/or modified policies and practices to all employees. Night and Day Dental shall conspicuously post the non-discrimination policy in the reception area of Night and Day Dental's offices and as a link on the company's main webpage, currently located at <https://www.nightanddaydental.com/>, as well as on the webpage of any future Night and Day Dental website, for the duration of this Agreement. Throughout the term of this Agreement, Night and Day Dental shall disseminate these policies and practices to all new employees within 30 days of their hire.

Training

11. Night and Day Dental shall provide ADA training within 90 calendar days of the effective date of this Agreement, and every year thereafter for the Term of this Agreement, to all of its management and employees who interact with new or current patients.
12. Within 60 calendar days of the effective date of this Agreement, Night and Day Dental shall provide all written or electronic training materials to the United States. Such materials shall be consistent with the provisions of this Agreement and approved in advance of the training dates by the United States. The ADA Training shall address:
 - a. the requirements of Title III of the ADA, including the "General Obligations" outlined at Paragraph 8 of this Agreement;
 - b. a general overview of the terms and obligations of this Agreement; and
 - c. the reporting obligations under Paragraphs 16-18 of this Agreement.
13. The ADA Training shall be conducted by an individual or individuals with substantive knowledge of the ADA. The initial ADA Training shall be conducted live, either in-person or via webinar, with an opportunity to pose questions to the individual(s) conducting the training at the conclusion of the training session. Each subsequent training may be conducted by video recording.
14. Night and Day Dental shall send to counsel for the United States for pre-approval the name, qualifications (including resume), and contact information of the individual who will conduct the training, no later than 45 calendar days after the effective date of this Agreement. The trainer shall be pre-approved by the United States.
15. For each session of the ADA Training conducted under this Agreement, Night and Day Dental shall maintain attendance logs reflecting the date of the training, names and titles of attendees, and the attendees' signatures.

Reporting

16. Initial Regular Report: Within 120 calendar days following the effective date of this Agreement, Night and Day Dental shall submit a report to the United States confirming its implementation of the policies referenced in Paragraphs 9-10 (“Non-Discrimination Policies and Procedures”) as well as its fulfillment of the requirements of Paragraph 8 (“General Obligations”) and Paragraphs 11-15 (“Training”). Night and Day Dental shall provide the Department with the attendance logs maintained for the ADA Training under Paragraph 15.
17. Subsequent Regular Reports: For the Term of this Agreement, every year on the anniversary of the due date of the Initial Regular Report, and two months before the termination of this Agreement, Night and Day Dental shall submit a Subsequent Regular Report to the Department regarding its compliance with this Agreement. The report shall include, for the period since the prior report to the Department, the following:
 - a. All dates of Night and Day Dental’s ADA Training conducted pursuant to this Agreement;
 - b. All attendance logs associated with the ADA Training conducted pursuant to this Agreement; and
 - c. Night and Day Dental’s continued fulfillment of the obligations of Paragraph 8 (“General Obligations”), Paragraphs 9-10 (“Non-Discrimination Policies and Procedures”) and Paragraphs 11-15 (“Training”).
18. Immediate Reports: During the Term of this Agreement, Night and Day Dental shall notify the United States within 10 calendar days of the following:
 - a. For any individual with HIV who has disclosed that condition to Night and Day Dental and is not provided treatment, or for whom treatment is ceased after the disclosure, Night and Day Dental shall provide an explanation, as well as documents (including, but not limited to, internal and external email correspondence), indicating the reason for the denial or cessation of treatment. In such an instance, Night and Day Dental shall identify the individual by unique identifier (instead of by name, in order to maintain privacy), and the United States shall keep confidential such information.
 - b. Knowledge of any lawsuit, written complaint, charge, or other allegation that Night and Day Dental has engaged in disability-based discrimination and/or violated the ADA with regard to a person with HIV. Such notice shall include, at a minimum, a description of the nature of the allegation, the name(s) of the individual(s) bringing the allegation, and all documentation possessed by Night and Day Dental relevant to the allegation.

Monetary Relief

19. Within ten (10) days after receiving the Complainant's signed release (attached as Exhibit A), Night and Day Dental shall send a check in the amount of thirty thousand dollars (\$30,000.00) made out to the Complainant. This check is compensation to the Complainant pursuant to 42 U.S.C. § 12188(b)(2)(B) for the effects of the discrimination and the harm she has endured, including, but not limited to, emotional distress and pain and suffering, as a result of Night and Day Dental's discrimination on the basis of HIV. Night and Day Dental shall provide written notification to counsel for the United States, including a copy of the check, within seven (7) days of completing the actions described in this paragraph.

IV. OTHER PROVISIONS

20. Consideration: In consideration for this Agreement, the United States shall close its investigation (DJ # 202-54-195) without further enforcement action, except as provided in Paragraph 25 of this Agreement.
21. Effective Date: The effective date of this Agreement is the latest date of the signatures below.
22. Term: The duration of this Agreement will be three years from the effective date.
23. Dates: All references to "days" shall mean calendar days, unless otherwise specified.
24. Reviewing Compliance: The United States may review Night and Day Dental's compliance with this Agreement or Title III of the ADA at any time, and take appropriate action. If the United States believes that Title III of the ADA, this Agreement, or any portion of it has been violated, the United States will notify Night and Day Dental in writing and the parties will attempt to resolve the issue in good faith. If the parties are unable to reach a satisfactory conclusion within thirty (30) days of the date the United States notifies Night and Day Dental, the United States may institute a civil action in the appropriate U.S. District Court to enforce this Agreement and/or Title III of the ADA. Failure by the United States to enforce any provision of this Agreement is not a waiver of its right to enforce any provision of this Agreement.
25. Submission of Materials: All materials sent to the United States pursuant to this Agreement shall be sent by e-mail to undersigned counsel. The cover letter shall include a subject line referencing DJ # 202-54-195.
26. Counterparts: This Agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same Agreement. Facsimile or electronic signatures are acceptable.

27. Severability: If any term of this Agreement is determined by any court to be unenforceable, the other terms of this Agreement shall nonetheless remain in full force and effect, provided, however, that if the severance of any such provision materially alters the rights or obligations of the parties, the United States and Night and Day Dental shall engage in good faith negotiations to adopt mutually agreeable amendments to this Agreement as may be necessary to restore the parties as closely as possible to the initially agreed upon relative rights and obligations.
28. Binding Nature of Agreement & Successor Liability: This Agreement is binding on Night and Day Dental, including all principals, agents, executors, administrators, representatives, employees, and beneficiaries. In the event that Night and Day Dental seeks to sell, transfer, or assign substantially all of its assets or a controlling membership position in Night and Day Dental during the term of this Agreement, then, as a condition of such sale, transfer, or assignment, Night and Day Dental shall obtain the written agreement of the successor, buyer, transferee, or assignee to all obligations remaining under this Agreement for the remaining term of this Agreement.
29. Authority: The individuals signing this Agreement represent that they are authorized to do so on behalf of the respective entity for which they have signed.
30. Entire Agreement: This Agreement constitutes the entire Agreement between the United States and Night and Day Dental on the matters raised herein and no other statement or promise, written or oral, made by any party or agents of any party, that is not contained in this written Agreement shall be enforceable. This Agreement can only be modified by mutual written agreement of the parties.
31. Extensions: Any time limits for performance imposed by this Agreement may be extended only by the mutual written consent of the Parties. With regard to any of the deadlines specified in this Agreement, Night and Day Dental shall notify the United States at least 14 days before any deadline of an anticipated inability to meet the deadline and the reason(s) why, and shall request an extension of time to a specific date. The United States shall not unreasonably withhold consent to a request for an extension of time made in good faith. A failure to comply with deadlines agreed upon in this Agreement constitutes a violation of this Agreement.
32. Other Violations: This Agreement is not intended to remedy any other potential violations of the ADA or any other law that is not specifically addressed in this Agreement, including any other claims for discrimination on the basis of disability. Nothing in this Agreement relieves Night and Day Dental of its obligation to comply with the requirements of the ADA.
33. Publicity: This Agreement and any amendment hereto shall be public documents. A copy of this Agreement or any information contained herein may be made available to

any person, and the Night and Day Dental shall provide a copy of this Agreement to any person upon request.

34. Titles: Titles and other headings contained in this Agreement are included only for ease of reference and shall have no substantive effect.

By their signatures below, the Parties consent to the execution of all aspects of this Agreement.

For Night and Day Dental, Inc.:

/s/

Patrick O'Brien, DMD
Owner

/s/

Chauncey West, DMD
Owner

Night and Day Dental, Inc.
2945 New Bern Avenue Raleigh, North Carolina, 27610

/s/

Jonathan S. Feld, Member
Eric Klein, Member
Dykema Gossett PLLC
10 South Wacker Drive
Suite 2300
Chicago, Illinois 60606
Telephone: (312) 627-5680
Email: JFeld@dykema.com
EKlein@dykema.com

6/15/21
Date

For the United States of America:

Rebeca B. Bond
Chief
Kathleen P. Wolfe
Special Litigation Counsel
Amanda Maisels
Deputy Chief

/s/

Elaine Grant
Senior Trial Attorney
Disability Rights Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
4 Constitution Square Building, 9th Floor
Washington, DC 20530
Telephone: (202) 307-1444
Email: Elaine.Grant@usdoj.gov

6/17/21
Date