

**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' OPPOSITION TO DEFENDANT'S MOTION *IN LIMINE*

Plaintiffs submit this opposition to Defendant's omnibus motion *in limine*.

ARGUMENT

- I. The Documents Produced By Plaintiffs On April 29, 2024 And May 6, 2024 Should Not Be Excluded.

Defendant seeks to exclude two sets of documents produced by Plaintiffs after the close of discovery in this case: those produced on April 29, 2024, and those produced on May 6, 2024. Defendant fails to note that these documents fall into two categories: documents that were created after the close of discovery and documents that were discovered after the close of discovery.

In seeking to create the impression that Plaintiffs have violated their discovery responsibilities, Defendant fails to acknowledge that many of the documents on their face were created after the close of discovery. This includes grievances filed by Mr. McCann in April 2024, which show prison staff refusing to assist with matters related to his accommodations and are directly relevant to Mr. McCann's claims in this case.

The second category of documents produced by Plaintiffs were inadvertently not produced by Plaintiffs during discovery. Plaintiffs regret the error and produced these documents as soon as the omission was discovered. However, *all* of these documents are documents that the Individual Plaintiffs had previously filed with VDOC (as acknowledged by the markings on the documents themselves) and should therefore already be a part of Defendant's grievance files. Some of them are duplicates of documents that Defendant produced to Plaintiffs. Others, however, are documents (including grievance documents) that the Individual Plaintiffs filed with Defendant but Defendant failed to produce to Plaintiffs in its productions. Thus, either Defendant violated its *own* discovery obligations by failing to produce them to Plaintiffs or its procedures for storing and cataloguing prisoner grievances—which it has repeatedly represented to this Court are effective—are as flawed

as Plaintiffs claim. Either way, Defendant had previously received these documents and is in no way prejudiced by Plaintiffs' late production of them.

Accordingly, this Court should not exclude the documents produced by Plaintiffs on April 29, 2024 and May 6, 2024.

II. VDOCs Violations of the ADA and Section 504 that Fall Outside The Statute Of Limitations Are Still Relevant To This Case.

Citing no cases in which a court has adopted its argument, Defendant seeks to exclude all evidence of Defendant's violations of the ADA and Section 504 outside the statute-of-limitations period. However, "the statute of limitations does not bar [a party] from using the prior acts [outside the statute of limitations] as background evidence in support of a timely claim." *Blakes v. Gruenberg*, No. 116CV00240GBLMSN, 2016 WL 8731784, at *6 (E.D. Va. July 29, 2016) (quoting *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002)). "Generally, the Court may consider facts and events occurring outside the limitations period as relevant to timely claims, even if those events could not be the subject of a timely claim." *Leckie v. Bd. of Educ. of Montgomery Cnty.*, No. CV TDC-23-0299, 2023 WL 8809310, at *3 (D. Md. Dec. 19, 2023) (citing *United Air Lines v. Evans*, 431 U.S. 553, 558 (1977) and *Shervin v. Partners Healthcare Sys., Inc.*, 804 F.3d 23, 47-48 (1st Cir. 2015)).

Defendant has indicated that it intends to defend against Plaintiffs' timely claims with evidence about its systems and procedures, arguing that they are adequate to accommodate blind prisoners in its care (including Plaintiffs). For example, in employment discrimination cases, "past discrimination 'might in some circumstances support the inference that such discrimination continued, particularly where relevant aspects of the decision-making process [have] undergone little change.'" *Ndugga v. Bloomberg L.P.*, No. 1:20-CV-7464-GHW, 2023 WL 4744184, at *4 (S.D.N.Y. July 25, 2023) (quoting *Bazemore v. Friday*, 478 U.S. 385, 402 (1986) (Brennan, J.,

concurring)). Such is the case here, where the relevant processes have not changed since well before the February 2022 cut-off date proposed by Defendant. And because some of Plaintiffs' claims rely on the theory of a continuing violation, evidence of past failures to accommodate them or provide equally effective communication is particularly relevant to their claims regarding the harms that persist today.

Evidence of Defendant's failures to accommodate outside the statute of limitations is also particularly relevant in this case because Plaintiffs bear the burden of demonstrating deliberate indifference by Defendant. Events outside the statute of limitations "can still be considered in deciding whether there was a policy of deliberate indifference that caused" the events contained in the timely claims. *Golodner v. City of New London*, No. 3:14-CV-173 (MPS), 2016 WL 1048746, at *6 (D. Conn. Mar. 11, 2016). The earlier and more often VDOC was informed that the Plaintiffs are blind and needed accommodations, yet VDOC failed to provide them, the more support there is for a finding of deliberate indifference.

While Defendant argues that jurors will be confused by evidence outside the statute of limitations, any actual risk of juror confusion is minimal. In this case, as in others where courts admitted evidence outside the statute of limitations, "[a]ny limited prejudice or likelihood of confusing the jury will be addressed by the jury instructions laying out the claims and theories of liability." *Long Beach Unified Sch. Dist. v. Santa Catalina Island Co.*, No. 2:19-CV-01139, 2024 WL 1639925, at *7–8 (C.D. Cal. Feb. 14, 2024) (denying motion to exclude evidence of events outside the statute of limitations). Because Plaintiffs are entitled to present relevant evidence in support of their case and the risks of a properly-instructed jury misunderstanding the evidence are low, this Court should deny Defendant's motion to exclude evidence outside the statute of limitations.

III. Evidence From Former Plaintiffs Is Relevant In This Case.

Again, citing to no cases in which a court has adopted its argument, Defendant seeks to exclude “all evidence from, or about” Mr. Shaw and Mr. Stravitz, whose claims have now been dismissed from this case. Because Mr. Shaw and Mr. Stravitz have relevant testimony for the claims at issue in this case, they are appropriate fact witnesses. “There is no *per se* rule that evidence of discrete acts of discrimination or retaliation towards non-parties is irrelevant or unduly prejudicial; instead, the court must determine admissibility ‘in the context of the facts and arguments in a particular case.’” *Belvin v. Electchester Mgmt., LLC*, 635 F. Supp. 3d 190, 203 (E.D.N.Y. 2022) (quoting *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 387 (2008)). “When such evidence is sufficiently similar to the claims raised in the case—for example, when the conduct was engaged in by the same actor, or the actions occurred close in time or space to the plaintiff’s experience—it is relevant.” *Id.* (citing *Schneider v. Regency Heights of Windham, LLC*, No. 14-CV-217 (VAB), 2016 WL 7256675, at *12 (D. Conn. Dec. 15, 2016)). The same is true for claims under the ADA. The fact that they were both formerly plaintiffs in this action is irrelevant and is certainly no ground to categorically exclude them from testifying in this case.

As noted in the previous section, Defendant’s systems and procedures are directly at issue in the live claims before this Court. Mr. Stravitz and Mr. Shaw, as blind prisoners with direct experience of these systems and procedures, possess evidence relevant to these systems and procedures. Excluding them from trial merely because they were previously plaintiffs in this case would deprive the jury of relevant information and prejudice Plaintiffs’ case.

As with events outside the statute of limitations above, the testimony of Mr. Stravitz and Mr. Shaw is also relevant to show Defendant’s deliberate indifference, which Plaintiffs bear the burden of demonstrating to the jury. Non-party evidence is appropriate for this purpose. *See Anderson v. Sutton*, No. 14 CIV. 1272, 2016 WL 1258585, at *4 (N.D. Ohio Mar. 31, 2016)

(admitting inmate grievance forms authored by non-parties into evidence in case against defendant corrections officers to show “whether the [defendants] were on notice about [the complaints described therein]”).

Because Mr. Stravitz and Mr. Shaw have relevant evidence and Defendant has failed to show grounds for excluding them from testifying, this Court should deny Defendant’s motion to exclude their testimony.

IV. Plaintiffs Require More Time In Their Case-In-Chief Than Defendant.

Citing no cases or law, Defendant moves this Court to order that Defendant and Plaintiffs present their cases in equal time. Because this order would unfairly prejudice Plaintiffs, the Court must deny it.

A district court may set time limits for each party to present evidence in a civil trial, but “district courts should not adopt this practice as a ‘matter of course.’” *Raynor v. G4S Secure Sols. (USA), Inc.*, 805 F. App’x 170, 177–78 (4th Cir. 2020) (quoting *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 610 (3d Cir. 1995)). However, “to impose arbitrary limitations, enforce them inflexibly, and by these means turn a federal trial into a relay race is to sacrifice too much of one good—accuracy of factual determination—to obtain another—minimization of the time and expense of litigation.” *McKnight v. Gen. Motors Corp.*, 908 F.2d 104, 115 (7th Cir. 1990) (holding that “[i]f [the party denied sufficient time] had preserved the issue of undue curtailment of trial time, we would reverse and order a new trial”); accord *Raynor* at 177 (collecting cases). “Efficiency is an important value in our judicial system, but it is not the only one. There comes a point at which the pursuit of trial efficiency undermines the fundamental fairness of a trial.” *Raynor*, 805 F. App’x at 178.

In this case, five Plaintiffs bear the burden of proof on multiple, complex elements of their claims. Where a party bears the burden of persuasion on multiple claims is relevant to the analysis

of whether a court's time limits are reasonable. *See id.* at 179. Defendant, a single entity, bears the burden only on its affirmative defenses to those claims. At least one of these, the failure-to-exhaust defense, would involve extensive evidentiary overlap with Plaintiffs' claims of discrimination in Defendant's administration of the grievance process. Defendant would thus be required to spend less of its own time establishing the basics of this process. This weighs against equal time for the two parties.

Giving equal time to each side is especially inappropriate in this case because many of Plaintiffs' witnesses, unlike Defendant's witnesses, are either incarcerated or have disabilities, or both. Those witnesses who suffer from visual disabilities may need assistance in reaching the witness box and taking the oath (or, at a minimum, may take longer to do so than the sighted witnesses proffered by Defendant). While Defendant, the federal marshals, and courthouse security have not definitively stated what security measures will be taken when incarcerated witnesses have to take the stand, any delays that are caused by such security measures would only count against Plaintiffs' case. Offering the parties equal time according the clock would thus have the effect of depriving Plaintiffs of equal time to present their case.

Defendant's proposal to stop Plaintiffs' case-in-chief "no later than midday Wednesday, May 22nd," (Defs.' Mot. in Limine at 8), also gives *Defendant* the ability to determine how long Plaintiffs' case-in-chief lasts through the length of its cross examinations. While Plaintiffs would oppose any rigid time limits placed on the parties before trial, they should at a minimum be provided with three days to present their case-in-chief (in addition to a rebuttal case of half a day) with any questioning by Defendant counting against *Defendant's* time, not Plaintiffs'. This much time is necessary to ensure that Plaintiffs possess a fair trial.

CONCLUSION

For the foregoing reasons, this Court should deny Defendant's Motion in *Limine*.

Dated: May 13, 2024

Respectfully submitted,

/s/ Eve L. Hill

Eve L. Hill (VSB No. 96799)
Monica R. Basche (*pro hac vice*)
Jacqueline Cadman (*pro hac vice*)
Jamie Strawbridge (*pro hac vice*)
Jessica P. Weber (*pro hac vice*)
Brown, Goldstein & Levy, LLP
120 E. Baltimore Street, Suite 2500
Baltimore, Maryland 21202
(410) 962-1030
ehill@browngold.com
mbasche@browngold.com
jcadman@browngold.com
jstrawbridge@browngold.com
jweber@browngold.com

Matthew W. Callahan (VSB No. 99823)
Samantha Westrum (VSB No. 98453)
Vishal Agraharkar (VSB No. 93265)
American Civil Liberties Union of Virginia
701 E. Franklin Street, Suite 1412
Richmond, Virginia 23219
(804) 519-5366
swestrum@acluva.org
vagraharkar@acluva.org

Rebecca Herbig (VSB No. 65548)
disAbility Law Center of Virginia
1512 Willow Lawn Drive, Suite 100
Richmond, Virginia 23230
(204) 255-2042
Rebecca.Herbig@dlcv.org

CERTIFICATE OF SERVICE

I hereby certify that on this 13th 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:

Ann-Marie C. White Rene (VSB No. 91166)
Timothy E. Davis (VSB No. 87448)
Andrew R. Page (VSB No. 80776)
Assistant Attorneys General
Office of the Virginia Attorney General
202 North 9th Street
Richmond, VA 23219
Telephone: (804) 786-0030
arene@oag.state.va.us
tdavis@oag.state.va.us
arpage@oag.state.va.us

Counsel for Defendant Virginia Department of Corrections

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

Armor Correctional Health Inc.
c/o Registered Agent
CT CORPORATION SYSTEM
4701 Cox Rd Ste 285
Glen Allen, VA 23060-6808

Pro Se Defendant

/s/ Eve L. Hill
Eve L. Hill (VSB No. 96799)