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

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

Plaintiffs,

v. Case No. 3:23cv127

VIRGINIA DEPARTMENT OF CORRECTIONS,

Defendant.

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION *IN LIMINE*

The Virginia Department of Corrections ("VDOC" or "Defendant"), by counsel, submits this Memorandum in support of its Motion *In Limine*. In support of its Motion, VDOC includes its Second, Third, and Fourth Sets of Requests for Production of Documents that were propounded to the Plaintiffs in this action, and the Plaintiffs' First Amended Rule 26(A) Initial Disclosures, as Exhibits 1, 2, 3, and 4, respectively.

BACKGROUND

This case has been brought by four current VDOC inmates, two former inmates, and one non-profit organization, regarding various accommodations that the incarcerated Plaintiffs allege that they were denied for their vision impairments while they were housed at Deerfield Correctional Center ("Deerfield") and Greensville Correctional Center ("Greensville"). This action currently proceeds on the Plaintiffs' Amended Complaint, in which the Plaintiffs bring claims under the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act ("RA") against VDOC. (*See* Am. Compl., ECF No. 136.) This case is set for a jury trial to begin on May 20, 2024. The Plaintiffs have moved for Partial Summary Judgment in this action

and VDOC has moved for Summary Judgment in full. (ECF Nos. 189, 209.) At this time, these Motions are pending.

In anticipation of the scheduled jury trial, VDOC now moves to exclude or limit the Plaintiffs' use of certain evidence at trial. Specifically, VDOC requests that the Court enter an order implementing the following restrictions: (1) to exclude evidence related to documents that were produced by the Plaintiffs on April 29, 2024 and May 6, 2024, over two months after the close of discovery in this case; (2) to exclude evidence about any alleged failure to accommodate the Plaintiffs that occurred outside the statute of limitations in this action; (3) to exclude evidence from, or about, any of the Plaintiffs who have been dismissed from this case prior to trial; and (4) to allow equal time during the trial for the presentation of the Plaintiffs' case-in-chief and VDOC's case-in-chief.

ARGUMENT AND AUTHORITIES

I. Evidence related to the documents produced by the Plaintiffs on April 29, 2024 and May 6, 2024 should be excluded.

Throughout the discovery phase of this litigation, VDOC propounded Requests for Production of Documents to the Plaintiffs requesting the production of the documents that support the Plaintiffs' claims in this case. (*See* Exs. 1, 2, and 3.) Discovery in this action closed on February 23, 2024. (*See* ECF No. 108.) Nonetheless, on April 29, 2024—over two months after the close of discovery and on the very day that the Parties were ordered to designate discovery for trial—the Plaintiffs produced over 250 documents. Likewise, on May 6, 2024—the day that the Plaintiffs were required to file their Witness and Exhibit List—the Plaintiffs produced another set of documents. The documents produced on April 29th and May 6th appear to include grievance documents, Facility Requests, Requests for Reasonable Accommodation forms, and other documents relating to the Plaintiffs that date as far back as 2018. The documents that were

produced on April 29th are Bates Stamped as "Shaw 000001–8," "McCann 000146–200" and "Hajacos 000001–200." The Plaintiffs have designated these documents for trial in their discovery designations and have included many of them on their Exhibit List. (*See* ECF Nos. 301, 314.) The documents that were produced on May 6th are Bates Stamped as "McCann 000201–220" and likewise are included on the Plaintiffs' Exhibit List. (*See* ECF No. 314.) Despite that these documents are responsive to VDOC's Requests for Productions (*see* Exs. 1, 2, and 3), the Plaintiffs did not timely produce them.

Further, the Plaintiffs last updated their Initial Disclosures in this case on September 25, 2023. (Ex. 4.) In that disclosure, the Plaintiffs stated that "Counsel is in the process of obtaining documents from Plaintiffs—most, if not all, of which are accessible to the Defendant through other means. Documents and information, when available, will be provided in accordance with Fed R. Civ. P. 26(e)(1)." Plaintiffs never further supplemented their disclosures to identify or describe the documents that they intended to use to support their claims in this action.

Under Rule 26(e)(1), a party has a duty to supplement its initial disclosures and discovery responses to requests for production of documents. Fed. R. Civ. P. 26(e)(1). Accordingly, Rule 37(c)(1) provides that "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." "Supplementations after the close of discovery do not satisfy Rule 26(e) when the party was able to serve the supplement sooner." *Willmore v. Savvas Learning Co. LLC*, 344 F.R.D. 546, 563 (D. Kan. 2023) (citation omitted).

Here, two months after the close of discovery, the Plaintiffs produced documents that date as far back as 2018 and that are responsive to VDOC's Requests for Production. The Plaintiffs

have designated many of these documents for trial and have included them on their Exhibit List. However, the Plaintiffs did not produce these documents in a timely fashion, as discovery closed in this action on February 23, 2024. Further, Plaintiffs never updated their Rule 26 Disclosures to identify or describe any of these documents that they were planning to untimely produce. Accordingly, the documents which were produced for the first time on April 29, 2024 and May 6, 2024, and evidence related to them, should be excluded at trial. *See Willmore*, 344 F.R.D. at 563 (excluding documents produced after the close of discovery under Rule 26(e)).

II. Evidence about any failure to accommodate that falls outside the statute of limitations should be excluded.

As argued in VDOC's Motion for Summary Judgment, any claim that accrued prior to the one-year statute of limitations governing ADA and RA cases is barred in this case. (ECF No. 210, at 43-44, 50-52, 54.) Accordingly, any failure to accommodate claim that accrued before February 15, 2022 (one year before the filing of the Plaintiffs' initial Complaint) is barred, and evidence of any accommodation that was requested and not provided outside this limitations period should be excluded at trial, so long as the request was not made or denied again within the limitations period. Evidence of any failure to accommodate that occurred outside the statute of limitations is irrelevant, would be unfairly prejudicial to VDOC, and would confuse the jury.

Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence," and if "the fact is of consequence in determining the action." Fed. R. Evid. 401. Further, Rule 403 grants the Court discretion to exclude otherwise admissible 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.

The inquiry for the jury in this case is whether VDOC has reasonably accommodated the incarcerated Plaintiffs during the one-year limitations period governing this case. Relevant evidence to this inquiry is the Plaintiffs' Requests for Reasonable Accommodation forms, grievance documents, and other documents and testimony about what accomodations the Plaintiffs requested, received, and/or were denied within the limitations period. Evidence about accommodations that were requested and/or denied years *prior* to the statute of limitations in this case is irrelevant to the jury's inquiry. Although the Plaintiffs have argued that their claims are subject to the continuing violation doctrine (ECF No. 232, at 49), as explained by the Fourth Circuit, "[t]he continuing-violation doctrine applies to claims based upon a defendant's ongoing policy or pattern of discrimination rather than discrete acts of discrimination." *Hill v. Hampstead Lester Morton Court Partners LP*, 581 Fed. App'x 178, 181 (4th Cir. 2014) (citations omitted). "[A] defendant's failure to accommodate constitutes a discrete act rather than an ongoing omission. . . . Plaintiffs' claims premised upon acts that predate" the governing statute of limitations are time-barred. *Id*. "A plaintiff who renews a request for a previously denied accommodation may bring suit based on a new discrete act of discrimination if the [defendant] again denies [the] request, and the subsequent denial carries its own, independent limitations period." *Id*.

Here, evidence of any alleged failure to accommodate the incarcerated Plaintiffs prior to the one-year statute of limitations governing this case should be excluded, so long as that failure was not repeated within the limitations period. Allowing evidence of requests and/or denials of accomodations that occurred outside of the limitations period is irrelevant to the jury's inquiry.

Similarly, allowing evidence about any alleged failure to accommodate that occurred outside the limitations period would be prejudicial to VDOC and confusing to the jury. In this

case, the jury will be tasked with deciding whether VDOC acted reasonably or not when addressing specific accomodations for the Plaintiffs. It would be prejudicial to VDOC if the jury were to hear about additional, unrelated accommodation requests that are not directly at issue. This concern is compounded by the fact that there are multiple Plaintiffs in this case and that multiple accomodations will be addressed at trial. It is unlikely that the jury will be able to keep track of what accomodations are actually at issue, or which fall within the limitations period, if multiple Plaintiffs put forth evidence of accommodation requests and/or denials that occurred years prior. Evidence of any alleged failure to accommodate made outside the statute of limitations should be excluded on the basis that such evidence is irrelevant, prejudicial to VDOC, and would be confusing to the jury.

III. Evidence from, or about, any of the Plaintiffs who have been dismissed prior to trial should be excluded.

VDOC further requests that the Court exclude evidence from, or about, any Plaintiff who has been dismissed from this action by the time of trial as irrelevant, prejudicial to VDOC, and confusing to the jury. As stated, evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence," and if "the fact is of consequence in determining the action." Fed. R. Evid. 401. And, in this case, specifically, "Title II requires public entities to engage in an individualized inquiry when determining whether an accommodation is reasonable." *Wright v. New York State Dep't of Corr.*, 831 F.3d 64, 77 (2d Cir. 2016) (citation omitted).

Here, the inquiry for the jury at trial will be whether VDOC has reasonably accommodated the individual Plaintiffs who remain in this action after summary judgment. Evidence of a failure to accommodate any Plaintiff who has been dismissed from this action is irrelevant to the jury's inquiry. This is particularly true as this is not a class action case. Although

the Plaintiffs have argued that they seek "systematic relief" from VDOC in this case, as has been explained previously, such relief is not available to the Plaintiffs under the Prison Litigation Reform Act ("PLRA"). (*See* ECF No. 303, at 1-3 (explaining why systemic relief is not available to the Plaintiffs in this action under the PLRA)).[1] Therefore, evidence about VDOC's individualized decisions for non-Plaintiff(s) at the time of trial is irrelevant and should be excluded.

Even if the Court could find that evidence of VDOC's alleged failure to accommodate any of the Plaintiffs that are dismissed prior to trial is relevant, that evidence nonetheless should still be excluded because any probative value would be outweighed by its prejudicial effect and would be confusing to the jury. Admission of extrinsic evidence about non-Plaintiff inmates at trial would require VDOC to address allegations wholly unrelated to the accomodations actually at issue and could divert the jury's focus from determining the facts of the case. Moreover, evidence about non-Plaintiffs would essentially create trials within a trial in order for the jury to determine whether VDOC's individual accommodation decisions were reasonable for each person. Because these risks outweigh the minimal probative value that any such evidence would have, VDOC requests that the Court exclude evidence about, or from, any of the Plaintiffs who have been dismissed from this action by the time of trial.

[1] As explained in VDOC's Reply in Support of its Motion *In Limine* to Exclude the Plaintiffs' Expert Testimony, broad systematic injunctive relief is not available to any of the Plaintiffs here, including the National Federation of the Blind of Virginia ("NFB-VA"). As explained by the Court, the NFB-VA has standing to seek injunctive relief for its members. *Nat'l Fed'n of the Blind of Virginia v. Virginia Dep't of Corr.*, 2023 WL 6812061, at *8 (E.D. Va. Oct. 16, 2023). However, the only inmate NFB-VA members which the Plaintiffs have identified in this litigation are Plaintiffs McCann, Shabazz, Shaw, and Stravitz. (Amen. Compl., ECF No. 136 ¶ 17.) Because there is no evidence here of any other NFB-VA members in VDOC custody, NFB-VA's standing is limited to that of these member-Plaintiffs. Accordingly, as detailed herein, should Plaintiffs McCann, Shabazz, Shaw and/or Stravitz be dismissed prior to trial, evidence of VDOC's alleged failure to accommodate them is irrelevant, prejudicial to VDOC, and would be confusing to the jury at trial.

IV. VDOC requests that the Court allow equal time for the Plaintiffs' and Defendant's case-in-chief.

Finally, VDOC respectfully requests that the Court allow an even distribution of time for the Plaintiffs and the Defendant to present their case-in-chief. This case is currently set for a week-long jury trial, to begin on May 20, 2024. Plaintiffs, of course, will begin their case-in-chief on Monday, May 20th. In the interest of fairness, VDOC requests that it be allowed to begin its case-in-chief no later than midday Wednesday, May 22nd, with VDOC finishing its case by midday Friday, May 24th. Therefore, the Plaintiffs will have approximately two days to present their case-in-chief, VDOC will have approximately two todays to present its case-in-chief, and the Plaintiffs will still have time on Friday, May 24th for rebuttal. In the interest of fairness, VDOC respectfully requests that the Court proportion even time for the Parties to present their cases at the scheduled jury trial.

CONCLUSION

For the reasons stated herein, VDOC respectfully requests that the Court exclude certain evidence in this case, and allow for an even distribution of time for the Parties to present their case-in-chief at trial.

Respectfully submitted,

VIRGINIA DEPARTMENT OF CORRECTIONS.

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of May, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to all counsel of record for the Plaintiffs.

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