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 DEFENDANT FROM INTRODUCING EVIDENCE OF GRIEVANCE REPORTS AT TRIAL

Plaintiffs submit this motion *in limine* in order to preclude Defendants from introducing into evidence "grievance reports" that purport to summarize Plaintiffs' administrative grievances for purposes of Defendant's failure-to-exhaust defense.

PRELIMINARY STATEMENT

In this action under the Americans with Disabilities Act and Rehabilitation Act, seven Plaintiffs are alleging that the Virginia Department of Corrections ("VDOC") is failing and has failed to provide legally-required auxiliary aids and accommodations for blind prisoners.

Throughout this case (including in its summary judgment briefing), Defendant has relied on "grievance reports" to support its argument that Plaintiffs failed to exhaust administrative remedies. These grievance reports are attempts to characterize other documents and are thus inadmissible under the best evidence rule of Federal Rule of Evidence 1002. The grievance reports are also offered for the truth of their summaries of Plaintiff's grievances and are thus inadmissible hearsay in violation of Federal Rule of Evidence 802.

ARGUMENT

Defendant has indicated that it intends to introduce into evidence "grievance reports" (prepared by unidentified VDOC officials) that purport to list and summarize the contents of Plaintiffs' administrative grievances. Plaintiffs have repeatedly challenged these grievance reports as omitting grievances and mischaracterizing the scope of the grievances that they do contain. Fortunately, Federal Rules of Evidence 1002 and 802 bar the admission of the grievance reports.

I. The Grievance Reports are Inadmissible Under the Best Evidence Rule of Federal Rule of Evidence 1002.

Federal Rule of Evidence 1002 (which codifies the so-called "best evidence rule") states that "[a]n original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise." Fed. R. Evid. 1002. Federal Rule of Evidence

1004 provides exceptions to the best evidence rule, stating that "[a]n original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:

> **(a)** all the originals are lost or destroyed, and not by the proponent acting in bad faith;
> **(b)** an original cannot be obtained by any available judicial process;
> **(c)** the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or
> **(d)** the writing, recording, or photograph is not closely related to a controlling issue."

Fed. R. Evid. 1004. Writings require special consideration under the Federal Rules because "precision in presenting to the court the exact words of the writing is of more than average importance, particularly as respects operative or dispositive instruments, . . . since a slight variation in words may mean a great difference in rights." *United States v. Buchanan*, 604 F.3d 517, 522–23 (8th Cir. 2010) (quoting *United States v. Duffy*, 454 F.2d 809, 811 (5th Cir. 1972)). Because grievances have the potential to determine the ultimate scope of a prisoner's case, they represent one class of the "dispositive instruments" that the Eight Circuit identified as being one of the motivating factors behind the adoption of the best evidence rule. Plaintiffs have the right to be judged according to their own words, not another person's characterization of those words.

At summary judgment, Defendant argued that Plaintiffs had failed to exhaust their administrative remedies, relying primarily on the declarations of the law librarians at Deerfield and Greensville. *See* ECF 210-22 (Phillips Decl.); ECF 210-24 (DeBerry Aff.). These declarations claim that the Plaintiffs failed to exhaust various claims by comparing the allegations in Plaintiffs' Complaint to the contents of VDOC's grievance reports. *See, e.g.,* ECF 210-24 at ¶13–¶18. But the grievance reports attached to each declaration are not compilations of each Plaintiff's actual, filed grievances—rather, the reports contain a "summary/addendum" for each logged grievance that is clearly written by a VDOC official.

For example, one Level II grievance lists as its summary: "**You state** that an ADA accommodation request was put in for markings to various landmarks in the pod from your bunk and only one strip has been done and you are waiting for an evaluation to be completed for more markings." ECF 210-24 at 164 (emphasis added). This language clearly does not state verbatim the contents of Mr. McCann's grievance; Mr. McCann would hardly refer to himself as "you," for example. Yet Defendant attempts to use this "summary" to conclusively establish the scope of Mr. McCann's grievance. Ms. DeBerry claims that Mr. McCann "did not exhaust his administrative remedies" with regard to his allegation "[t]hat correctional officers have pulled up parts of the tape on the floor, breaking Mr. McCann's path from his bed to key pod areas." ECF 210-24 at ¶34(23). Plaintiffs dispute the notion that the law required Mr. McCann to separately exhaust each of the dozens of comically narrow incidents that Ms. DeBerry outlines in her declaration. But even under Defendant's crabbed reading, the question of whether Mr. McCann's grievance covered, not only the failure to put down floor tape, but also the pulling up of floor tape, would depend on the wording Mr. McCann used in his grievance—not the wording that an unnamed VDOC official used in summarizing Mr. McCann's grievance.

As the proponent of the grievance reports, VDOC has the burden to demonstrate that an exception to the best evidence rule, such as the loss or destruction of the original documents, applies. *Warden v. PHH Mortg. Corp.*, 799 F. Supp. 2d 635, 642–43 (N.D.W. Va. 2011) (citing *Sellmayer Packing Co. v. Commissioner*, 146 F.2d 707, 710 (4th Cir. 1944)). VDOC has not done so. The prison's own policy requires that Plaintiffs turn their original grievances over to Defendant's custody, so VDOC is the only party with control of those documents. Even if Defendant could meet its burden to show that the original grievances were lost or destroyed, it would not only raise the question of whether VDOC acted in bad faith by losing or destroying

them (since these documents were important to prisoners who are currently suing VDOC) but it would also demonstrate the overall inadequacy of VDOC's record-keeping system, which Plaintiffs have already challenged. *See* Pls.' Opp'n. to Defs.' Mot. for Summ. J. at 16–17, 35.

For those reasons, the best evidence rule of Federal Rule of Evidence 1002 bars use of the grievance reports at trial in support of Defendant's failure-to-exhaust defense.

II. The Grievance Reports Are Inadmissible Hearsay.

The grievance reports are also inadmissible for the independent reason that they are hearsay. "Hearsay" is a statement that "the declarant does not make while testifying at the current trial or hearing" and "a party offers into evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c). "Hearsay is not admissible" unless its admission is provided for by a federal statute, the Federal Rules of Evidence, or other rules proscribed by the U.S. Supreme Court. Fed. R. Evid. 802.

As noted above, the grievance reports include statements by unnamed VDOC officials who are not testifying in this case (neither Ms. DeBerry nor Ms. Phillips testifies to having authored any part of the grievance reports in their written submissions). These statements are listed as a "summary/addendum" of each grievance that is logged in the report. Defendant is offering the grievance reports as evidence that Plaintiffs failed to exhaust administrative remedies, which means that the documents are only relevant if the summaries included are true accounts of the contents of Plaintiffs' summaries. Accordingly, they are offered for the truth of the matter asserted (that the listed language is a "summary" of Plaintiffs' grievance) and prepared by someone who is not testifying at trial (the unnamed VDOC officials).

Nor has Defendant has not laid the proper foundation for the grievance reports to be admitted as business records. A "record of an act, event, condition, opinion, or diagnosis" may be admitted despite being hearsay if:

> **(A)** the record was made at or near the time by—or from information transmitted by—someone with knowledge;
> **(B)** the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
> **(C)** making the record was a regular practice of that activity;
> **(D)** all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
> **(E)** the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Fed. R. Evid. 803(6). The DeBerry and Phillips declarations fail on every one of the points above. There is no testimony concerning which VDOC officials prepare the summaries in the grievance reports, when they are prepared, whether they are maintained in regularly conducted activity, or that the procedure itself is trustworthy. Without such a foundation, the Court cannot admit the grievance reports as business records.

In fact, the Fourth Circuit has made clear that records prepared in anticipation of litigation are especially inappropriate subjects of the business records exception. Because the Prison Litigation Reform Act requires that all prisoners exhaust their administrative remedies, prison officials are on notice that any grievance is a potential lawsuit in the making and any summary is being prepared in anticipation of litigation. "The absence of trustworthiness [for purposes of the business records exception] is clear . . . when a report is prepared in the anticipation of litigation because the document is not for the systematic conduct and operations of the enterprise but for the primary purpose of litigating." *Certain Underwriters at Lloyd's, London v. Sinkovich*, 232 F.3d 200, 204–05 (4th Cir. 2000) (affirming district court decision to exclude report prepared in anticipation of litigation under the business records exception). Therefore, VDOC's report

characterizing grievances that might lead to liability for VDOC is, like all documents prepared in anticipation of litigation, "dripping with motivations to misrepresent." *Id.* at 204 n.2 (quoting *Hoffman v. Palmer,* 129 F.2d 976, 991 (2d Cir. 1942)).

Nor can Defendant introduce evidence that the *absence* of a grievance from these grievance reports is proof that Plaintiffs never filed or fully exhausted a grievance. Evidence that a matter is *not* included in a business record is only admissible in federal court if:

> **(A)** the evidence is admitted to prove that the matter did not occur or exist;
> **(B)** a record was regularly kept for a matter of that kind; and
> **(C)** the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

Fed. R. Evid. 803(7). Defendant's witnesses Ms. DeBerry and Ms. Phillips base their conclusions regarding non-exhaustion on the fact that VDOC's grievance reports contain no summaries that they characterize as corresponding to the allegations at issue. Yet Plaintiffs have already showed that Defendant's record-keeping is not trustworthy, both because it omits grievances that Plaintiffs testified they fully exhausted (*see, e.g.,* Pls.' Opp'n. to Defs.' Mot. for Summ. J. at 17 ("Mr. Courtney testified that he filed a grievance regarding the lighting in his cell and 'appeal[ed] that all the way up,' yet that appeal is not noted in VDOC's Grievance File and Grievance Report")) and because Defendant's own custodians overlooked relevant grievances for months during discovery after falsely certifying a production of such grievances as complete. (*Id*. at 33–35). Because these circumstances indicate a lack of trustworthiness on the part of VDOC's creation and maintenance of the grievance reports, this Court should bar their admission into evidence on the grounds that they constitute inadmissible hearsay.

CONCLUSION

For the foregoing reasons, this Court should preclude Defendant from introducing grievance report documents as evidence at trial in support of Defendant's failure-to-exhaust defense.

Dated: May 6, 2024

Respectfully submitted,

/s/ Samantha Westrum
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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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