IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

THE NATIONAL FEDERATION OF THE BLIND OF VIRGINIA, *et al*.,

Plaintiffs,

Case No. 3:23-cv-127-HEH

v.

VIRGINIA DEPARTMENT OF CORRECTIONS, *et al.*,

Defendants.

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION *IN LIMINE* TO PRECLUDE EVIDENCE OF (1) PLAINTIFFS' CRIMINAL HISTORIES; (2) PLAINTIFFS' DISCIPLINARY INFRACTIONS OR OTHER ALLEGED "BAD ACTS"; 3) PLAINTIFFS' ALLEGED DRUG USE; 4) PLAINTIFFS' ALLEGED GANG AFFILIATIONS; AND (5) ALLEGATIONS OF SEXUAL MISCONDUCT AT THE NATIONAL FEDERATION OF THE BLIND

Plaintiffs submit this motion *in limine* in order to preclude Defendant from offering, or eliciting on cross-examination, any irrelevant and prejudicial evidence about (1) Plaintiffs' criminal histories; (2) Plaintiffs' prison disciplinary infractions or other alleged "bad acts;" (3) Plaintiffs' alleged drug use; (4) Plaintiffs' alleged gang affiliations; and (5) allegations of sexual misconduct at the National Federation of the Blind.

PRELIMINARY STATEMENT

In this action under the Americans with Disabilities Act ("ADA") and Rehabilitation Act, six individuals and one organization are alleging that the Virginia Department of Corrections ("VDOC") is failing to provide legally-required accommodations for the blind prisoners.

VDOC's obligations to the plaintiffs are established under federal law and in no way turn on whether the plaintiffs have committed alleged "bad acts." Because of this, this Court should exclude any mention by Defendant at trial of Plaintiffs' criminal histories or the nature of their convictions; Plaintiffs' prison disciplinary infractions; Plaintiffs' alleged drug use; Plaintiffs' alleged gang affiliations; and any allegations of sexual harassment leveled at a former employee of the National Federation of the Blind, the parent organization of plaintiff National Federation of the Blind of Virginia.

ARGUMENT

I. Pursuant To Federal Rules Of Evidence 609 And 403, Evidence Regarding Plaintiffs' Criminal Histories Must Be Excluded.

A. This Court Should Exclude All Mention Of Plaintiffs' Convictions.

At trial, Defendant should be precluded from introducing any evidence, or eliciting any testimony, regarding the crimes of which plaintiffs were convicted, or the circumstances thereof.[1]

[1] Plaintiffs also request that any ruling on this motion *in limine* apply equally to inmate witnesses that plaintiffs may call at trial, but whose criminal histories and disciplinary infractions are not fully known to plaintiffs at this time.

Because Plaintiffs are currently or were recently incarcerated with sentences that exceed a year in length, Federal Rule of Evidence 609 allows the introduction of Plaintiffs' convictions into evidence solely for purposes of impeachment—but only "subject to Rule 403." Fed. R. Evid. 609(a)(1)(A). Rule 403 states that a court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

None of Plaintiffs' convictions or crimes relate to or are in any way relevant to the subject matter of this case. VDOC's obligations under the ADA are extended to prisoners regardless of the nature of their crimes or sentences and "there is a significant danger that [plaintiff's criminal conviction's] probative value could be substantially outweighed by unfair prejudice, confusing the issues, and misleading the jury under Federal Rule of Evidence 403." *Lawton v. S.C. Dep't of Corr.*, No. 2:20-CV-01527-DCC, 2022 WL 2195326, at *2 (D.S.C. June 17, 2022) (excluding evidence of plaintiff's criminal history and disciplinary history as "irrelevant to [plaintiff's] present allegations against Defendants" in section 1983 and gross negligence case); *see also Jolly v. Troisi*, 92 Civ. 5332, 2000 WL 620304, at* 2 (S.D.N.Y. May 11, 2000) (in civil rights action for claims of physical abuse by correction officers, defendants precluded from offering evidence of plaintiffs prior convictions for disorderly conduct, murder, and burglary); *Fletcher v. City of New York*, et al., 54 F. Supp. 2d 328, 332 (S.D.N.Y. 1999) (civil rights plaintiff's conviction for attempted robbery excluded as prejudicial); *Eng v. Scully*, 146 F.R.D. 74, 78 (S.D.N.Y. 1993) (in excessive force action against correction officers, ruling on motion *in limine* to exclude plaintiff's prior murder conviction because murder "is not necessarily indicative of truthfulness" and probative value is substantially outweighed by danger of unfair prejudice).

Fed. R. Evid. 609 is a credibility rule: prior convictions cannot be used to prove any character trait other than truth-telling. None of the Plaintiffs' crimes relate to the honesty or veracity of the Plaintiffs themselves. While crimes such as forgery or perjury might arguably be probative of a character for truthfulness, no such argument can be made about Plaintiffs' crimes, which, in aggregate, involve physical violence, sexual violence, illegal drug charges, and property crimes. Parading a sensational list of plaintiffs' convictions before the jury will serve no legitimate purpose with respect to establishing plaintiffs' character for veracity.

Evidence of Plaintiffs' convictions also adds nothing to the jury's analysis of whether VDOC violated the Plaintiffs' rights under the ADA and Rehabilitation Act. Not only is evidence of Plaintiffs' convictions of absolutely no probative value, *see* Fed. R. Evid. 402, it will be undeniably prejudicial and inflammatory. Fed. R. Evid. 403. Such evidence seeks simply to encourage the jury to punish plaintiffs as bad people because of their criminal histories, notwithstanding whatever unlawful conduct actually transpired here. It is also especially inappropriate in this case because the fact that Plaintiffs are (or were until recently) incarcerated will be immediately clear to the jury due to the nature of Plaintiffs' claims. Accordingly, testimony related to the fact that Plaintiffs have been convicted would be "cumulative" and wasteful of the jury's time.

To the extent that Defendant seeks to introduce evidence of Plaintiff's convictions for which they finished serving time more than ten years ago, Federal Rule 609(b) permits such evidence only "its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect" and "the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use." Fed. R. Evid. 609(b). This Rule amounts to a presumption against admitting such evidence. See *Lewis v. Velez*,

149 F.R.D. 474, 481 (S.D.N.Y. 1993). While Defendant has not yet indicated any intent to use such convictions, Plaintiffs have no convictions of such an age that bear any relevance to the case and such convictions would thus be inadmissible.

B. In The Alternative, If Evidence About Plaintiffs' Convictions Is Permitted, Such Evidence Must Be Strictly Limited

Plaintiffs submit that all evidence of convictions should be excluded because it is not probative of plaintiffs' character for truth-telling and is highly prejudicial. If this Court is inclined to permit Defendant to introduce evidence about Plaintiffs' convictions, Defendants should be limited to asking whether the plaintiff has been convicted of a crime punishable by more than one year in prison. Exploring in detail the nature of Plaintiffs' crimes would be vastly more prejudicial to their case than it is probative of any disputed fact about the plaintiffs.

For this reason, the Western District of Wisconsin limited the nature of the questioning when a defendant sought to cross-examine a plaintiff in a civil case about his past criminal activity:

> [Defendant] wants to ask the following questions: (1) "You have been convicted of one count of Robbery with Use of Force"; and (2) "You have been convicted of one count of Throwing or Discharging Bodily Fluid at a Public Safety Worker." . . . . [T]here is . . . a requirement to limit [the question's] prejudice under Rule 403. Accordingly, defendant's counsel may ask [the plaintiff] the following question: "You have been convicted of two crimes punishable by more than one year, correct?" If [the plaintiff's] answer to that question is a simple "Yes", no further inquiry will be allowed. If, on the other hand, he refuses to answer "Yes," then counsel may impeach with evidence of the individual convictions.

Williams v. Esser, No. 18-CV-1008-WMC, 2022 WL 2340773, at *1 (W.D. Wis. June 29, 2022); *accord McClenny v. Meadows*, No. 7:18-CV-221, 2020 WL 5751621, at *3–4 (W.D. Va. Sept. 25, 2020) ("[Defendant] will be permitted to cross-examine [Plaintiff] on whether he is a convicted felon, as the fact of his convictions goes to his credibility as a witness, but not the details of his convictions.") Such a limitation is the only way to remove the unfair prejudice to Plaintiffs that might result from a deeper exploration of their crimes, and, if this Court intends to allow

questioning about Plaintiffs' convictions, Defendants' questions should be limited to asking if Plaintiffs have been convicted of crimes punishable by more than one year in prison.

Any plaintiff prisoner faces an uphill battle with respect to the jury's willingness to credit a prisoner's version of events. At a minimum, the jury will know that plaintiffs were in prison when these incidents occurred. If permitted by the Court, notwithstanding this motion, the jury will also learn that plaintiffs are convicted of crimes punishable by more than one year in prison. The jury does not need to know the specific offenses or facts of plaintiffs' crimes in order to assess the plaintiffs' credibility. It would serve only to irreparably bias the jury against plaintiffs and prevent a fair hearing on plaintiffs' ADA and Rehabilitation claims.

II. This Court Should Exclude Plaintiffs' Prison Disciplinary History, Alleged Illegal Drug Use, and Alleged Gang Activity.

The Federal Rules of Evidence do not allow impeachment through extrinsic evidence of mere "bad acts" unless those acts are "probative of the character for truthfulness or untruthfulness of the witness." Fed. R. Evid. 608(b)(1). All evidence--even bad acts that are permissible under Rule 608—must also be "relevant" (i.e., "tend to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence") and sufficiently relevant that "its probative value is [not] substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 402, 403.

Prison disciplinary history is not probative of truthfulness and would, therefore, be properly excluded under the Rule. To begin with, disciplinary hearings are conducted by prison employees, not neutral arbiters. *Cleavinger v. Saxner*, 474 U.S. 193, 203-204 (1985) (to say that prison hearing officers are "independent" is "to ignore reality"; hearing officers "are under obvious pressure to resolve a disciplinary dispute in favor of the institution and their fellow employee."). In a disciplinary hearing, there is no "full adversarial process" because "[t]here is no right to counsel

or to cross-examination, and the inmate does not have subpoena power." *Tulloch v. Coughlin*, 50 F.3d 114, 117 (2d Cir. 1995). Asking the jury to draw any conclusions about Plaintiffs' truthfulness from such one-sided procedures would be prejudicial to Plaintiffs. Moreover, any inquiry into plaintiffs' disciplinary history and/or prior bad acts will certainly cause "undue delay" and the "needless presentation of cumulative evidence." Fed. R. Evid. 403. If Defendant is permitted to introduce this evidence, it will lead to an extensive sideshow into the merits of completely irrelevant incidents, which will distract and wear down the jury in this case.

While Plaintiffs' disciplinary histories are not categorically relevant to this case, Plaintiffs, in their case-in-chief, may introduce evidence that they were improperly disciplined for shortcomings related to their disabilities. This Motion is not intended to exclude that evidence, which is relevant to the question of whether Defendants are properly accommodating Plaintiffs in the discipline process, but to exclude any instances of prison discipline unrelated to Plaintiffs' allegations. This Motion is not intended to prevent Defendants from responding with evidence about specific incidents that are discussed by Plaintiffs at trial. The Eastern District of Michigan found it appropriate to bar irrelevant prison disciplinary history while permitting the use of relevant history:

> Because Plaintiff's remaining claims are inextricable from certain grievances he filed while incarcerated at the Saginaw Correctional Facility, and from a misconduct hearing that resulted in disciplinary action against him, the Court will permit introduction of that evidence of his past grievances and disciplinary history which is relevant to assessing his remaining claims. Other past grievances or disciplinary history that are unrelated to the facts and claims at issue in this case will be excluded at trial because they are not relevant and more prejudicial than probative.

Alexander v. Hoffman, No. 4:16-CV-12069, 2019 WL 4640281, at *1 (E.D. Mich. Sept. 24, 2019). This Court should do the same.

Evidence of alleged illegal drug use by Plaintiffs is also barred by the Rule. "[I]f the past drug use does not shed light on credibility, it properly may be excluded." *Tunnell v. Ford Motor*

Co., No. 4:03-CV-00074, 2005 WL 3776353, at *5 (W.D. Va. Apr. 18, 2005) (citing *Bennett v. Longacre,* 774 F.2d 1024, 1027 (10th Cir. 1985) and *United States v. Bentley,* 706 F.2d 1498, 1510 (8th Cir. 1983)). Whether or not Plaintiffs used illegal drugs does not affect their claims or remedies in this case, so its introduction can be nothing but prejudicial.

Finally, any supposed gang activity or gang affiliations among the Plaintiffs would be inappropriate to be placed before the jury. This case does not involve gang activity nor are the accommodations provided to Plaintiffs affected by any alleged membership in a gang. Accordingly, the jury should not hear the potentially prejudicial allegations of gang membership or activity by Plaintiffs. *See Joyner v. O'Neil*, No. 3:10CV406, 2012 WL 2576355, at *3 (E.D. Va. July 3, 2012) (excluding evidence of plaintiff's gang activity because "Defendants have not sufficiently connected any evidence of gang affiliation with the core issue before this Court").

III. This Court Should Exclude Allegations of Sexual Misconduct Against A Former Staff Member Of National Federation Of The Blind.

At the deposition of NFB-VA's corporate representative, Defendants questioned the deponent about a lawsuit that alleged sexual misconduct by a former staff member of the National Federation of the Blind, NFB-VA's parent organization.

This alleged incident has nothing to do with the present case and is therefore not relevant. *See* Fed. R. Evid. 402. The National Federation of the Blind is a separate organization from NFB-VA (though the two organizations have reciprocal memoranda of understanding) and the abuse is alleged to have occurred years ago in Louisiana by a staff member with no relationship to the NFB-VA. No person associated with this case is involved with the lawsuit and the allegations in the lawsuit are irrelevant to any disputed fact in this case. Due to the inflammatory nature of the allegations in the lawsuit, admitting evidence related to them would be highly prejudicial to

plaintiff NFB-VA and thus inappropriate for trial. *See* Fed. R. Evid. 403. For these reasons, the Court should preclude Defendants from asking about the allegations in this lawsuit.

CONCLUSION

For the foregoing reasons, this Court should preclude Defendants from offering, or eliciting on cross-examination, any irrelevant and prejudicial evidence about (1) Plaintiffs' criminal histories; (2) Plaintiffs' prison disciplinary infractions or other alleged "bad acts;" (3) Plaintiffs' alleged drug use; (4) Plaintiffs' alleged gang affiliations; and (5) allegations of sexual harassment at the National Federation of the Blind.

Dated: May 6, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May 2024, I filed the foregoing electronically with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing ("NEF") to the following:

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I hereby certify that I will mail the foregoing document by U.S. Mail and electronic mail to the following non-filing user:

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