IN THE

SUPREME COURT OF THE UNITED STATES

FRANK JOHN RICHARD,

Petitioner,

-against-

O'BELL T. WINN, et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Frank J. Richard, #0601706

Carson City Correctional Facility

10274 Boyer Road

Carson City, Michigan

48811

QUESTIONS PRESENTED

1.) Does Fed. R. Civ. P. Rule 26 (a)(1)(B)(iv.) deny Initial Disclosure to incarcerated, pro se litigants, simply because they are not represented by counsel; thereby rendering the Confrontation and Equal Protection clauses found in the Fourteenth Amendment to the United States Constitution, unavailable to them?

2.) Applying the response for Question No. 1, when challenging the veracity of an affidavit[1], before summary judgment, did the deprivation caused by Rule 26 (a)(1)(B)(iv.) infringe upon the petitioner's right to petition the courts, for the redress of grievances, guaranteed by the First Amendment to the United States Constitution?

3.) Did the United States Court of Appeals, for the Sixth Circuit, err when it stated that the petitioner failed to argue the case of Reed-Bey v. Pramstaller[2], in the district court?

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[1]An affidavit written by Richard D. Russell, the Grievance Section Manager for the Michigan Dep't of Corrections, signed on March 14, 2022 was taken in "Good Faith" by the attorney for the defendants, Joseph Y. Ho. The district court cited "Authentication Language" as the basis for it's acceptance of this document.

[2]Cited by the petitioner in a Reply brief, filed on Dec. 5, 2022, as ECF No. 50(See Appendix D., [D.2], and preserved for appeallate review by Objection No. 6, on Jan. 11, 2023. as ECF No. 57 (See Apendix D. [D.3].

PARTIES

The Petitioner is Frank John Richard, a prisoner who is currently housed at the Carson City Correctional Facility, in Carson City, Michigan. The defendants are/were all located at the Saginaw Correctional Facility, in Freeland, Michigan. They are as follows: O'Bell T. Winn, former Warden, Thomas Haynes, former Prison Counselor (P.C.), Jodie Anderson, now Norman, former Residential Unit Manager (R.U.M.), now Administrative Aid, (A.A.), Michael Guerin,former Prison Counselor (P.C.), now Residential Unit Manager (R.U.M.), and Christoper LaBreck, Classification Director.

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Case law:

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DECISIONS BELOW

The decisions of the United States Court of Appeals for the Sixth Circuit are unreported. They are cited as: Richard v. Winn, et al., 2024 U.S. App. LEXIS 12922*, (6th Cir. May 29, 2024) a copy of which is attached in Appendix A to this petition as [A.1] and Rehearing, en banc Denied by: Richard v. Winn, et al., 2024 U.S. App. LEXIS 25669, (6th Cir. Oct. 10, 2024) a copy of which is attached in Appendix A to this petition as [A.2].

The Orders of the United States District Court for the Eastern District of Michigan are unreported as well. They are cited as: Richard v. Winn, et al., 2022 U.S. Dist. LEXIS 162185, (on Sept. 8, 2022)(ECF No. 32), Richard v. Haynes, et al., 2022 U.S. Dist. LEXIS 244164, (on Dec. 15, 2022)(ECF No. 53) and Richard v. Haynes, 2023 U.S. Dist. LEXIS 849, (on April 10, 2023) (ECF No. 68).

A copy of each are attached in Appendix B, sequentially as: [B.1], [B.2] and [B.3].

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on May 29, 2024. An Order denying a Petition for Rehearing, En Banc was entered on Oct. 10, 2024. Copies of these rulings are in Appendix A to this petition. They are marked as [A.1] & [A.2]. Jurisdiction is conferred by 28 U.S.C. § 1254 (1).

BASIS FOR FEDERAL JURISDICTION

This petition raises questions of the interpretations of the First and Fourteenth Amendments to the United States Constitution. The district court had jurisdiction under the general federal question, conferred by 28 U.S.C. § 1331.

As the complaint involves an incarcerated, honorably discharged, disabled veteran, who was deprived of federaly-funded rehabilative veteran's programing and disability benefits, the following federal statutes should apply:

5 U.S.C. § 551 en banc Federal Administrative Procedures Act.

29 U.S.C. § 794 Section 504 of the Rehabilitation Act.

42 U.S.C. § 1997 Civil Rights of Institutionalized Persons.

Prison Litigation Reform Act of 1996.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the deprivation of rights, conferred by the First Amendment to the United States Constitution, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and petition the government for redress of grievances.

This case also involves the deprevations of the Fourteenth Amendment to the United States Constitution, which in relevant part provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state they reside. No State shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce by appropriate legislation, the provisions of this article.

The preceding sections are also known as the Confrontation and Equal Protection Clauses of the Fourteenth Amendment.

STATEMENT OF THE CASE

The petitioner's complaint alledges that MDOC officals removed him from rehabilative veterans programing, a "high-paying" paid program[1], and transferred him to a differant facility. The motive for these actions was retaliation for speech, for the redress of grievances.

A grievance was filed for the extortion of the petitioner's signature onto a document titled, "Regaining Honor". This was a retro-active conditional agreement, to be signed by all of the incarcerated veteran residents of 800 unit @ Saginaw Correctional Facility. This was for participation in the Veterans Unit Program.

The petitioner signed the agreement under protest. He then wrote a letter to the Director of the MDOC, to complain of the above actions of the staff. The Step I Grievance, SRF 2018-06-0531-28B was how this issue was raised.

The retaliation that was promised, removal from the Veterans Program, back in May and June of 2018, was carried-out on Sept. 5, 2019. MDOC staff, under the pretext of a termination for cause, removed the petitioner from his dog-handler job and moved him into a differant unit. Three weeks later, the petitioner was transferred to a differant facility, in Muskegon, Michigan.

The insturment used to enact these retributions, was a MDOC

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[1]Blue Star Service Dogs, a P.T.S.D. therapy dog training program.

Prisoner Program and Work Evaluation, (CSJ-363)[2]. It contained falsehoods, non-posted rule violations, and was signed by the same person as both the Evaluator and Supervisor. All of these are violations of MDOC Policy Directives for Work Programs.

When the petitioner sent an institutional "kite" to the Classification Director, to request the removal of the document from his file, the reponse was "No". A Step I Grievance was filed for the **erroneous** work report and that the petitioner had been ordered to sign a blank work report. This was on the same day that the petitioner was transferred to Muskegon Correctional Facility, September 25, 2019.

No Step II Appeal was ever filed for the rejection at Step I because the prospective Step II Respondent would be the person who authorized the transfer, Warden O'Bell T. Winn. This would also be a violation of the MDOC Grievance Process. The Step I Respondent, was a witness/participant to the petitioner's firing. This violates the same policy directive as above.

At Step III of the process, the Respondent upheld the Step I **ruling.** This was Richard D. Russell, the Grievance Section Manager for the MDOC. He later claimed in an affidavit, that the reason for rejection was failure to file at Step II of the process. Acopy of this affidavit was included as an attachment in the petitioner's Motion for Sanctions[3], for the subornation of perjury by the attorney for the defendants. A Demand for the Production of Documents, referanced by the affiant, were cited.

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[2]This form, dated 9/5/2019, is in Appendix C., [C.1].

[3]Acopy of this Motion is included in Appendix C., [C.2].

Incarcerated, pro se litigants are not permitted early discovery or initial disclosure, to challenge such testimonial evidence. A motion to Hold in Abeyance for Discovery was filed, and Denied as Moot. As no other avenue for judical redress exists, the petitioner asks this panel for it's opinion.

REASONS FOR GRANTING THE WRIT

A.) The first question presented asks why an incarcerated, pro se litigant is not afforded the same rights to discovery, as one who is represented by a lawyer.[1] Why such a deprivation is made, should shock the members of this panel. Any penological rational for this rule can only be described as prejudical. Per 28 U.S.C.S. § 1915, Procedings in forma pauperis:

> ...identity of persons and seeking witnesses having informatition regarding inmate's claim, requesting oral conversations inmate had with prison employees regarding his complaint, requesting inmate to detail his damages, seeking correspondence alledgedly not mailed in violation of inmate's rights, seeking information as to inmate's efforts to re-mail disputed correspondence, and seeking identification of inmates legal procedings were subject to mandatory disclosure under Fed.R.Civ.P. Rule 26 (a)(1)(A)...

The Fourteenth Amendment to the United States Constitution, under Section 1, provides the due process to seek discovery. Why then does Fed.R.Civ.P. Rule 26 (a)(1)(B)(iv.) deprive an inmate, in pro se? The Prison Litigation Reform Act has no such provision. It applies to both pro se and those with a lawyer.

The First Amendment is supposed to guarantee a citizen's right to petition for redress and no government agency may infringe upon this.Please refer to Cain v. Lane, 857 F.2d

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[1] An affidavit that details the efforts of the petitioner to seek counsel, is included in Appendix C.,[C.2].

1139 (7th Cir. 1988);

> "pro se prisoner-litigants have the right under the First Amendment to investigate and document claims, including obtaining affidavits from other prisoners."

And John L. v. Adams, 969 F.2d 228, 235 (6th Cir. 1992):

> "states may not erect barriers that impede the right of access of incarcerated persons."

Under this logic, the submission of an affidavit, before discovery[2], should be subject to the rule regarding Initial Disclosure. Refer to Siggers v. Campbell, 652 F.3d 681 (6th Cir. 2011):

> "courts generally grant Rule 56 (d) motions to postpone summary judgment when a party files for a summary judgment very early in the procedings, before the parties have had an opportunity for discovery."

The petitioner moved for a Hold in Abeyance for Discovery on April 6, 2023. This was by Richard v. Haynes, (ECF No. 67). It was Denied as Moot by Judge Linda V. Parker, in Richard v. Haynes, U.S. Dist. LEXIS 849, April 10, 2023, (ECF No. 68).

B.) The **third** question presented to this court, asks whether or not an issue concerning the doctrine of stare decisis was followed by the lower courts. Did they ignore/overlook the precident established by published case law? The determination as to whether or not an incarcerated, pro se litigant exhausted administrative remedies, was raised as a defense.

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[2]See affidavit of Richard D. Russell, as an attachment to petitioner's Motion for Sanctions, in Appendix D., [D.1].

[3]Michigan Dep't of Corrections Policy Directive 03.02.130, to comport with: 42 U.S.C. § 1997(e) §§ (a); Porter v. Nussle, 534 U.S. 516, 122 S. Ct. 983, 152 L.Ed.2d 12 (2002):

The petitioner did not file a Step II Appeal, and instead moved on to the third and final step of the process. This was because the Warden who transferred the petitioner, could never be considered an "impartial decision-maker".

The state offical who acted as the Step III Respondent, upheld the ruling on the merits of the step I decision. The forgiveness for this omission, was opined in the case of Reed-Bey v. Pramstaller, 603 F.3d 322 (6th Cir. 2010), which states in part;

> "prison officals could not raise exhaustion defense when they decided prisoner's grievance on the merits despite it's procedural failings."

The petitioner cited Reed-Bey at 322, 325 by;

> "When prison officals decline to enforce their own procedural requirements and opt to consider otherwise-defaulted claims on the merits, so as a general rule will we."

and Reed-Bey at 325;

> "We do not 'second guess [a states] decision to overlook or forgive it's own procedural bar."[4]

These arguments were preserved for appellate review by Supplement to Objection No. 6, Plaintiff's Objection's, filed on Jan. 11, 2023 as (ECF No. 57).[5]

> "(PLRA) requires prisoners to complete prison administrative remedies before suing prison officals under federal law, because the exhaustion requirement was created "to reduce the quantity and improve the quality of prisoner's suits, to this purpose, Congress afforded corrections officals time and opportunity to address complaints internally before allowing the initiation of a federal case" [534 U.S. at 524-25]; PLRA applies to suits involving prison conditions, and the phrase "prison condition" applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong"[534 U.S. at 532].

[4] Petitioner's Reply of 12/5/2022 as (ECF No. 50), App. D., [D.2].

[5] Objection No. 6 is in Appendix D., [D.3].

The petitioner presented these citations to the Sixth Circuit Court of Appeals, in the case of No. 23-1429, and a Petition for Rehearing, En Banc. The panel cited a failure to argue Reed-Bey, in the district court as the reason for Denial. See para's 5 & 6 on Pg. 5 of the Order dated May 29, 2024, in the Appendix A., [A.1]. The Petition for Rehearing resulted in eleven justices affirming, with one who recussed herself. This is also in Appendix A., [A.2]. This is a palpable error.

A Ninth Circuit case, while having no weight in the home circuit of the petitioner, may be considered by this forum. The deprivation of Initial disclosure for an incarcerated pro se litigant was discussed. This petitioner asks this court to take these decisions into account.

Pulido v. Lunes, 2016 U.S. Dist. LEXIS 66904 (E.D. Cal. 2016),[6] cited Fed. R. Civ. P. Rule 16 (b)(3)(B)(i);

> "modify the extent of discovery."

This allowed a district court the wide latitude to permit a pro se litigant the opportunity to discover documents, the option to do so was from the prior case of Ollier v. Sweetwater Union High School Dist., 768 F.3d 843, 862 (9th Cir. 2014);[7]

> "a district court wide discretion in controlling discovery."

The Magistrate who ruled on this portion of the petitioner's Motion for Sanctions, did not exercise this alternative rule.

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[6]Is located in Appendix E. as [E.1].

[7]Is located in Appendix E. as [E.2].

C.) This case involves the deprivation of the rights of an honorably discharged, disabled veteran, because of his status as an incarcerated pro se litigant. The deprivations here denied him the ability to properly litigate his case. The right to early discovery, to challenge a confabulated affidavit, prevented the petitioner from obtaining redress. His losses were as follows;

Removal from a federally-funded rehabilative program, and to miss an appointment for a hearing test at a Veterans Administration Hospital.

On September 5th of 2019, the petitioner was removed from Veterans programing. This was done without a hearing, by the use of a MDOC Prisoner Program and Work Evaluation Form (CSJ-363). Then on September 25, 2019, he was transferred to a differant facility, in Muskegon, Michigan.

The first removal deprived the veteran/petitioner of a Veterans rehabilative program, known as the Veterans Unit Program at the Saginaw Correctional Facility in Freeland, Michigan.[9] The second transfer caused the petitioner to miss a hearing test at a V.A. facility. This resulted in a loss of a 10% disability benefit for tinnitus. The period of loss is between September 23, 2019 to October 7, 2021. (Board of Veterans Appeals Decision, Docket No. 240213-416239), in Appendix F., [F.1].

As rehabilative programing is involved, Section 504 of the Rehabilitation Act must be considered as the statute breached.

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[9]The petitioner, in addition to being removed from the Veterans Unit, lost a "paid-program". He was a dog-handler for Blue Star Service Dogs, a P.T.S.D. therapy dog training program, The petitioner is currently rated at 50% for this condition. This is per the Board of Veterans Appeals, on March 12, 2024, (Docket No. 230921-382108), Appendix F., [F.2].

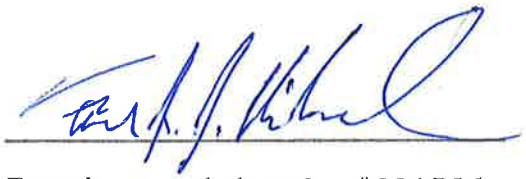
CONCLUSIONS

1.) As the deprivations complained of are the loss of veteran's rehabilative programing and V.A. disability benefits, special attention should be brought to bear for this portion of the petition.

2.) No law, regulation, or statute should ever impede a citizen's right to demand discoverable documents. A pro se litigant should be afforded the same rights and privileges as one who is represented by an attorney.[1] Fed. R. Civ. P. Rule 26 (a)(1)(B)(iv.) amounts to nothing less than class discrimination.

3.) At no time did the lower courts follow the precident set by Reed-Bey v. Pramstaller, with respect to the forgiveness of a procedural bar. The petitioner's timely citations of this case, and preservation of this issue, were ignored as well.

Respectfully submitted,



Frank J. Richard, #601706
Petitioner in Pro Se
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Carson City, MI 48811

Dated: Dec. 12, 2024

[1] See the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

IN THE

SUPREME COURT OF THE UNITED STATES

FRANK JOHN RICHARD,

-against-

O'BELL T. WINN, et al.,

APPENDIX FOR
PETITION FOR A WRIT OF CERTIORARI

Appendices [A.1] to [F.2]

APPENDIX

APPENDIX

A.

[A.1], Richard v. Winn, et al., 2024 U.S. App. LEXIS 12922*, (6th Cir. May 29, 2024)

[A.2], Richard v. Winn, et al., 2024 U.S. App. LEXIS 25669, (6th Cir. Oct. 10, 2024)

NOT RECOMMENDED FOR PUBLICATION

Rec'd on 6/3/24

No. 23-1429

FILED
May 29, 2024
KELLY L. STEPHENS, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANK JOHN RICHARD,	)	
	)	
Plaintiff-Appellant,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE EASTERN DISTRICT OF
O'BELL T. WINN, et al.,	)	MICHIGAN
	)	
Defendants-Appellees.	)	

ORDER

Before: LARSEN, NALBANDIAN, and READLER, Circuit Judges.

Frank John Richard, a Michigan prisoner proceeding pro se, appeals a district court judgment dismissing his civil rights action filed under 42 U.S.C. § 1983. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). For the following reasons, we affirm.

Richard sued five employees of the Michigan Department of Corrections (MDOC): Warden O'Bell T. Winn, Prison Counselors Thomas Haynes and Michael Guerin, Resident Unit Manager Jodie Anderson, and Classification Director Christopher LaBreck. The district court later granted Richard's motion to file an amended complaint, which became the operative pleading.

Richard alleged that on May 1, 2018, Winn told him and other military veteran inmates that they must sign "a 'Regaining Honor' agreement" during a meeting at the Saginaw Correctional Facility (SRF). Three days later, Haynes told Richard that if he did not sign the honor agreement, he would lose his prison job as a dog handler in the Veterans' Unit Dog Program and be moved to another prison unit. Richard signed the agreement "under protest" and complained to the MDOC director about Haynes's conduct.

On June 14, 2019, Haynes issued a work report about Richard. A few months later, Richard wrote a fake adoption notice for one of the dogs in the program and left it in his cell. Two days later, on September 5, 2019, Haynes showed Richard that adoption notice, in Guerin's presence, and asked if he wrote it. When Richard responded that he did so as a joke, Haynes told him to sign a blank work report, which he refused to do. Haynes terminated Richard's job in the dog program and moved him to another prison unit. A few days later, Richard asked LaBreck to remove the June 14 and September 5 work reports from his prison file, but LaBreck refused to do so. Richard was transferred to the Muskegon Correctional Facility (MCF) in late September 2019.

In February 2020, Richard was returned to SRF for a medical appointment. Although Anderson initially told Richard that he would not be staying at SRF, he remained at SRF due to COVID-19. Richard tried to get his dog-handler job back, but Assistant Resident Unit Supervisor Amy Novak did not hire him. She stated that he was "probably" not hired because of the September 5 work report in his prison file. Richard alleged that he exhausted his administrative remedies by filing a grievance regarding the September 5 work report and contacting the MDOC director, the Ombudsman's Office, Internal Affairs, and others.

Richard claimed that Winn retaliated against him by authorizing his transfer to MCF after he challenged the loss of his job and move to another prison unit and violated his free speech rights by threatening to retaliate against him if he did not sign the honor agreement; that Haynes violated his free speech rights by coercing him to sign the honor agreement, violated his due process rights by ordering him to sign a blank work report, and retaliated against him for exercising his free speech rights by terminating his job; that Guerin violated his free speech rights and denied him due process by responding to his grievance because he was not impartial; that Anderson violated his due process rights when reviewing Guerin's response to his grievance; and that LaBreck violated his due process rights by denying his request to remove two work reports from his prison file. He claimed that the defendants' conduct caused the denial of his disability claim for hearing loss, his removal from the dog program, and his inability to obtain a prison job and psychological treatment. He sought declaratory, injunctive, and monetary relief.

The defendants moved for summary judgment under Federal Rule of Civil Procedure 56(a), asserting that Richard failed to exhaust his administrative remedies. A magistrate judge recommended that the district court grant in part and deny in part the defendants' motion. The magistrate judge determined that Richard pursued two grievances, one alleging that Haynes ordered him to sign the honor agreement or he would lose his prison dog-handler job and be moved to another prison unit (SRF-18-06-0531-28b ("531")) and one alleging that Haynes told him to "sign a blank work report" on September 5 (SRF-19-09-0966-28e ("966")). The magistrate judge concluded that only the claim raised in the 531 grievance was exhausted. Over Richard's objections, the district court adopted the magistrate judge's report, denied summary judgment as to Richard's claim that Haynes coerced him to sign the honor agreement, granted summary judgment as to his remaining claims, and dismissed Winn, Guerin, Anderson, and LaBreck as parties. Richard moved to file a second amended complaint to add two defendants, Novak, and D. Schur, which the magistrate judge denied as futile.

Haynes moved to dismiss the remaining claim against him under Federal Rule of Civil Procedure 12(b)(1), (2), and (6) on various grounds. The magistrate judge recommended granting the motion because the honor-agreement claim was untimely. Over Richard's objections, the district court adopted the magistrate judge's report, granted Haynes's motion, and dismissed Richard's complaint.

On appeal, Richard argues that the district court improperly (1) granted partial summary judgment on exhaustion grounds; (2) granted the defendants' summary-judgment motion "based on unsworn statements" in Richard's response to the motion; (3) denied his motion to file a second amended complaint; and (4) granted Haynes's motion to dismiss before the parties could conduct discovery. Richard moves for appointment of counsel.

I. EXHAUSTION

We review de novo the district court's partial grant of summary judgment based on Richard's failure to exhaust his administrative remedies. *See Does 8-10 v. Snyder*, 945 F.3d 951, 961 (6th Cir. 2019). "Summary judgment is appropriate only if defendants establish the absence

of a 'genuine dispute as to any material fact' regarding non-exhaustion." *Risher v. Lappin*, 639 F.3d 236, 240 (6th Cir. 2011) (quoting Fed. R. Civ. P. 56(a)).

Prisoners are required to exhaust all available administrative remedies before filing civil rights suits in federal court. 42 U.S.C. § 1997e(a). A prisoner "exhausts a claim by taking advantage of each step the prison holds out for resolving the claim internally and by following the 'critical procedural rules' of the prison's grievance process to permit prison officials to review and, if necessary, correct the grievance 'on the merits' in the first instance." *Reed-Bey v. Pramstaller*, 603 F.3d 322, 324 (6th Cir. 2010) (quoting *Woodford v. Ngo*, 548 U.S. 81, 90 (2006)). Proper exhaustion requires a prisoner to comply with the grievance procedures established by his prison. *Jones v. Bock*, 549 U.S. 199, 218 (2007). Failure to exhaust is an affirmative defense, which defendants bear the burden to prove. *Risher*, 639 F.3d at 240.

The MDOC has a three-step grievance process that prisoners must follow to exhaust their administrative remedies. *See* MDOC Policy Directive 03.02.130. Before beginning the process, a prisoner must "attempt to resolve the issue with the staff member involved within two business days" and, if unsuccessful, proceed to Step I of the grievance process. At Step I, a prisoner must submit a grievance within five days after attempting informal resolution. If the Step I response is unsatisfactory or untimely, a prisoner may submit a Step II grievance to the warden, the warden's delegate, or another appropriate official. If the Step II response is unsatisfactory or untimely, a prisoner may submit a Step III grievance to the MDOC's Grievance Section.

Richard submitted the 966 Step I grievance on the same day that he was transferred from SRF to MCF. He alleged that Haynes told him to sign a blank work report, that he refused to do so, and that the prison classification director refused to remove the work report from his prison file. Guerin responded to the Step I grievance, and Anderson reviewed it. The investigation summary states that Richard was unavailable for an interview due to his transfer to MCF, that Haynes denied asking Richard to sign a blank work report when interviewed, and that "Refused to Sign" was inserted in the space for Richard's signature. Because Richard's refusal to sign was notated on the work report and the form was sent to the classification director as required by prison

policy, no policy violation was found and the Step I grievance was denied. Richard requested a Step II grievance form but did not submit a Step II grievance. In his Step III grievance, Richard explained that he did not file a Step II grievance because he received the response to his Step I grievance three days after the deadline for filing his Step II grievance. At Step III, Richard reiterated his allegations against Haynes and LaBreck. The Step III decision stated, without elaboration, that "the rejection is upheld." An affidavit from the Step III respondent, Richard Russell—which defendants submitted in reply to Richard's response to their summary-judgment motion—stated that the Step III grievance was rejected because it did not include Step II grievance documents.

The district court concluded that the 966 grievance did not exhaust any of Richard's claims because he did not file a Step II grievance.

In this court, Richard argues that the Step III grievance decision, stating that "the rejection is upheld," appears to be a merits decision rather than the enforcement of a procedural rule. "When prison officials decline to enforce their own procedural requirements and opt to consider otherwise-defaulted claims on the merits, so as a general rule will we." *Reed-Bey*, 603 F.3d at 325. Thus, Richard's exhaustion argument does not turn on whether he complied with the grievance procedure. It is about whether the MDOC forgave his failure to do so and considered his grievance on the merits.

Richard's argument presents interesting questions about the application of the summary-judgment standard to forgiveness of procedural requirements. This is not the case to answer those questions, though, because Richard did not make this argument in district court.

In district court, Richard argued that the magistrate improperly credited Russell's affidavit, which he says is false. But the district court did not rely on Russell's affidavit or the reason for the rejection of Richard's Step III grievance. Instead, it relied on Richard's failure to pursue a Step II grievance. Notably absent from Richard's district court filings is *any* reference to forgiveness or an argument that because the Step III appeal was resolved on the merits, his failure to exhaust should be overlooked.

"In this circuit, the failure to object to a magistrate judge's Report and Recommendation results in a waiver of appeal on that issue as long as the magistrate judge informs the parties of the potential waiver." *United States v. Wandahsega*, 924 F.3d 868, 878 (6th Cir. 2019). The Report and Recommendation in this case contained such a warning. And neither Richard's response in opposition to summary judgment nor his objections to the Report and Recommendation suggested that he should be forgiven for failing to comply with the exhaustion requirement because the Step III decision was on the merits. As a result, we need not consider this argument further.

II. UNSWORN STATEMENT

Richard argues that the district court improperly granted the defendants' summary-judgment motion without addressing the magistrate judge's determination that Richard failed to support with a sworn statement his explanation for his failure to file a Step II grievance in the 966 grievance process.

In response to the defendants' motion for summary judgment, Richard stated that he asked for a Step II grievance form on October 21, 2019, but did not receive one. The magistrate judge did not credit that statement, however, because it was not sworn or verified, and Richard's response did not include an affidavit swearing to that fact. The district court agreed that Richard "did not provide evidence to support the assertion that he requested, but did not receive, the Step II [grievance] form." While some statements in Richard's response were verified, the statement concerning his alleged request for a Step II grievance form on October 21 was not. And he did not support the statement with an attached affidavit declaring that fact to be true or an unsworn declaration under penalty of perjury. *See* 28 U.S.C. § 1746 (providing that written and dated unsworn declarations subscribed "as true under penalty of perjury" have "like force and effect" as sworn declarations).

Richard also argues that his amended complaint should be treated as an affidavit because it was verified. But because the amended complaint was not verified, it could not serve as an opposing affidavit sufficient to rebut the defendants' summary-judgment motion. *See id.*; *King v.*

Harwood, 852 F.3d 568, 578 (6th Cir. 2017) (explaining that a verified complaint may be treated as an opposing affidavit in response to a summary-judgment motion).

III. AMENDED COMPLAINT

Richard challenges the denial of his motion to file a second amended complaint, arguing that the two new defendants he sought to add are sufficiently related to the original defendants.

The magistrate judge denied Richard's motion to amend as futile. The magistrate judge concluded that Richard's proposed claim against Novak, which was based on the denial of a prison job, did not implicate a constitutional right. The magistrate judge concluded that Richard's proposed claims against Schur—that Schur retaliated against him for complaining to staff of a veterans' agency, denied him medical care, and failed to give him notice that he was no longer a client of a veterans' agency—were unrelated to his sole remaining claim against Haynes related to the honor agreement.

We review de novo a district court's denial of a motion to amend based on the determination that "amendment would be futile." *Williams v. City of Cleveland*, 771 F.3d 945, 949 (6th Cir. 2014). An amendment is futile if it could not survive a motion to dismiss under Rule 12(b)(6). *Id.* Leave to amend should be freely given "when justice so requires." Fed. R. Civ. P. 15(a)(2). But leave need not be given if amendment would be futile. *Pittman v. Experian Info. Sols., Inc.*, 901 F.3d 619, 640-41 (6th Cir. 2018).

Richard's proposed second amended complaint was futile. His proposed claim against Novak was futile because prisoners do not have a due process right to a prison job. *See Bethel v. Jenkins*, 988 F.3d 931, 943 (6th Cir. 2021); *Dellis v. Corr. Corp. of Am.*, 257 F.3d 508, 511 (6th Cir. 2001). And his proposed claims against Schur were futile because they were unrelated to his remaining claim against Haynes. The proposed claims did not arise from "the same transaction, occurrence, or series of transactions or occurrences" as his claim against Haynes. *See* Fed. R. Civ. P. 20(a)(2)(A). Nor did his proposed claims against Schur and the claim against Haynes present common questions "of law or fact." *See* Fed. R. Civ. P. 20(a)(2)(B). Moreover, Richard's proposed claims against Schur are unrelated to his claims against Haynes and LaBreck concerning

the September 5 work report. *See* Fed. R. Civ. P. 20(a)(2). Richard's second motion to amend was properly denied.

IV. DISCOVERY

Richard argues that the district court prematurely granted Haynes's motion to dismiss before the parties could conduct discovery. Although he does not explicitly address the merits of the motion to dismiss or the district court's timeliness determination, his discovery argument implicitly challenges the dismissal of his remaining claim against Haynes as untimely.

Richard's honor-agreement claim against Haynes was time-barred. For § 1983 actions, federal courts apply the state personal injury statute of limitations. *Wallace v. Kato*, 549 U.S. 384, 387 (2007). The appropriate statute of limitations for personal injury actions arising in Michigan is three years. Mich. Comp. Laws § 600.5805(2); *Garza v. Lansing Sch. Dist.*, 972 F.3d 853, 868 n.8 (6th Cir. 2020). "[T]he statute of limitations begins to run when the plaintiff knows or has reason to know of the injury which is the basis of his action." *McCune v. City of Grand Rapids*, 842 F.2d 903, 905 (6th Cir. 1988).

Based on his own allegations, Richard knew about his honor-agreement claim against Haynes on, at the latest, May 31, 2018.[1] The statute of limitations "is tolled while the [prisoner] exhausts his required administrative remedies." *Surles*, 678 F.3d at 458. Richard began the grievance process on June 5, 2018. The grievance process was completed 40 days later when he received a Step III grievance decision on July 15, 2018. Giving Richard the benefit of the latest possible accrual date and tolling the statute of limitations during the exhaustion process, the statute of limitations expired on July 10, 2021. Because Richard's complaint, considered filed on August 23, 2021, under the prison mailbox rule, was filed beyond the expiration of the statute of limitations, this claim was untimely. *See Houston v. Lack*, 487 U.S. 266, 276 (1988) (holding that

[1] As the district court observed, it is unclear whether Richard's injury occurred on May 4, 2018, as he alleges in his compliant, or on May 31, 2018, as he alleges in the grievance related to this conduct. But the exact date upon which his injury occurred is immaterial; his compliant was not filed within the statute of limitations as calculated from either date.

a prisoner's notice of appeal is deemed filed on the date given to prison officials for mailing to the court).

Richard neither explained in the district court nor explains on appeal what discovery he needs or how discovery would change the timeliness determination. In his response to Haynes's motion to dismiss, Richard did not assert a need for discovery or indicate that he was unable to respond to Haynes's motion in the absence of discovery. He stated that it was "far too early to dismiss this case, without first allowing the parties" to conduct discovery in his objections to the magistrate judge's report recommending that Haynes's motion to dismiss be granted. But he did not elaborate. Similarly, Richard's appellate brief does not state what information he sought to discover or how the absence of discovery prevented him from presenting his case and responding to Haynes's motion to dismiss.

For these reasons, we **AFFIRM** the order granting summary judgment on exhaustion grounds and the district court's judgment dismissing the remaining claim against Haynes as untimely, and we **DENY** as moot the motions for appointment of counsel.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

Neutral
As of: December 13, 2024 1:08 PM Z

Richard v. Winn

United States Court of Appeals for the Sixth Circuit

October 10, 2024, Filed

No. 23-1429

Reporter
2024 U.S. App. LEXIS 25669 *

FRANK JOHN RICHARD, Plaintiff-Appellant, v. O'BELL T. WINN, ET AL., Defendants-Appellees.

Prior History: Richard v. Winn, 2024 U.S. App. LEXIS 12922 (6th Cir. Mich., May 29, 2024)

Core Terms

petition for rehearing, en banc

Counsel: **[*1]** FRANK JOHN RICHARD, Plaintiff - Appellant, Pro se, Carson City, MI.

For O'BELL T. WINN, THOMAS HAYNES, MICHAEL GUERIN, JODIE ANDERSON, CHRISTOPHER LABRECK, Defendants - Appellees: James E. Keathley, Office of the Attorney General, Lansing, MI.

Judges: BEFORE: LARSEN, NALBANDIAN, and READLER, Circuit Judges.

Opinion

ORDER

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

End of Document

* Judge Davis recused herself from participation in this ruling.

APPENDIX

B.

[B.1], Richard v. Winn, et al., 2022 U.S. Dist. LEXIS 162185, (Sept. 8, 2022, ECF No. 32)

[B.2], Richard v. Haynes, 2022 U.S. Dist. LEXIS 244164, (DEC. 15, 2022, ECF No. 53)

[B.3], Richard v. Haynes, 2023 U.S. Dist. LEXIS 849, (April 10, 2023, ECF No. 68)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FRANK RICHARD,

Plaintiff,

v.

Civil Case No. 21-12064
Honorable Linda V. Parker

O.T. WINN, THOMAS HAYNES, MICHAEL GUERIN, JODIE ANDERSON and CHRISTOPHER LABRECK,

Defendants.
_____/

OPINION AND ORDER (1) REJECTING PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE'S JULY 27, 2022 REPORT AND RECOMMENDATION; (2) ADOPTING REPORT AND RECOMMENDATION; AND (3) GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff, a Michigan Department of Corrections inmate, initiated this pro se civil rights lawsuit against Defendants on August 26, 2021. In an Amended Complaint filed November 12, 2021, Plaintiff asserts violations of his rights under the First, Eighth, and Fourteenth Amendments. (ECF No. 16.) Defendants filed a motion for summary judgment based on the failure of Plaintiff to exhaust his administrative remedies (ECF No. 21), which this Court referred to Magistrate Judge Curtis Ivy, Jr. (ECF No. 24).

On July 27, 2022, Magistrate Judge Ivy issued a Report and Recommendation ("R&R") in which he recommends that this Court grant in part and deny in part Defendants' motion. (ECF No. 25.) Specifically, Magistrate Judge Ivy finds that Plaintiff administratively exhausted only his claim that Defendant Thomas Haynes forced Plaintiff to sign an agreement or face the loss of his job and a prison transfer. (*Id.* at Pg ID 247.) Magistrate Judge Ivy therefore recommends the dismissal of the remaining claims alleged in Plaintiff's Complaint and the remaining Defendants. (*Id.*) At the conclusion of the R&R, Magistrate Judge Ivy informs the parties that they must file any objections to the R&R within fourteen days. Plaintiff filed objections on August 16. (ECF No. 28.)

When objections are filed to a magistrate judge's R&R on a dispositive matter, the Court "make[s] a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). The Court, however, "is not required to articulate all of the reasons it rejects a party's objections." *Thomas v. Halter*, 131 F. Supp. 2d 942, 944 (E.D. Mich. 2001) (citations omitted). A party's failure to file objections to certain conclusions of the R&R waives any further right to appeal on those issues. *See Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir.1987). Likewise, the failure to object to certain conclusions in the magistrate

judge's report releases the Court from its duty to independently review those issues. *See Thomas v. Arn*, 474 U.S. 140, 149 (1985).

The Court has reviewed Plaintiff's objections to the R&R but reaches the same conclusion as Magistrate Judge Ivy with respect to the issue of whether Plaintiff administratively exhausted his pending claims. For the most part, Plaintiff's objections do not even relate to Magistrate Judge Ivy's analysis of the issue at hand. The only objections that appear to address the issue are Plaintiff's second objection related to the failure of the grievance coordinator to provide a Step II appeal form to Plaintiff and his seventh objection in which he argues that a Step II appeal would have been "moot" because of Defendant Winn's participation. [1]

Taking the latter objection first, mere conclusory assertions of futility are insufficient to excuse exhaustion. *Davis v. Keohane*, 835 F.2d 1147, 1149 (6th Cir. 1987). "To further the purposes behind the [Prison Litigation Reform Act], exhaustion is required even if the prisoner subjectively believes the remedy is not available; even when the state cannot grant the particular relief requested; and

[1] Plaintiff maintains that, had he filed a Step II appeal, it would have been invalid as Defendant Winn would have reviewed it and this would have violated Plaintiff's due process rights because Defendant Winn was involved in the involuntary transfer. (ECF No. 28 at Pg ID 286.) This grievance, however, related to Defendant Hayne's alleged attempt to have Plaintiff sign a blank work report form and Plaintiff's request to have an evaluation removed from his file. (*See* ECF no. 21-3 at Pg ID 192.)

'even where the prisoners believe the procedure to be ineffectual or futile.'" *Barnett v. Laurel Cnty., Kentucky*, No. 16-5658, 2017 WL 3402075, at *2 (6th Cir. 2017) (quoting *Napier v. Laurel Cnty., Ky.*, 636 F.3d 218, 222 (6th Cir. 2011)) (brackets and ellipsis removed).

As to Plaintiff's second objection, Magistrate Judge Ivy correctly explained that Plaintiff did not provide evidence to support the assertion that he requested, but did not receive, the Step II form. (ECF No. 25 at Pg ID 246.) Moreover, the "evidence" Plaintiff cites to support this assertion (*See* ECF No. 22 at Pg ID 210 (citing ECF No. 21-3 at Pg ID 200)) reflects that he requested the Step II form on October 21, 2019, which is the same date he filed his Step III appeal (ECF No. 21-3 at Pg ID 199). Thus, as Magistrate Judge Ivy found, Plaintiff did not afford the prison the opportunity to provide the Step II form before he filed his Step III appeal. (ECF No. 25 at Pg ID 246.)

For these reasons, the Court rejects Plaintiff's objections to Magistrate Judge Ivy's R&R and adopts Magistrate Judge Ivy's recommendations.

Accordingly,

IT IS ORDERED that Defendants' motion for summary judgment (ECF No. 21) is **GRANTED IN PART AND DENIED IN PART** in that summary judgment is denied as to Plaintiff's claim that Defendant Haynes forced Plaintiff to sign an agreement or risk losing his job and being transferred to a different prison

facility. However, summary judgment is granted as to Plaintiff's remaining claims and Defendants O.T. Winn, Michael Guerin, Jodie Anderson, and Christopher Labreck are **DISMISSED AS PARTIES** to this action.

IT IS SO ORDERED.

s/ Linda V. Parker
LINDA V. PARKER
U.S. DISTRICT JUDGE

Dated: September 8, 2022

I hereby certify that a copy of the foregoing document was mailed to counsel of record and/or pro se parties on this date, September 8, 2022, by electronic and/or U.S. First Class mail.

s/Aaron Flanigan
Case Manager

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FRANK JOHN RICHARD

Plaintiff,
v.

THOMAS HAYNES,

Defendant.
_____/

Case No.: 21-12064

Linda V. Parker
United States District Judge

Curtis Ivy, Jr.
United States Magistrate Judge

ORDER DENYING MOTION TO AMEND COMPLAINT (ECF No. 27); MOTION FOR SANCTIONS (ECF NO. 37).

Plaintiff Frank John Richard filed this prisoner civil rights suit on August 26, 2021, without the assistance of counsel, alleging violations of the First, Eighth, and Fourteenth Amendments. (ECF No. 1). It was referred to the undersigned for all pretrial matters. (ECF No. 31). This matter is currently before the Court on Plaintiff's motions to amend (ECF No. 27) and for sanctions (ECF No. 37).

For the reasons discussed below, the Court **DENIES** Plaintiff's motions.

I. DISCUSSION

a. Standard Governing Motions to Amend.

Rule 15(a) provides that leave to amend "shall be freely given when justice so requires." There are several factors courts consider in deciding whether to allow amendment: "the delay in filing, the lack of notice to the opposing party, bad

faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment." *Perkins v. Am. Elec. Power Fuel Supply, Inc.*, 246 F.3d 593, 605 (6th Cir. 2001).

The Court need not grant leave to amend where the amendment would be futile. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Amendment of a complaint is futile when the proposed amendment would not permit the complaint to survive a motion to dismiss. *Miller v. Calhoun Cnty.*, 408 F.3d 803, 817 (6th Cir. 2005) (citing *Neighborhood Dev. Corp. v. Advisory Council on Historic Pres.*, 632 F.2d 21, 23 (6th Cir. 1980)). A complaint may be dismissed under Rule 12(b)(6) when the plaintiff fails to state a claim on which relief can be granted. Fed. R. Civ. P. 12(b)(6).

b. Analysis of Plaintiff's Motion to Amend.

Plaintiff seeks to amend his complaint to add two proposed Defendants: Amy Novak and D. Schur. (ECF No. 27, PageID.276). Plaintiff alleges Novak violated his right to Due Process when she "knowingly relied upon false information on a state form, to deny employment to the Plaintiff." (*Id.*). Plaintiff alleges three claims against Schur. (*Id.*). Plaintiff asserts that Schur retaliated against him "for complaints the Plaintiff made to Michigan Department of Veterans Affairs Agency Staff." (*Id.* at 277). In his second claim, Plaintiff

explains that Schur also denied him medical care because Schur is responsible for arranging appointments for incarcerated veterans and Schur denied Plaintiff a medical examination. (*Id.*). Plaintiff alleges the denial of a medical examination is also retaliation. (*Id.*). In his third claim, Plaintiff claims Schur violated his procedural due process rights under the Fourteenth Amendment for informing Plaintiff that "he had been 'revoked' as a client of the Michigan Veterans Affairs Agency ['M.V.A.A.']." (*Id.*). Plaintiff asserts Schur is liaison to the M.V.A.A. and "should have given prior notice to the Plaintiff of the M.V.A.A.'s intent to 'drop' him as a client." (*Id.* at PageID.277-78). Plaintiff indicates he is seeking to amend his complaint because "[a]t the time of the original filing, these Defendants were not yet 'ripe . . . as the Exhaustion of Administrative Remedies, had not yet been completed." (*Id.* at PageID.276).

Defendant Haynes asserts that Plaintiff's motion to amend should be denied because he failed to follow E.D. Mich. Local Rule 15.1 which provides "[a] party who moves to amend a pleading shall attach the proposed amended pleading to the motion." Beyond this procedural issue, Defendant Haynes argues the Court should deny Plaintiff's motion to amend as the motion is futile. Defendant asserts the motion fails to state a claim against proposed Defendant Novak and the claims against proposed Defendant Schur do not arise from the same transaction or occurrence as his sole remaining claim against Haynes, which relates to Haynes

allegedly forcing Plaintiff to sign an agreement or else face loss of his job and a prison transfer. (ECF No. 46, PageID.389).

In Plaintiff's reply brief, Plaintiff attaches his proposed second amended complaint in order to comply with E.D. Mich. Local Rule 15.1, which he states he was unaware of. (ECF No. 51, PageID.427). The proposed second amended complaint is an amalgamation of his first amended complaint (ECF No. 16) and the factual allegations from his motion to amend (ECF No. 27). (ECF No. 51). The undersigned has already addressed and dismissed the claims Plaintiff reiterates against Defendants Jodie Anderson, M. Guerin, C. LaBreck, and O.T. Winn in the July 27, 2022, report and recommendation. (ECF No. 25). The report and recommendation was adopted over Plaintiff's objections. (ECF No. 32). As to these allegations, the Court finds considering them would be futile because this Court has already ruled on these claims.

Despite the procedural deficiency in his motion, the Court will consider the allegations in the brief, reply, and proposed second amended complaint together to assess whether amendment would be futile. In his reply, Plaintiff alleges that potential Defendant Novak denied him a "high-paying" job and Plaintiff asked her if she did not hire him because of a work report by Defendant Haynes she replied "[p]robably[.]" (ECF No. 51, PageID.441). Plaintiff contacted Novak about returning to the Veterans Unit Dog Program on February 26, 2021, and alleges

there was not an available bottom-bunk in the program area. (*Id.* at PageID.452). Plaintiff asked Healthcare to remove the bottom-bunk detail from his file, and Plaintiff indicates they rescinded the detail a month later. (*Id.*) Plaintiff alleges he worked with a third-party organization, Humanity for Prisoners, to attempt to re-enter the dog program, but that the head of the program "declined to hear" Plaintiff's version of events. (*Id.* at PageID.453).

The other allegations against potential Defendant Schur are that Schur denied Plaintiff medical examinations for two outstanding Veterans Affairs ("VA") claims and that Schur threatened him in his cell stating, "[i]f this continues, you won't get shit from me." (ECF No. 51, PageID.441). More specifically, Plaintiff provides that he asked Schur to fax a "hearing loss/tinnitus disability claim" to the M.V.A.A. on July 27, 2029, and Schur returned the claim form the same day stating "[i]t's taken care of." (*Id.* at PageID.450). On September 23, 2019, Plaintiff contacted the M.V.A.A. to ask if a hearing test had been scheduled and the M.V.A.A. responded "[t]here is no hearing loss claim on record for you, we can file this now[.]" (*Id.* at PageID.451). Plaintiff alleges he wrote a letter to the Michigan Department of Corrections ("MDOC") Director where he "complained of being retaliated against for the filing of this lawsuit." (*Id.* at PageID.453). On January 11, 2022, Plaintiff alleges Schur "confronted the Plaintiff" regarding comments about Schur's "lack of professionalism." (*Id.*). Plaintiff indicates Schur

threatened him by stating "[i]f this continues, you won't get shit from me." (*Id.*). Plaintiff conveyed this interaction to the M.V.A.A. and Schur's supervisor. (*Id.*). M.V.A.A. recommended Plaintiff "reevaluate your relationship with CPC. D. Schur" on January 13, 2022. (*Id.*). Schur informed Plaintiff he had been "revoked" as a client of the M.V.A.A. on June 6, 2022. (*Id.* at PageID.454). Plaintiff alleges Schur threatened to have him removed from the Veterans Unit Program in response to a letter to the Director of the M.V.A.A., which he states is an act of retaliation. (*Id.* at PageID.441). These are all the additional factual allegations against potential Defendants Novak and Schur contained in Plaintiff's proposed second amended complaint. (ECF No. 51).

As to potential Defendant Novak, Plaintiff's motion is futile because he has not identified a sufficient liberty or property interest which can sustain a Due Process claim. Taking as true Plaintiff's assertions against Novak, he fails to state a claim because prisoners do not have a "constitutional right to prison employment or a particular prison job." *Martin v. O'Brien*, 207 F. App'x 587, 590 (6th Cir. 2006); *see also Williams v. Straub*, 26 F. App'x 389, 390-91 (6th Cir. 2001) (affirming dismissal of prisoner's § 1983 Due Process claim that being placed on "unemployable status" without a hearing violated his Due Process rights). Where, as here, a plaintiff has not identified "a protected liberty or property interest, there can be no federal procedural due process claim." *Experimental Holdings, Inc. v.*

Farris, 503 F.3d 514, 519 (6th Cir. 2007). Accordingly, the Court concludes that granting Plaintiff's motion to amend would be futile as to Novak.

As to potential Defendant Schur, the Court concludes the amendment would be futile because the allegations do not arise from the same transaction or occurrence his sole remaining claim against Haynes. With respect to the joinder of parties and claims in a single lawsuit, Federal Rule of Civil Procedure 20(a) limits the joinder of parties, whereas Federal Rule of Civil Procedure 18(a) limits the joinder of claims. Rule 20(a)(2) governs when multiple defendants may be joined in one action: "[p]ersons . . . may be joined in one action as defendants if: (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action." Fed. R. Civ. P. 20(a)(2). Rule 18(a) states: "A party asserting a claim . . . may join, as independent or alternative claims, as many claims as it has against an opposing party." Fed. R. Civ. P. 18(a).

Under Rule 20, "a civil plaintiff may not name more than one defendant in his original or amended complaint unless one claim against each additional defendant is transactionally related to the claim against the first defendant and involves a common question of law or fact." *Proctor v. Applegate*, 661 F. Supp. 2d 743, 778 (E.D. Mich. Sept. 30, 2009) (internal quotation marks omitted); *see*

also United States v. Mississippi, 380 U.S. 128, 142–43 (1965) (discussing that joinder of defendants is permitted by Rule 20 if both commonality and same transaction requirements are satisfied). When determining whether civil rights claims arise from the same transaction or occurrence, a court may consider various factors, including, "the time period during which the alleged acts occurred; whether the acts . . . are related; whether more than one act . . . is alleged; whether the same supervisors were involved, and whether the defendants were at different geographical locations." *Proctor*, 661 F. Supp. 2d at 778 (quoting *Nali v. Mich. Dep't of Corr.*, No. 07-10831, 2007 WL 4465247, at *3 (E.D. Mich. Dec. 18, 2007)). "Permitting the improper joinder in a prisoner civil rights action also undermines the purpose of the PLRA, which was to reduce the large number of frivolous prisoner lawsuits that were being filed in the federal courts." *Mims v. Simon*, No. 1:22-CV-323, 2022 WL 1284106, at *4 (W.D. Mich. Apr. 29, 2022) (citing *Riley v. Kurtz*, 361 F.3d 906, 917 (6th Cir. 2004)).

Plaintiff's claims against Schur are not transactionally related to the claim against the first defendant and do not involve a common question of law or fact. Plaintiff's allegations against Schur in his proposed second amended complaint are that Schur retaliated against him for complaints made to Michigan Department of Veterans Affairs Agency ("M.V.A.A.") staff, that Schur denied Plaintiff medical examinations by failing to make him an appointment, and that Schur did not give

him notice of M.V.A.A.'s intent to drop him as a client. (ECF No. 27, PageID.276-78; ECF No. 51, PageID.441; PageID.450-51). The remaining claim against Haynes relates to Haynes allegedly forcing Plaintiff to sign an agreement in 2018 or else face loss of his job and a prison transfer. (ECF No. 16, PageID.106; ECF No. 25, PageID.247).

There are no questions of common fact between the conduct ascribed to Schur and Haynes. Plaintiff does not allege the events occurred at the same time, nor does he allege the acts are related or that the same supervisors were involved. *Proctor*, 661 F. Supp. 2d at 778 ("the time period during which the alleged acts occurred; whether the acts . . . are related; whether more than one act . . . is alleged; whether the same supervisors were involved, and whether the defendants were at different geographical locations."). Indeed, in his reply brief, Plaintiff himself acknowledges his "claims against Schur are not related to his remaining claim against Haynes." (ECF No. 51, PageID.427). As Plaintiff does not allege any common questions of law or fact, joinder of Schur would be improper.[1]

For all these reasons, Plaintiff's motion to file a second amended complaint is **DENIED**. (ECF No. 27; PageID.277).

c. Plaintiff's Motion for Sanctions.

[1] The Court notes that denying Plaintiff's motion to amend does not preclude him from filing a separate suit on the merits of the claims alleged. (ECF No. 27; PageID.275) (raising concerns of res judicata)

On October 27, 2022, Plaintiff filed a motion seeking sanctions against Defendant's counsel because he "filed a document he knew to be false." (ECF No. 37, PageID.336). Plaintiff indicates the allegedly false document is an affidavit by Mr. Richard Russell related to rejection of grievances and that the affidavit references "records attached" but there are no such attachments. (*Id.* at PageID.336-37). Plaintiff also asserts that a paragraph of the affidavit is "complete fabrication" because it misstates the grievance record. (*Id.*). Plaintiff argues that Defendant's counsel and Russell failed to produce documents that indicate Plaintiff did not file a Step II grievance. (*Id.*).

In response, Defendant argues there is a "misunderstanding" related to a paragraph of Russell's March 2022 affidavit which states "[a]ny copy of these records attached to or accompanying this affidavit are true and accurate copies of the original records." (ECF No. 42, PageID.366). Defendant argues this language is used to authenticate any MDOC business records which may be attached to an affidavit but does not mean any documents were actually attached to the affidavit. (*Id.* at PageID.367). Russell produced an affidavit regarding his March affidavit, clarifying that he did not attach any documents to his March affidavit. (*Id.*; ECF No. 43). Defendant argues there is "another misunderstanding" regarding grievance SRF-19-09-0966-28e. (ECF No. 42, PageID.368). Defendant indicates he did not argue, as Plaintiff alleges, that SRF-19-09-0966-28e was rejected for a

failure to file at Step II. (*Id.*). Counsel asserts that SRF-19-09-0966-28e was rejected at Step III because the Step III submission "did not contain the Step II documents." (*Id.*) (quoting ECF No. 23, PageID.229.) Russell affirms this in his affidavit on these issues. (ECF No. 43, PageID.375). Defendant asks the Court to deny Plaintiff's motion for sanctions.

In his reply, Plaintiff argues Defendant is "doubling-down on the lie[.]" (ECF No. 50, PageID.418) (internal quotations omitted). Plaintiff asserts he demanded production of documents in his motion for sanctions, which he asserts are removed from the shield of Fed. R. Civ. P. 26(a)(1)(b)(iv) under Fed. R. Civ. P. 11(d). (*Id.*). He argues that Defendant's counsel and Russell have still not disclosed the aforementioned documents. (*Id.*). Plaintiff asserts that MDOC ignored their own policy directives in appointing Guerin as a Step I respondent, when he witnessed the events complained of in the grievance. (*Id.*).

The touchstone for sanctions under Federal Rule of Civil Procedure 11 is whether the party conducted a reasonable inquiry into the factual and legal basis of the challenged content and whether that inquiry was objectively reasonable under the circumstances. *Bus. Guides, Inc. v. Chromatic Comm'cns Enters., Inc.*, 498 U.S. 533, 548-51 (1991); *Cruz v. Don Pancho Mkt., LLC*, 171 F. Supp. 3d 657, 667-68 (W.D. Mich. Mar. 8, 2016) (further citation omitted). Here, the dispute arises from the language of Russell's affidavit stating "[a]ny copy of these records

attached to or accompanying this affidavit are true and accurate copies of the original records" ("authentication language") and the reason Defendant asserted SRF-19-09-0966-28e was rejected. (ECF No. 42, PageID.366-67). The Court interprets the authentication language as a statement that any accompanying documents are true and genuine copies, not a statement that there are necessarily documents attached. As to the reason the grievance was rejected, the reasonable inquiry requirement allows an attorney to rely on representations that another person makes. *Garr v. U.S. Healthcare, Inc.*, 22 F.3d 1274, 1278 (3d Cir.1994). Russell submitted an affidavit as to why this grievance was rejected, which Defendant may reasonably rely on. (ECF No. 23, PageID.229; ECF No. 43, PageID.375).[2] The Court concludes the conduct here does not warrant sanctions because Defendant's conduct was reasonable. The Plaintiff's motion for sanctions is **DENIED**. (ECF No. 37).

IT IS SO ORDERED.

The parties here may object to and seek review of this Order, but are required to file any objections within 14 days of service as provided for in Federal Rule of Civil Procedure 72(a) and Local Rule 72.1(d). A party may not assign as

[2] The Court notes the issue of the exhaustion on this grievance was not decided on the merits of why Step III rejected the grievance. (ECF No. 25; PageID.246-47). The Court determined Plaintiff failed to pursue a Step II appeal as required by MDOC policy and therefore this grievance was not exhausted. (*Id.*).

error any defect in this Order to which timely objection was not made. Fed. R. Civ. P. 72(a). Any objections are required to specify the part of the Order to which the party objects and state the basis of the objection. When an objection is filed to a magistrate judge's ruling on a non-dispositive motion, the ruling remains in effect unless it is stayed by the magistrate judge or a district judge. E.D. Mich. Local Rule 72.2.

Date: December 15, 2022.

s/Curtis Ivy, Jr.
Curtis Ivy, Jr.
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that this document was served on counsel of record and any unrepresented parties via the Court's ECF System or by First Class U.S. mail on December 15, 2022.

s/Kristen MacKay
Case Manager
(810) 341-7850

Rec'd 12/20/22

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FRANK JOHN RICHARD,

Plaintiff,

v.

Civil Case No. 21-12064
Honorable Linda V. Parker

THOMAS HAYNES,

Defendant.
_____/

ORDER REGARDING PLAINTIFF'S OBJECTIONS AND MOTION TO HOLD MAGISTRATE JUDGE'S REPORT AND RECOMENDATION IN ABEYANCE

Plaintiff Frank Richard, an individual incarcerated in the Michigan Department of Corrections, initiated this pro se civil rights lawsuit against Defendants on August 26, 2021. On March 7, 2023, Magistrate Judge Ivy issued a report and recommendation (R&R) (ECF No. 63) recommending that the Court grant Defendant's Motion to Dismiss because Plaintiff failed to file his lawsuit within the three-year statute of limitations pursuant to 42 U.S.C. § 1983, which the Court adopted on April 4, 2023. (ECF No. 64.) The matter is presently before the Court on Plaintiff's objections[1] to Magistrate Judge Ivy's Report &

[1] Plaintiff's objections arrived on April 6, 2023, which was well after the 14-day window to provide objections to an R&R. However, due to the Prisoner Mailbox Rule, *see Brand v. Motley*, 526 F.3d 921, 925 (6th Cir. 2008), the Court will accept the delayed filing of objections and address them accordingly.

Recommendation ("R&R") (ECF No. 66.) and Plaintiff's "Motion to Hold in Abeyance Magistrate's R&R to Grant Defendant's Motion to Dismiss." (ECF No. 67.)

When objections are filed to a magistrate judge's R&R on a dispositive matter, the Court "make[s] a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). The Court, however, "is not required to articulate all of the reasons it rejects a party's objections." *Thomas v. Halter*, 131 F. Supp. 2d 942, 944 (E.D. Mich. 2001) (citations omitted). A party's failure to file objections to certain conclusions of the R&R waives any further right to appeal on those issues. *See Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir.1987). Likewise, the failure to object to certain conclusions in the magistrate judge's report releases the Court from its duty to independently review those issues. *See Thomas v. Arn*, 474 U.S. 140, 149 (1985).

Plaintiff raises two objections: (1) Magistrate Judge Ivy made a "judicial error" by citing to Federal Rule of Civil Procedure 12(g)(6) in a footnote when Plaintiff cited to Rule 12(g)(2) in response to Defendant's motion to dismiss; and (2) Magistrate Judge Ivy made a "judicial error" by not converting Defendant's motion to dismiss into a motion for summary judgment. (ECF No. 66 at Pg ID 595-96.) First, Magistrate Judge Ivy's citation to "Rule 12(g)(6)," which does not

exist under the Federal Rules, instead of 12(g)(2) was obviously a typo. (ECF No. 63 at Pg ID 583 n.2.) The subsequent language where he quotes the correct rule, Rule 12(g)(2), and applies it makes the fact that it was a typo apparent. (*Id.*) A typo does not amount to a valid objection to an R&R. *See Cole v. Yukins*, 7 F. App'x 354, 356 (6th Cir. 2001) (citing *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995)) ("The filing of vague, general, or conclusory objections does not meet the requirement of specific objections and is tantamount to a complete failure to object."); *see also Thomas*, 474 U.S. at 147 (noting that the purpose of filing objections is to focus the district judge's "attention on those issues—factual and legal—that are at the heart of the parties' dispute.").

Next, Magistrate Judge Ivy did not commit "judicial error" by failing to convert Defendant's motion to dismiss to a motion for summary judgment. If in a 12(b)(6) motion to dismiss, "matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." *Wysocki v. Int'l Bus. Mach. Corp.*, 607 F.3d 1102, 1104 (6th Cir. 2010) (citing Fed. R. Civ. P. 12(d)). However, some documents may be considered without converting a motion to dismiss into a motion for summary judgment, including "public records, matters of which a court may take judicial notice, and letter decisions of governmental agencies."

Thomas v. Noder-Love, 621 F. App'x 825, 829 (6th Cir. 2015). Moreover, "when a document is referred to in the pleadings and is integral to the claims, it may be considered without converting a motion to dismiss into one for summary judgment." *Com. Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 335–36 (6th Cir. 2007). Here, Magistrate Judge Ivy's R&R relied on Plaintiff's grievance against Mr. Haynes and the Step III response—which are both in the Court record—and caselaw to reach his conclusion. Nothing in the R&R and nothing in Plaintiff's objections assert otherwise. As such, Magistrate Judge Ivy was not required to convert the motion to dismiss into a motion for summary judgment.

Finally, Plaintiff requests that the Court hold the R&R in abeyance but fails to provide a reason why other than listing allegedly disputed and undisputed facts and requests that "(ECF No. 63) be held for discovery." The Court assumes that the request for an abeyance is due to the objections presented. Because the Court rejects Plaintiff's objections, the motion for an abeyance is moot.

Accordingly,

IT IS ORDERED that Defendant's objections to Magistrate Judge Ivy's R&R (ECF No. 66) are rejected, and Plaintiff's "Motion to Hold in Abeyance Magistrate's R&R to Grant Defendant's Motion to Dismiss" (ECF No. 67) is

DENIED AS MOOT.

SO ORDERED.

s/ Linda V. Parker
LINDA V. PARKER
U.S. DISTRICT JUDGE

Dated: April 10, 2023
Rec'd on 4/13/23

I hereby certify that a copy of the foregoing document was mailed to counsel of record and/or pro se parties on this date, April 10, 2023, by electronic and/or U.S. First Class mail.

s/Aaron Flanigan
Case Manager

APPENDIX

C.

[C.1], Prisoner Program and Work Evaluation (CSJ-363), dated September 5th, 2019.

[C.2], Affidavit, Frank J. Richard's pursuit of counsel.

MICHIGAN DEPARTMENT OF CORRECTIONS

PRISONER PROGRAM AND WORK ASSIGNMENT EVALUATION

9-144

CSJ-363
REV. 09/06
4835-3363

Prisoner Name (last)	(first)	(middle initial)	Prisoner No.	Lock No.	Institution Code
Richard	Frank		601706	8-30	SRF
Assignment Name			Assignment No.	Date Assigned	Date Evaluated
Primary Dog Handler			819	4/7/18	9/5/19
Assignment Classification: ☐ Student ☒ Unskilled ☐ Semi-Skilled ☐ Skilled ☐ Other			Race W	Date Terminated 9/5/19	Will Take Back ☐ Yes ☒ No

Circle the number beside each statement which describes the prisoner's work/school assignment performance:	3 or more exceptions	1-2 exceptions	No exceptions
1. The prisoner was on time.	0	2	3
2. The prisoner came on the correct days.	0	2	3
3. The prisoner followed all safety rules.	0	2	3
4. The prisoner followed all other rules.	0	2	3
5. The prisoner followed the assignment authority's instructions.	0	2	3
6. The prisoner cooperated with the assignment authority, followed the working chain of command and refrained from arguing about assignments. (Working relationship with Authority)	0	2	3
7. The prisoner discussed work/education related problems with peers/tutor, listened to peer's/tutor's point of view, encouraged discussion without argument and limited disruptive vocalizations. (Communication with Peers)	0	2	3
8. The prisoner did the assignment share of the work/education assignment, remained in the assigned area until the end of the shift and engaged in no horseplay. (Teamwork with Peers)	0	2	3
9. The prisoner kept a neat, clean and well groomed personal appearance, suitable for the assignment.	0	2	3
10. The prisoner did job/education tasks according to the job/education description.	0	2	3
11. The prisoner kept the work area neat and clean.	0	2	3
12. The prisoner worked without constant supervision or direction when appropriate.	0	2	3
13. The prisoner was willing to perform additional duties or stay beyond scheduled time. When asked, the prisoner did not argue or complain and performed additional assignments in a satisfactory manner.	0	2	3
REVIEWED: Prisoner's Signature: REFUSED TO SIGN Date: 09/05/19	COLUMN TOTAL:		
	TOTAL SCORE:		

I RECOMMEND:

☐ Entry Pay with 30 Days Conditional - Below Average Score 0-27 ☐ Status Pay Satisfactory - Average Score 28-34
☐ * Above Average Score 35-39 ☐ Bonus Pay for Food Service Workers ☒ Termination ☐ Close Supervision

Fill in the appropriate information for school programming

* *No notations in the 3 or more exceptions column.*

14. Academic CBI Modules in Progress ☐ N/A	Subject						
	Letter/Number	/	/	/	/	/	
15. GED Test Version						Avg. Standard Score	Date Tested
16. Voc Ed Program in Progress ☐ N/A	Duties (capital letter) Completed. If duty not completed, print duty letter & task (number) completed.						
17. Pre-Release/Job Seeking Skills Completed ☐ YES ☐ NO							Date Completed:
18. Completed training to operate the following machinery or equipment:							Date Completed:
19. Attendance Hours Attended				Hours Missed			

PRINTED
JUL - 9 RECD
SRF
CLASSIFICATION

COMMENTS AND RECOMMENDATIONS:

On 09/03/19 I received a kite from the mailroom. The kite makes sarcastic and unfavorable remarks about Ranger, a dog in the 800 Unit Dog Program that was recently put up for adoption. The handwriting in the kite is an exact match to Richard's handwriting. This type of behavior is subversive and undermines the credibility of the dog program. Richard is attempting to sabotage the adoption of Ranger by making disparaging remarks about him to SRF staff. When asked by PC Guerin and myself, Richard admitted writing the kite, stating it was a 'joke'.

Richards last work evaluation on 06/14/19 details how he is resistant to cross-training with the other handlers, which is a requirement of the program. He also had to be re-directed by Mat Sica, the Blue Star trainer, about putting only information about the dogs in his weekly report instead of his personal views.

A copy of a helper report from 7/23/19 showed Richard would not let another handler train his dog, again refusing cross-training.

Evaluator's Signature	Supervisor's Signature
Evaluator's Printed Name and Title: THAYNES PC	Supervisor's Printed Name and Title: THAYNES PC

DISTRIBUTION: White – Record Office; Green – Assignment Supervisor; Canary – School Principal/Classification Director; Pink – RUM; Goldenrod – Prisoner

EX 2

AFFIDAVIT

Frank J. Richard's pursuit of counsel

The petitioner, Frank J. Richard, in the case of Richard v. Winn, et al., 2021-12064-LVP-CI, in the E.D. of Michigan has been fruitless to this point. As this case is governed by the Prison Litigation Reform Act of 1996, (PLRA), little interest has been shown in representing me.

Colleges, Law schools, and Pro Bone legal clinics have no desire to involve themselves with this type of case. DNA and forensics seem to be the only types of litigation in fashion right now.

The courts that I have litigated in so far, have declined to appoint me a lawyer. Their contention has been that since I posses the ability to read & write, conform with court rules, and meet filing deadlines I do not require an appointed attorney. They also assert that the complexity of my case is insufficent to warrent assistance of counsel.

I have yet to prevail on any major motion or objection in this case. My lack of experience was quite evident.

The exceptional circumstances requirement didn't pass muster either. I listed the following medical, as well as mental health conditions:

1.) T.B.I. on 12/28/2016, which left me with severe migraine headaches and short-term memorey loss.

2.) A lengthy history of mental health issues:

A.) Major depression.

B.) Service connected P.T.S.D., (50% rating by the V.A.)

3.) Prostate cancer, the radiation treatment for this took valuable time away from me, to pursue my litigation of this case.

In addition to my medical conditions, Covid-19 was a major factor in restricting my access to legal referance materials and photocopying services. During several periods when the facility was on lock-down for Covid-19 outbreaks, I encountered deprivations not suffered by my counterparts, in the Attorney General's Office, (counsel for the defendant's).

I wrote to several differant attorneys, who had litigated a case similar to mine, and had done so pro bono. Most did not respond. One who did, Frank J. Lawrence, said he would only represent me if the Pro Bono Panel directed him to do so.

I declare the foregoing to be true, under the penalty of perjury.

Dated: 12/02/2024

Frank J. Richard, #601706
Affiant
Carson City Corr. Facility
10274 Boyer Road
Carson City, MI 48811

APPENDIX

D.

[D.1], Motion for Sanctions, filed on10/27/2022, (ECF No. 37).

[D.2], Petitioner's Reply Brief, filed on 12/5/2020, (ECF No. 50).

[D.3], Petitioner's Supplemental for Objection No. 6, filed on Jan. 11, 2023, (ECF No. 57).

ECF 37 6pages

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FRANK JOHN RICHARD,
Plaintiff,

v.

O.T. WINN, et al.,
Defendants.
_____/

Civil Case No. 21-12064
Honorable: Linda V. Parker
Magistrate: Curtis Ivy Jr.

MOTION FOR SANCTIONS

Introduction

The Plaintiff, FRANK JOHN RICHARD, in Pro Se, herby gives Notice to the Defendant's Attorney of Record, Mr. Joseph Y. Ho (P-77390) that he intends to file this Motion to the District Court for review of the allegation of offering false evidence, knowingly, that does not support any claims.

This action is taken under Fed. R. Civ. P. Rule 11(c)(1)(A)

The Defendants have twenty-one (21) days to respond to the Notice, or the Plaintiff will file this Motion to the District Court.

DEMAND FOR THE

PRODUCTION OF DOCUMENTS

Under the Fed. R. Evid. Rules 1001-1004, "Best Evidence Rule", the Plaintiff hereby demands the production of the documents described of by Mr. Richard Russell in his Affidavit of 3/14/22. Specifically in ¶'s 7 & 8, Failure

to file at Step II.

This demand is for impeachment purposes.

A certified copy is required.

CONTROLLING, OR MOST APPROPROATE AUTHORITIES

Fed. R. Civ. P. Rule 11(c)(1)(A) "Safe Harbor" provision.

MDOC Policy Directive 03.02.130 ¶ V.

Rules of Professional Conduct Rule 3.3(a)(3)(a).

Fed. R. Evid. Rules 1001-1004 "Best Evidence Rule".

28 USCS § 1621, Perjury 28 USCS § 1622, Subornation of Perjury.

MCLS § 168.933 Perjury

U.S. Constitution

Fourteenth Amend., Due Process Clause

Allegations

That on March 14th, 2022, the Defendants Attorney, Mr. Joseph Y. Ho filed a document he knew to be false. The Affidavit, of the same date, signed as Affiant by Mr. Richard Russell, is false. 28 USCS § 1621, Perjury, and MCLS § 168.933, Perjury.

1.) ¶ 8. of this Affidavit references records attached to this Affidavit. No such attachments exist, in the Affidavit, or anywhere else. 28 USCS § 1622, Subornation of perjury.

2.) ¶ 7. is a complete fabrication. The reason for the Step III Rejection was Rejection is Upheld. The only reason, of record, is the Step I rejection, "No Policy violation was found", by the Step I grievance Respondant, Defendant Michael Guerin.

3.) Attorney Ho cites this Affidavit on page No. 5 of his MDOC DEFENDANTS' REPLY TO (ECF No. 22) RESPONSE TO (ECF No. 21) MOTION FOR SUMMARY JUDGMENT

Mr. Russell and Mr. Ho failed to produce the documents to support the claim of Failure to File at Step II.

4.) The Step III Response shows: The Rejection is Upheld.

This fact cannot be disputed by Mr. Russell, as he is the person who signed this document, dated 2/19/20.

5.) Mr. Russell is ignoring the MDOC Policy Directive 03.02.130 ¶ V. Simply put, Warden Winn is not able to act as the Step II Respondent, as he was a participant in events related to this grievance.

6.) Attorney Joseph Y. Ho, is clearly violating the Rules of Professional Conduct, Rule 3.3(a)(3)(a).

AUTHORITIES

Pope v. Federal Exp. Corp., 974 F2d 982, 984 (8th Cir. 1992); Combs v. Rockwell Int'l Corp., 927 F2d 486, 488 (9th Cir. 1991); Compos v. Corrections Officer Smith, 418 F.Supp.2d 277, 279 (W.D.N.Y. 2006).

"The knowing presentation of a falsified document to a court is grounds for dismissal."

Seals v. Sears, Roebuck & Co., 688 F. Supp. 1252 (6th Cir. 1988) "A federal court may not abstain merely from deciding an issue of state law because it is difficult and because the state courts have not spoken".

Remedies

The defendants' are to stipulate that Grievance SRF 0966 is in fact exhausted per provisions of the PLRA and is in compliance with P.D. 03.02.130 ¶ V.

Warden Winn, by acting as the prospective Step II respondent, would violate the above Policy Directive and the Plaintiff's Fourteenth Amend. Right to Due Process.

All papers tendered to support the claim of failure to exhaust administrative remidies as to SRF 0966 are to be withdrawn forthwith.

Respectfully submitted,

Dated Sept. 21, 2022

Frank J. Richard #601706
Saginaw Correctional Facility
9625 Pierce Road
Freeland, MI 48623

ATTACHMENTS

1.) Page No. 5 of MDOC DEFENDANTS' REPLY TO (ECF No. 22) RESPONSE TO (ECF No. 22) MOTION FOR SUMMARY JUDGMENT.

2.) Affidavit (with no attachments) of Richard Russell, dated 3/14/22.

3.) Copy of Step III Response for SRF 0966, dated 3/19/20, and signed by Mr. Richard Russell.

4.) Copy of the Step I Response, for SRF 0966, signed by Defendant Michael Guerin on 10/03/19.

Issue #2 SRF-19-09-0966-28e

Step I Grievance SRF-19-09-0966-28e also alleges staff misconduct, by the same individual P.C. Thomas Haynes. This time the Plaintiff accused Defendant Haynes of ordering him to sign a blank CSJ-363 work report. This was also done in plain english, without any legal jargon. A clear case of fraud.

It was rejected as "vague" by the Step I Respondent, P.C. M. Guerin.

Once again, the Grievance Coordinator failed to refer this grievance to Internal Affairs per P.D. 03.02.130 ¶ R.

This grievance must also be considered as "exhausted" per policy. It was properly prepared and timely submitted, while the Plaintiff was housed at SRF's 900 unit.

The Plaintiff was transferred the day after he filed the grievance. Timing must be considered in this instance.

As the person who authorized the Plaintiff's transfer, Warden O.T. Winn, would be the Step II appeal respondant. What reasonable finder of fact could ever assume that this person would ever grant the Plaintiff any relief?

Retaliatory transfers serve two (2) purposes. One is as a punitive measure. The second is to confound any attempt at redress of grievances.

As the Step I Response was delivered three (3) days after it was due for an appeal, the Plaintiff submits that had he filed a Step II appeal, as the Defense suggests, his appeal would have been denied as untimely filed. Please refer to:

Days v. Johnson, 322 F3d 863, 867-68 (5th Cir. 2003); Moro v. Winsor, 2008 WL 718687, #4-5 (S.D. Ill., Mar. 14, 2008)(holding remedy unavailable to prisoner whose appeal was untimely because he could not get a timely answer at the first level in a system that required a response in order to appeal); McManus v. Schilling, 2008 WL 682577, #8 (E.D. Va., Mar. 7, 2007)(holding

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

FRANK RICHARD #601706,

Plaintiff,

v

O.T. WINN, THOMAS HAYNES, MICHAEL GUERIN, JODIE ANDERSON and CHRISTOPHER LABRECK,

Defendants.

NO. 2:21-cv-12064

HON. LINDA V. PARKER

MAG. CURTIS IVY, JR.

/

AFFIDAVIT OF RICHARD RUSSELL

I, Richard Russell, being duly sworn, depose and say as follows:

1. I am presently the Hearings Administrator and the Manager of the Grievance Section in the Office of Legal Affairs (OLA) of the Michigan Department of Corrections (MDOC), with my office in Lansing, Michigan. I have held this position since May 1, 2011.

2. If sworn as a witness, I can testify competently and with personal knowledge to the facts contained within this affidavit.

3. As the Manager of the Grievance Section my duty is the oversight of the Step III prisoner grievance process as defined in MDOC Policy Directive (PD) 03.02.130, "Prisoner/Parolee Grievances."

4. MDOC PD 03.02.130 sets forth the three-step grievance process by which a prisoner can seek redress for most alleged violations of policy and procedure or unsatisfactory conditions of confinement.

5. In preparation for this affidavit, I have reviewed the Step III grievance documents for SRF-18-06-0531-28b (SRF-531) and SRF-19-09-0966-28e (SRF-966).

6. SRF-531 was rejected at Step I for vagueness because it did not allege a violation of any policy or procedure. Prisoners are routinely asked to sign pledges or agreements of codes of conduct as a condition for placement or participation in various prison programs, which was what happened here.

7. SRF-966 was rejected at Step III because it did not contain the Step II documents as required under policy. If a prisoner does not receive a Step I response in a timely manner, they should submit a kite regarding the Step I response or a request for Step II appeal forms.

8. The documents referenced in this affidavit are records of regularly conducted activity of the MDOC. The records were made at or near the time of the occurrences reflected, by a person with knowledge of those matters, or from information transmitted by a person with knowledge of those matters. These documents are kept in the regular course of business of the MDOC. Any copy of these records attached to or accompanying this affidavit are true and accurate copies of the original records.

AFFIANT SAYS NOTHING FURTHER.

"I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND ACCURATE."

Date: March 14, 2022

RD Russell

Richard D. Russell
Grievance Section Manager &
Hearings Administrator
Office of Legal Affairs, MDOC

[D.1]

GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF CORRECTIONS
LANSING

HEIDI E. WASHINGTON
DIRECTOR

STEP III GRIEVANCE DECISION

113102

To Prisoner: Richard #: 601706
Current Facility: SRF
Grievance ID #: SRF-19-09-0966-~~02B~~ 28e
Step III Received: 12/17/2019

Your Step III appeal has been reviewed and considered by the Grievance Section of the Office of Legal Affairs in accordance with PD 03.02.130, "Prisoner/Parolee Grievances".

THE REJECTION IS UPHELD.

THIS DECISION CANNOT BE APPEALED WITHIN THE DEPARTMENT.

Richard D. Russell, Manager Grievance Section, Office of Legal Affairs

Date Mailed: MAR 19 2020

cc: Warden, Filing Facility: SRF

MICHIGAN DEPARTMENT OF CORRECTIONS

CSJ-247S 3/18/2019

STEP I GRIEVANCE RESPONSE SUPPLEMENTAL FORM

(Use if space on the CSJ-247A is insufficient for a full response by stating on the CSJ-247A "See attached CSJ-247S")

Prisoner Last Name:	Prisoner #:	Lock/Location:	Grievance #:
Richard	601706	4-114/MCF	SRF-19-09-0966-02B

Prisoner Interviewed: YES ☐ NO ☒ **If "NO", Reason:** Prisoner at another Facility

Extension Granted: YES ☐ NO ☒ **If "YES", Enter End Date:**

COMPLAINT SUMMARY:
Richard 601706 is seeking to have a CSJ-363 "Prisoner Program and Work Assignment Evaluation" removed from his file. He states PC Haynes "tried to have me sign a blank 363 work report."

INVESTIGATION SUMMARY:
Richard 601706 was transferred from this facility and not available for an interview. Mr. Haynes stated that the work report was already completed when Richard was removed from the program and that he didn't request Richard to sign a blank work report. A review of the CSJ-363 shows a notation of "Refused to Sign" on the Prisoner's signature line.

APPLICABLE POLICY, PROCEDURE, ETC.:
SRF's Operating Procedure 05.01.100B addresses the procedure when a prisoner refuses to sign a negative work evaluation. It states, "If a prisoner refuses to sign, write 'refused to sign' in the comment section." Then, forward the evaluation to the Classification Director.

DECISION SUMMARY:
No policy violation was found. It was noted on the CSJ-363 that the prisoner refused to sign, and the CSJ-363 was forwarded to the Classification Director as required. Grievance denied at Step I.

RESPONDENT NAME:	M. Guerin	**TITLE:**	PC9
RESPONDENT SIGNATURE:	M Guerin	**DATE:**	10/3/19
REVIEWER NAME:	J. Anderson	**TITLE:**	RUM
REVIEWER SIGNATURE:	J Anderson RUM	**DATE:**	10/3/19

Distribution: Original - Step I Grievance Coordinator Copies – 3 To Grievant (1 Prisoner Copy; 1 for Step II filing; 1 for Step III filing)

ECF 50 5pages

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

FRANK JOHN RICHARD, #601706,
Plaintiff,

v.

THOMAS HAYNES,
Defendant.
_____/

Case No. 21-12064
Judge: Linda V. Parker
Magistrate Judge: Curtis Ivy, Jr.

PLAINTIFF'S REPLY TO DEFENDANT HAYNES' RESPONSE IN OPPOSITION TO (ECF No.37) MOTION FOR SANCTIONS (ECF No.42) and (ECF No.43)

TIMELINESS OF FILING

The response brief and affidavit from Defendant Thomas Haynes were received respectively by the Plaintiff on November 14 and November 17 of 2022. This makes the Plaintiff's reply brief timely filed, per the Prison Mailbox Rule.

AUTHORITIES

Federal Regulations:

Fed.R.Civ.P. Rule 11(b)

Fed.R.Civ.P. Rule 11(c)(1)(A)

Fed.R.Civ.P. Rule 11(c)(3)

Fed.R.Civ.P. Rule 11(d)

Fed.R.Civ.P 26(a)(1)(B)(iv)

Michigan Bar Code:

Rules of Professional Conduct Rule 3.3(a)(3)

Michigan Dept. of Corrections Policy Directives:

M.D.O.C. Policy Directive 03.02.130 ¶V.

CASE LAW

Reed-Bey v. Prametaller, 603 F.3d 322, 325 (6th Cir. 2010)

CASE SUMMARY

The Plaintiff filed a MOTION FOR SANCTIONS (ECF No.37) for misconduct by an affiant, Mr. Richard Russell and the Defendant's attorney for knowingly proffering false testimony. The Plaintiff alleged that this conduct constituted perjury on the part of Mr. Russell, and the subornation of perjury by Mr. Joseph Ho. The Plaintiff further claimed that Mr. Ho violated the Rules of Professional Conduct Rule 3.3(a)(3)(a).

The Defense was given a twenty-one (21) day "safe harbor" notice per Fed.R.Civ.P. Rule 11(c)(1)(A), Safe Harbor Provision.

REPLY TO DEFENDANT

HAYNE'S RESPONSE BRIEF (ECF No.42)

ARGUMENTS

Attorney Ho and Mr. Russell seem to be "doubling-down" on the lie, as to the reason for the Step III rejection of SRF0966.

A demand for the production of documents was included in the Plaintiff's motion for sanctions. As this court well knows, they are exempt from Initial Disclosure per Fed.R.Civ.P. Rule 26(a)(1)(B)(iv).

However, Fed.R.Civ.P. Rule 11(d) Inapplicability to Discovery, exempts them from the shield of the above rule.

Of course the court may at any time, of it's own accord, order the Defendant to Show Cause as to how they did not violate Fed.R.Civ.P. Rule 11(b), this is per Rule 11(c)(3).

Mr. Russell, parrots most of his assertions from the affidavit of 3/14/22 (ECF No.23-1), in his affidavit filed on 11/15/22 (ECF No.43). The claim of "Failure to include Step II documents" remains.

The Step III response is clear, Rejection Upheld. As Mr. Russell did not disclose the aforementioned documents, his claim is without merit. An evidentiary statement by an affiant, by itself, does not prove anything. The affidavits, sworn to by Richard Russell, are unsupported by any hard evidence.

The Step III appeal was ruled on, on the merits by Mr. Russell. As he cannot provide anything other than a concocted statement, the Ruling on the Merits must stand.

Mr. Russell had the option to invoke the bar "Failure to include Step II documents," on the Step III appeal decision. He failed to do so.

The only previous ruling from which to uphold is the decision was made by PC Michael Guerin on Oct. 3, 2019 "No violation of policy found." This was his decision on the Step I response for SRF-0966.

This is supported by Reed-Bey v. Prematellar, 603 F3d 322, 325 (6th Cir. 2010).

"When prison officials decline to enforce their own procedural requirements and opt to consider otherwise-defaulted claims on the merits, so as a general rule will we."

The grievance was in default long before Mr. Russell ever saw it. M.D.O.C. staff ignored M.D.O.C. Policy Directive 03.02.130 ¶V., when PC Michael Guerin was appointed as the Step I respondent.

The CSJ-363 work report filed by defendant Haynes, on Sept. 5, 2019, clearly shows PC Guerin as being a witness to the events complained of by the Plaintiff.

Warden Winn was a party to these events. A Step II appeal would have been MOOT.[1]

Footnote' (Winn authorized the retaliatory transfer of the Plaintiff to MCF.)

M.D.O.C. PD 03.02.130 ¶V. states: "Prisoners and staff who may be involved in the issue being grieved shall not participate in any capacity in the grievance investigation, review, or response, except as necessary to provide information to the respondent."

> Reed-Bey, 603 F3d at 325 (6th Cir. 2010), "We do not 'second guess [a state's] decision to overlook or forgive its own procedural bar.'"

IN CONCLUSION

The preceding facts are ample grounds for sanctions on the Defendant. Making false representations, on an affidavit is impermissable.

Filed on 12/5/22

Respectfully submitted,

Date:_____

_____

Frank J. Richard #601706
Plaintiff in Pro Se
Saginaw Corr. Facility
9625 Pierce Rd
Freeland, MI 48623

ECF No. 57 (3 pages)

UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF MICHIGAN SOUTHERN DIVISON

FRANK JOHN RICHARD, Case No.: 21-12064
Plaintiff, Linda V. Parker
United States District Judge
v.
THOMAS HAYNES, Curtis Ivy, Jr.
Defendant. / United States Magistrate Judge

OBJECTIONS TO (ECF No. 53)
SUPPLEMENT TO PLAINTIFF'S
OBJECTION No. 6

The Plaintiff submits the following text, as a supplement to his previous filing, will give the Court a firmer legal basis from which to make a ruling.

(1)

SUPPLEMENT TO OBJECTION
No. 6

Mr. Richard Russell ignored the procedural error, Plaintiff's failure to file an appeal at Step II, and made his ruling based on the Step I appeal. This is why Russell attached the Step I appeal response to the Step III appeal response.

In Reed-Bey v. Pramstaller, 603 F.3d 324-25 (6th Cir. 2010); cited by Alexander v. Huss, No. 2:16-cv-209, 2017 U.S. Dist. LEXIS 150801, 2017 WL 4119944 (W.D. Mich. Sept. 18, 2017),

"When the MDOC opts to ignore procedural violations, and instead addresses the merits of the claim or the appeal, it cannot later raise

the procedural defect as a defense."

This grievance, SRF 0966, is thusly exhausted.

Please accept the Plaintiff's apologies, the Alexander v. Huss case was/is a West Law citation. It was not easy to find via the Prison Electronic Law Library.

Respectfully submitted,

Frank J. Richard #601706
Plaintiff in Pro Se
Saginaw Corr. Facility
9625 Pierce Rd.
Freeland, MI 48623

Dated: 1/3/2023

APPENDIX

E.

[E.1], Pulido v. Lunes, 2016 U.S. Dist. LEXIS 66904, (E.D. Cal. 2016).

[E.2], Ollier v. Sweetwater Union High School Dist., 768 F.3d 842, 862 (9th Cir. 2014).

Pulido v. Lunes

United States District Court for the Eastern District of California

May 19, 2016, Decided; May 20, 2016, Filed

1:14-cv-01174-DAD-EPG-PC

Reporter
2016 U.S. Dist. LEXIS 66904 *

JOSE J. PULIDO, Plaintiff, vs. M. LUNES, et al., Defendants.

Prior History: Pulido v. Lunes, 2014 U.S. Dist. LEXIS 167002 (E.D. Cal., Dec. 1, 2014)

Counsel: **[*1]** Jose J. Pulido, Plaintiff, Pro se, CORCORAN, CA.

For M. Lounes, Sergeant, Defendant: Thomas P. Feher, LEAD ATTORNEY, LeBeau - Thelen, LLP, Bakersfield, CA.

For Cruz, Correctional Officer at Corcoran State Prison (CSATF), Shaw, Correctional Officer at Corcoran State Prison (CSATF), Defendants: Andrew James Whisnand, LEAD ATTORNEY, Office of the Attorney General, Sacramento, CA.

Judges: Erica P. Grosjean, UNITED STATES MAGISTRATE JUDGE.

Opinion by: Erica P. Grosjean

Opinion

ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION (ECF Nos. 42, 43.)

ORDER FOR PARTIES TO EXCHANGE INITIAL DISCLOSURES WITHIN THIRTY DAYS

I. BACKGROUND

Plaintiff Jose J. Pulido ("Plaintiff") is a state prisoner proceeding *pro se* and *in forma pauperis* with this civil rights action pursuant to 42 U.S.C. § 1983. This case now proceeds on the original Complaint filed by Plaintiff on July 28, 2014, against defendants Sergeant M. Lunes, Correctional Officer Cruz, and Correctional Officer Shaw on Plaintiff's Eighth Amendment claims that Defendants were deliberately indifferent to a serious risk to Plaintiff's safety. (ECF No. 1.)

On April 29, 2016, after Defendants filed Answers to the Complaint, the Court issued an Order Requiring Initial Disclosures and Setting Mandatory Scheduling Conference **[*2]** ("Court's Order"). (ECF No. 41.) The Order requires the parties to provide initial disclosures, including names of witnesses and production of documents.

On May 12, 2016, defendants Cruz and Shaw filed objections to the Court's Order. (ECF No. 42.) On May 12, 2016, defendant Lunes joined the objections. (ECF No. 43.) In the objections, Defendants request that the Court vacate the initial disclosure requirement of the Court's Order. The Court construes Defendants' objections as a motion for reconsideration of the initial disclosure requirement of the Court's Order.

II. MOTION FOR RECONSIDERATION

Defendants argue that the Court's Order requires the parties to engage in initial disclosures of discovery similar to those required under Federal Rule of Civil Procedure 26(a)(1). Defendants note that because Plaintiff is a *pro se* prisoner, there is an exemption from the initial disclosure requirements.[1] Thus, Defendants claim that the Court's ruling disregards the Federal Rules of Civil Procedure by imposing a requirement where it is subject to an exemption.

The Advisory Committee Notes published alongside the Federal Rules provide otherwise. In the notes to the 2000 amendments, the Advisory Committee Notes provide "even in a case excluded from initial disclosure under subdivision (a)(1)(E) . . . the court can order exchange of similar information in managing the action under Rule 16." Fed. R. Civ. P. 26(a)(1) Advisory Committee Note of 2000. Moreover, Rule 16 provides that "[i]n any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as: . . . establishing early and continuing control so that the case will not be protracted because of lack of management . . . discouraging wasteful pretrial activities; [and] improving the quality of the trial through more thorough preparation . . . ." Fed. R. Civ. P. 16(a). Rule 16 also permits the Court to issue a scheduling order to "modify the extent of discovery." Fed. R. Civ. P. 16(b)(3)(B)(i). Furthermore, Rule 16 provides that matters for consideration at any pretrial conference may include "controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37," and "facilitating in other ways the just, speedy, and inexpensive disposition of the action." Fed. R. Civ. P. 16(c)(2)(F), (P). See also, Chambers v. NASCO, Inc., 501 U.S. 32, 43, 111 S. Ct. 2123, 115 L. Ed. 2d 27, reh'g denied, 501 U.S. 1269, 112 S. Ct. 12, 115 L. Ed. 2d 1097 (1991) (district courts have **[*4]** an inherent power "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."); Ollier v. Sweetwater Union High School Dist., 768 F.3d 843, 862 (9th Cir. 2014) ("A district court has wide discretion in controlling discovery.") (internal citation omitted).

A similar order was upheld by the District Court in Irvin van Buren v. Emerson, 1:13-cv-01273-LJO-DLB, ECF No. 33, December 2, 2014. In that case, the Court had issued an initial Discovery and Scheduling Order in a prisoner case similarly requiring initial disclosures, including names of witnesses and production of documents. In upholding the disclosure requirement, Judge Lawrence J. O'Neill, who is now Chief Judge of this District, explained:

> The Court further notes that the discovery order at issue, which has been used and upheld in other actions in this Court, was implemented in light of the numerous discovery issues that were arising with increasing frequency in other pro se prisoner cases. Defendants' discovery practices were bordering on unnecessarily obstructive, and these tactics caused numerous discovery disputes that required extensive Court resources to resolve. The intent of the order, as explained above, is to discourage similar wasteful activities.
>
> Defendant further **[*5]** believes that such requirements are an undue burden on the State in prisoner cases. However, again, the intent behind the order is to streamline the discovery process and ultimately reduce the overall burden on the State, the Court and the parties. In fact, since the requirement to exchange initial disclosures has been in place, there has been a significant decrease in discovery disputes in actions where the ordered [sic] has issued. This decrease has benefited both the parties *and* the Court.

1:13-cv-01273-LJO-DLB, ECF No. 33, at p.3.

Defendants argue that the scope of disclosures required by the Court's Order is broader than what is permitted by the Federal Rules because it requires Defendants to produce "copies of all documents and other materials . . . *related to* the claims and defenses in this case." (ECF No. 41 at 2 (emphasis added)). Defendants assert that by contrast, the initial disclosure rule, Fed. R. Civ. P. 26(a)(1)(A)(ii), orders parties to "provide . . . a copy . . . of all documents . . . .[it] *may use* to support *its* claims or defenses . . . ." (emphasis added.) Defendants contend that this distinction causes an undue burden on Defendants and their counsel by inappropriately forcing them to develop **[*6]** Plaintiff's claim for him, likely encompasses privileged and confidential material, and requires defense counsel to spend time and resources sifting through documents that are equally available to Plaintiff.

---

[1] Rule 26(a)(1)(B)(iv) of the Federal Rules of Civil Procedure provides that "an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision" is exempt from initial disclosure of discovery. **[*3]**

This difference in language does not invalidate the Court's order. The purpose of initial disclosures under Rule 26(a) is "to accelerate the exchange of basic information . . . and to eliminate the paper work involved in requesting such information." Fed. R. Civ. P. 26(a)(1) Advisory Committee Note of 1993 (emphasis added). The difference in language cited by Defendants does not alter that intent. There is no material difference between documents *related to* claims and defenses and those that *may be* used in a claim and defense. This is especially true in the context of prisoner litigation, where the documents at issue are contained in common files associated with an inmate. Indeed, the prison often conducts its own evaluation of conduct in an organized and discrete manner based on an underlying grievance by the prisoner. Those types of documents are enumerated in the Court's order and include "grievances, responses, and appeals thereof," and "reports of completed investigations by CDCR or others." Thus, while being **[*7]** theoretically vague, its application to documents in this context should be clear. Moreover, in the context of prisoner litigation, Defendants are often the party with possession, custody, and control over documents related to the underlying incident. The wording of the Court's order, to the extent it applies to documents regarding Plaintiff's claim in addition to Defendant's defense, encompasses all documents related to the incident even if not directly supportive of a defense. Such a change is rationally suited to the prisoner context.

Defendants next object to the extent that the Court's order may include privileged documents. The Court's order permits withholding of such documents on the basis of confidentiality or privilege, provided that Defendants describe what is being withheld and on what legal basis. Defendants argue that in theory they could run the risk of inadvertently waiving the privilege by failing to include a privileged document that conceivably could relate to a claim or defense. But Defendants should have no such concern in light of the law that waiver of the privilege must be knowing and voluntary. U.S. v. Richey, 632 F.3d 559, 566 (9th Cir. 2011) (voluntary disclosure of privileged communications constitutes **[*8]** waiver of the privilege for all other communications on the same subject). So long as Defendants do not intentionally withhold privileged documents subject to the order, no claim of waiver would attach.

Defendants next claim that they should not be required to identify documents more available to Plaintiff, focusing on the words "with particularity." For the sake of clarity, describing documents in the possession of Plaintiff such as "Plaintiff's C-file" is sufficient disclosure. It is not necessary for Defendants to opine on which such documents are related to this claim—it is only necessary for Defendants to describe the universe of materials that Plaintiff already has and thus are not being produced by Defendants.

The Court thus declines to reconsider its order. At the scheduling conference, the Court is willing to discuss any outstanding questions or issues regarding the precise contours of its order. But the Court's intent should be clear: the universe of documents that refer to the incident underlying Plaintiff's complaint is very likely relatively small, already known, and easily located by Defendants. Defendants (as well as Plaintiff) need to produce such documents, or assert **[*9]** claims of privilege, in the timeline provided by the order. Such disclosure will streamline the case and allow resolution of the issues in a timely manner, saving time and expense for all parties and the Court. Especially given the volume of prisoner litigation cases in this District, the Court's order comports with the Court's obligation to manage such cases in a way that reaches a fair and just resolution in a timely manner.

III. CONCLUSION

Based on the foregoing, IT IS HEREBY ORDERED that:

1. Defendants' motion for reconsideration, filed on May 12, 2016, is DENIED; and
2. The parties SHALL exchange initial disclosures within thirty (30) days of the date of service of this order, pursuant to the Court's Order of April 29, 2016.

IT IS SO ORDERED.

Dated: **May 19, 2016**

/s/ Erica P. Grosjean

UNITED STATES MAGISTRATE JUDGE

Ollier v. Sweetwater Union High Sch. Dist.

United States Court of Appeals for the Ninth Circuit

June 3, 2014, Argued and Submitted, Pasadena, California; September 19, 2014, Filed

No. 12-56348

Reporter
768 F.3d 843 *; 2014 U.S. App. LEXIS 18020 **; 95 Fed. R. Evid. Serv. (Callaghan) 544; 89 Fed. R. Serv. 3d (Callaghan) 1292

VERONICA OLLIER; NAUDIA RANGEL, by her next friends Steve and Carmen Rangel; MARITZA RANGEL, by her next friends Steve and Carmen Rangel; AMANDA HERNANDEZ, by her next friend Armando Hernandez; ARIANNA HERNANDEZ, by her next friend Armando Hernandez, individually and on behalf of all those similarly situated, Plaintiffs-Appellees, v. SWEETWATER UNION HIGH SCHOOL DISTRICT; ARLIE N. RICASA; PEARL QUINONES; JIM CARTMILL; JAIME MERCADO; GREG R. SANDOVAL; JESUS M. GANDARA; EARL WEINS; RUSSELL MOORE, in their official capacities, Defendants-Appellants.

Prior History: [1]** Appeal from the United States District Court for the Southern District of California. D.C. No. 3:07-cv-00714-L-WMC. M. James Lorenz, Senior District Judge, Presiding.

Ollier v. Sweetwater Union High Sch. Dist., 604 F. Supp. 2d 1264, 2009 U.S. Dist. LEXIS 32683 (S.D. Cal., 2009)

Ollier v. Sweetwater Union High Sch. Dist., 858 F. Supp. 2d 1093, 2012 U.S. Dist. LEXIS 16003 (S.D. Cal., 2012)

Ollier v. Sweetwater Union High Sch. Dist., 735 F. Supp. 2d 1222, 2010 U.S. Dist. LEXIS 87204 (S.D. Cal., 2010)

Ollier v. Sweetwater Union High Sch. Dist., 267 F.R.D. 339, 2010 U.S. Dist. LEXIS 40565 (S.D. Cal., 2010)

Disposition: AFFIRMED.

Core Terms

district court, Coach, athletes, team, female, retaliation, witnesses, softball, fired, disclosure, proportionality, discovery, sport, girls, facilities, quotation, protected activity, marks, sex, enrollment, athletic program, female student, accommodation, contends, retaliation claim, retaliatory, Rights, high school, complaints, reasons

Case Summary

Overview
HOLDINGS: [1]-The school district did not fully and effectively accommodate the interests and abilities of its female athletes because female athletic participation and overall female enrollment were not substantially proportionate at the relevant times; the decision to cut field hockey twice during the relevant time period, coupled with the inability to show that the motivations were legitimate, was enough to show sufficient interest, ability, and available competition to sustain a field hockey team; [2]-The district court did not err under Fed. R. Evid. 702 in barring two experts for the school district from testifying at trial because their testimony was unreliable and unsupported by the facts; the experts' conclusions were based on their personal opinions and speculation rather than on a systematic assessment of the school's athletic facilities and programs.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1 **Standards of Review, De Novo Review**

An appellate court reviews de novo a district court's grant of a motion for summary judgment to determine whether, viewing the evidence in the light most favorable to the nonmoving party, there exists a genuine dispute as to any material fact and whether the district court correctly applied the substantive law. Fed. R. Civ. P. 56(a).

Education Law > ... > Gender & Sex Discrimination > Title IX > Athletics

HN2 **Title IX, Athletics**

Title IX of the Education Amendments of 1972 states that no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance. 20 U.S.C.S. § 1681(a). Title IX's implementing regulations require that schools provide equal athletic opportunity for members of both sexes. 34 C.F.R. § 106.41(c). Among the factors courts consider to determine whether equal opportunities are available to male and female athletes is whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes. 34 C.F.R. § 106.41(c)(1).

Education Law > ... > Gender & Sex Discrimination > Title IX > Athletics

HN3 **Title IX, Athletics**

Under a three-part "effective accommodation" test, an athletics program complies with Title IX of the Education Amendments of 1972 if it satisfies any one of the following conditions: (1) Whether participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or (2) Where the members of one sex have been and are underrepresented among athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or (3) Where the members of one sex are underrepresented among athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program. The three-part test applies to a high school. 34 C.F.R. § 106.41(a) disallows sex discrimination in any interscholastic, intercollegiate, club, or intramural athletics. Although the regulation does not explicitly refer to high schools, it does not distinguish between high schools and other types of interscholastic, club or intramural athletics.

Education Law > ... > Gender & Sex Discrimination > Title IX > Athletics

HN4 **Title IX, Athletics**

A court's analysis under the first prong of the Title IX of the Education Amendments of 1972 "effective accommodation" test, whether participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments, begins with a determination of the number of participation opportunities afforded to male and female athletes. In making this determination, a court counts only actual athletes, not unfilled slots, because Title IX participation opportunities are real, not illusory. The second step of the analysis under the first prong is to consider whether the number of participation opportunities, i.e., athletes, is substantially proportionate to each sex's enrollment. Exact proportionality is not required, and there is no magic number at which substantial proportionality is achieved. Rather, substantial proportionality is determined on a case-by-case basis in light of the institution's specific circumstances and the size of its athletic program. As a general rule, there is substantial proportionality if the number of additional participants required for exact proportionality would not be sufficient to sustain a viable team.

Education Law > ... > Gender & Sex Discrimination > Title IX > Athletics

HN5 **Title IX, Athletics**

Participation need not be substantially proportionate to enrollment, however, if an institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of female athletes. The second prong of the Title IX of the Education Amendments of 1972 "effective accommodation" test "looks at an institution's past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion. There are no fixed intervals of time within which an institution must have added participation opportunities. Neither is a particular number of sports dispositive. Rather, the focus is on whether the program expansion was responsive to developing interests and abilities of female students. The guidance also makes clear that an institution must do more than show a history of program expansion; it must demonstrate a continuing, i.e., present, practice of program expansion as warranted by developing interests and abilities. The second prong analysis focuses primarily on increasing the number of women's athletic opportunities rather than increasing the number of women's teams.

Education Law > ... > Gender & Sex Discrimination > Title IX > Athletics

HN6 **Title IX, Athletics**

An institution can satisfy Title IX of the Education Amendments of 1972 if it proves that the interests and abilities of female students have been fully and effectively accommodated by the present program. This, the third prong of the Title IX "effective accommodation" test, considers whether a gender imbalance in athletics is the product of impermissible discrimination or merely of the genders' varying levels of interest in sports. Stated another way, a school where fewer girls than boys play sports does not violate Title IX if the imbalance is the result of girls' lack of interest in athletics. In evaluating compliance under the third prong, a court must consider whether there is (1) unmet interest in a particular sport; (2) ability to support a team in that sport; and (3) a reasonable expectation of competition for the team. An institution is Title IX-compliant unless all three conditions are present. If an institution has recently eliminated a viable team, a court presumes that there is sufficient interest, ability, and available competition to sustain a team in that sport absent strong evidence that conditions have changed.

Education Law > ... > Gender & Sex Discrimination > Title IX > Athletics

HN7 **Title IX, Athletics**

Title IX of the Education Amendments of 1972 plaintiffs need not themselves gauge interest in any particular sport. It is a school district that should evaluate student interest "periodically" to identify in a timely and responsive manner any developing interests and abilities of the underrepresented sex.

Education Law > ... > Gender & Sex Discrimination > Title IX > Athletics

HN8 **Title IX, Athletics**

The implementing regulations of Title IX of the Education Amendments of 1972 state that compliance is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association. 34 C.F.R. § 106.6(c).

Education Law > ... > Gender & Sex Discrimination > Title IX > Athletics

HN9 **Title IX, Athletics**

If an educational institution has recently eliminated a viable athletic team, there is sufficient interest, ability, and available competition to sustain a team in that sport unless an institution can provide strong evidence that interest, ability, or available competition no longer exists.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Evidence > Admissibility > Expert Witnesses

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

Civil Procedure > Discovery & Disclosure > Disclosure > Sanctions

HN10 **Standards of Review, Abuse of Discretion**

An appellate court reviews a district court's evidentiary rulings, such as its decisions to exclude expert testimony and to impose discovery sanctions, for an abuse of discretion, and a showing of prejudice is required for reversal.

Civil Procedure > Trials > Bench Trials

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Civil Procedure > Discovery & Disclosure > Disclosure > Sanctions

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN11 **Trials, Bench Trials**

In non-jury cases, a district judge is given great latitude in the admission or exclusion of evidence. District courts have "broad latitude" to determine whether expert testimony is sufficiently reliable to be admitted. Appellate courts give particularly wide latitude to a district court's discretion to issue sanctions under Fed. R. Civ. P. 37(c)(1), which is a recognized broadening of the sanctioning power.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Expert Witnesses > Helpfulness

HN12 **Expert Witnesses, Daubert Standard**

Fed. R. Evid. 702 governs the admissibility of expert testimony. It provides that a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN13 **Expert Witnesses, Daubert Standard**

It is well settled that bare qualifications alone cannot establish the admissibility of expert testimony. Rather, courts interpret Fed. R. Evid. 702 to require that expert testimony be both relevant and reliable. A proposed expert's testimony, then, must have a reliable basis in the knowledge and experience of his discipline. This requires district courts, acting in a gatekeeping role, to assess whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue. It is not the correctness of the expert's conclusions that matters, but the soundness of his methodology.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN14 **Expert Witnesses, Daubert Standard**

Personal opinion testimony is inadmissible as a matter of law under Fed. R. Evid. 702, and speculative testimony is inherently unreliable.

Civil Procedure > Discovery & Disclosure > Disclosure > Mandatory Disclosures

Civil Procedure > Discovery & Disclosure > Disclosure > Sanctions

HN15 **Disclosure, Mandatory Disclosures**

The Federal Rules of Civil Procedure require parties to provide to other parties the name of each individual likely to have discoverable information, along with the subjects of that information, that the disclosing party may use to support its claims or defenses. Fed. R. Civ. P. 26(a)(1)(A)(i). A party who has made a disclosure under Rule 26(a) must supplement or correct its disclosure in a timely manner if the party learns that in some material respect the disclosure is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. Fed. R. Civ. P. 26(e). A party that does not timely identify a witness under Rule 26 may not use that witness to supply evidence at a trial unless the failure was substantially justified or is harmless. Fed. R. Civ. P. 37(c)(1). Indeed, Rule 37(c)(1) is intended to put teeth into the mandatory disclosure requirements of Rule 26(a) and (e).

Civil Procedure > Discovery & Disclosure > Disclosure > Sanctions

HN16 **Disclosure, Sanctions**

A district court has wide discretion in controlling discovery. That discretion is "particularly wide" when it comes to excluding witnesses under Fed. R. Civ. P. 37(c)(1).

Civil Procedure > Discovery & Disclosure > Disclosure > Mandatory Disclosures

HN17 **Disclosure, Mandatory Disclosures**

The theory of disclosure under the Federal Rules of Civil Procedure is to encourage parties to try cases on the merits, not by surprise, and not by ambush. After disclosures of witnesses are made, a party can conduct discovery of what those witnesses would say on relevant issues, which in turn informs the party's judgment about which witnesses it may want to call at trial, either to controvert testimony or to put it in context. Orderly procedure requires timely disclosure so that trial efforts are enhanced and efficient, and the trial process is improved. The late disclosure of witnesses throws a wrench into the machinery of trial. A party might be able to scramble to make up for the delay, but last-minute discovery may disrupt other plans. And if the discovery cutoff has passed, the party cannot conduct discovery without a court order permitting extension. This in turn threatens whether a scheduled trial date is viable. And it impairs the ability of every trial court to manage its docket.

Civil Procedure > Discovery & Disclosure > Disclosure > Mandatory Disclosures

HN18 **Disclosure, Mandatory Disclosures**

Fed. R. Civ. P. 26 states that a party must, without awaiting a discovery request, provide to the other parties the name and, if known, the address and telephone number of each individual likely to have discoverable information. Fed. R. Civ. P. 26(a)(1)(A). Compliance with Rule 26's disclosure requirements is "mandatory." The rule places the disclosure obligation on a party. That another witness has made a passing reference in a deposition to a person with knowledge or responsibilities who could conceivably be a witness does not satisfy a party's disclosure obligations. An adverse party should not have to guess which undisclosed witnesses may be called to testify.

Civil Procedure > Judicial Officers > Judges > General Overview

Civil Procedure > Trials > General Overview

HN19 **Judicial Officers, Judges**

A trial court's power to control the conduct of trial is broad.

Civil Procedure > ... > Justiciability > Mootness > Voluntary Cessation Exception

HN20 **Mootness, Voluntary Cessation Exception**

Voluntary cessation of wrongful conduct does not moot a case or controversy unless subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Justiciability > Standing > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN21 **Standards of Review, Clearly Erroneous Review**

An appellate court reviews de novo a district court's decision to deny a Fed. R. Civ. P. 12(b)(6) motion to dismiss. Similarly, whether a party has standing to bring a claim is a question of law that an appellate court reviews de novo. But an appellate court reviews a district court's fact-finding on standing questions for clear error.

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN22 **Justiciability, Standing**

U.S. Const. art. III requires a party to have standing to bring its suit. The elements of standing are well-established: the party must have suffered (1) an injury in fact, an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of, meaning the injury has to be fairly traceable to the challenged action of the defendant; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. In a class action, standing is satisfied if at least one named plaintiff meets the requirements.

Administrative Law > Agency Adjudication > General Overview

HN23 **Administrative Law, Agency Adjudication**

An injured party may sue under the Administrative Procedure Act, 5 U.S.C.S. § 551 et seq., if he falls within the "zone of interests" sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

HN24 **Justiciability, Standing**

Any plaintiff with an interest arguably sought to be protected by a statute with an anti-retaliation provision has standing to sue under that statute.

Education Law > ... > Gender & Sex Discrimination > Title IX > Scope of Title IX

HN25 **Title IX, Scope of Title IX**

Students have an interest arguably sought to be protected by Title IX of the Education Amendments of 1972; indeed, students are the statute's very focus.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Trials > Bench Trials

HN26 **Standards of Review, Abuse of Discretion**

An appellate court reviews a district court's decision to grant a permanent injunction for an abuse of discretion, but reviews for clear error the factual findings underpinning the award of injunctive relief, just as it reviews for clear error a district court's findings of fact after bench trial. However, an appellate court reviews de novo the rulings of law relied upon by a district court in awarding injunctive relief.

Civil Rights Law > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964
Business & Corporate Compliance > Governments > Civil Rights Act of 1964

Civil Rights Law > Protection of Rights > Federally Assisted Programs > Discrimination

Education Law > ... > Gender & Sex Discrimination > Title IX > Proof of Discrimination

Education Law > ... > Gender & Sex Discrimination > Title IX > Scope of Title IX

HN27 **Governments, Civil Rights Act of 1964**

The private right of action in Title IX of the Education Amendments of 1972 encompasses suits for retaliation, because retaliation falls within the statute's prohibition of intentional discrimination on the basis of sex. Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel. Courts apply to Title IX retaliation claims the familiar framework used to decide retaliation claims under Title VII of the Civil Rights Act of 1964. Under that framework, a plaintiff who lacks direct evidence of retaliation must first make out a prima facie case of retaliation by showing (a) that he or she was engaged in protected activity, (b) that he or she suffered an adverse action, and (c) that there was a causal link between the two. The burden on a plaintiff to show a prima facie case of retaliation is low. Only a minimal threshold showing of retaliation is required. After a plaintiff has made this showing, the burden shifts to the defendant to articulate a legitimate, non-retaliatory reason for the challenged action. If the defendant can do so, the burden shifts back to the plaintiff to show that the reason is pretextual.

Education Law > ... > Gender & Sex Discrimination > Title IX > Scope of Title IX

HN28 **Title IX, Scope of Title IX**

In the Title IX of the Education Amendments of 1972 context, speaking out against sex discrimination is protected activity. Indeed, Title IX empowers a woman student to complain, without fear of retaliation, that the educational establishment treats women unequally.

Education Law > ... > Gender & Sex Discrimination > Title IX > Enforcement of Title IX

Education Law > ... > Gender & Sex Discrimination > Title IX > Scope of Title IX

HN29 **Title IX, Enforcement of Title IX**

The existence of a private right of action to enforce Title IX of the Education Amendments of 1972 is well-established. A private right of action under Title IX includes a claim for retaliation. Title IX's private right of action encompasses suits for retaliation, because retaliation falls within the statute's prohibition of intentional discrimination on the basis of sex. Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel.

Civil Procedure > Remedies > Injunctions > General Overview

HN30 **Remedies, Injunctions**

The relief of an injunction is equitable, and a district court had broad powers to tailor equitable relief.

Civil Rights Law > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964
Business & Corporate Compliance > Governments > Civil Rights Act of 1964

Education Law > ... > Gender & Sex Discrimination > Title IX > General Overview

Evidence > Admissibility > Circumstantial & Direct Evidence

Education Law > ... > Gender & Sex Discrimination > Title IX > Proof of Discrimination

HN31 **Governments, Civil Rights Act of 1964**

Under Title IX of the Education Amendments of 1972, as under Title VII of the Civil Rights Act of 1964, the adverse action element is present when a reasonable person would have found the challenged action materially adverse, which means it well might have dissuaded a reasonable person from making or supporting a charge of discrimination. Courts construe the causal link element of the retaliation framework "broadly;" a plaintiff "merely has to prove that the protected activity and the adverse action are not completely unrelated. In Title VII cases, causation may be inferred from circumstantial evidence, such as the defendant's knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory conduct. The rule is extended to Title IX cases.

Summary:

SUMMARY[**]

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Civil Rights

The panel affirmed the district court's judgment granting declaratory and injunctive relief to plaintiffs in a class action suit brought in part pursuant to Title IX of the Education Amendments of 1972, alleging (1) unequal treatment and benefits in athletic programs; (2) unequal participation opportunities in athletic programs; and (3) retaliation.

The panel held that Sweetwater Union High School District and its administrators and board members did not fully and effectively accommodate the interests and abilities of female athletes and therefore the district court did not err in its award of summary judgment and injunctive relief to plaintiffs on their Title IX unequal participation claim.

The panel held that the district court did not abuse its discretion by: (1) striking the proposed testimony of Sweetwater's two experts because the record suggested that the testimony was based on, at best, an unreliable **[**2]** methodology; (2) excluding Sweetwater's 38 untimely disclosed witnesses from testifying at trial because Sweetwater's failure to comply with Fed. R. Civ. P. 26's disclosure requirement was neither substantially justified nor harmless; and (3) declining to consider contemporaneous evidence at trial.

The panel held that the student plaintiffs had Article III standing to bring their Title IX retaliation claim arising from the firing of the softball coach. The panel further determined that the district court did not clearly err when it found that: (1) plaintiffs established a prima facie case of Title IX retaliation; and (2) Sweetwater's purported non-retaliatory reasons for firing the coach were pretextual excuses for unlawful retaliation. The panel held, therefore, that the district court did not abuse its discretion by granting permanent injunctive relief to plaintiffs on their Title IX retaliation claim.

Counsel: Paul V. Carelli, IV (argued), Daniel R. Shinoff, and Patrice M. Coady, Stutz Artiano Shinoff & Holtz, APC, San Diego, California, for Defendants-Appellants.

Elizabeth Kristen (argued), Robert Borton, and Kim Turner, Legal Aid Society Employment Law Center, San Francisco, California; Vicky L. Barker and **[**3]** Cacilia Kim, California Women's Law Center, Los Angeles, California; Joanna S. McCallum and Erin Witkow, Manatt, Phelps & Phillips, LLP, Los Angeles, California, for Plaintiffs-Appellees.

Erin H. Flynn (argued), United States Department of Justice, Civil Rights Division, Appellate Section; Philip H. Rosenfelt, Deputy General Counsel; Thomas E. Perez, Assistant Attorney General; Vanessa Santos, United States Department of Education Office of the General Counsel; Dennis J. Dimsey and Holly A. Thomas, United States Department of Justice, Civil Rights Division, Appellate Section, for Amicus Curiae United States of America.

Fatima Goss Graves, Neena K. Chaudhry, and Valarie Hogan, National Women's Law Center, Washington, D.C.; Lauren B. Fletcher and Anant K. Saraswat, Wilmer, Cutler, Pickering, Hale & Dorr LLP, Boston, Massachusetts; Megan Barbero, Dina B. Mishra, and Brittany Blueitt Amadi, Wilmer, Cutler, Pickering, Hale & Dorr LLP, Washington, D.C., for Amicus Curiae National Women's Law Center, et al.

Kristen Galles, Equity Legal, Alexandria, Virginia; Nancy Hogshead-Makar, Women's Sports Foundation, Jacksonville, Florida, for Amicus Curiae Women's Sports Foundation, et al.

Judges: Before: Ronald **[**4]** M. Gould and N.R. Smith, Circuit Judges, and Morrison C. England, Jr., Chief District Judge.*. Opinion by Judge Gould.

Opinion by: Ronald M. Gould

Opinion

*The Honorable Morrison C. England, Jr., Chief District Judge for the U.S. District Court for the Eastern District of California, sitting by designation.

[*851] GOULD, Circuit Judge:

Defendants-Appellants Sweetwater Union High School District and eight of its administrators and board members (collectively "Sweetwater") appeal the district court's grant of declaratory and injunctive relief to Plaintiffs-Appellees Veronica Ollier, Naudia Rangel, Maritza Rangel, Amanda Hernandez, and Arianna Hernandez (collectively "Plaintiffs") on Title IX claims alleging (1) unequal treatment and benefits in athletic programs;[1] (2) unequal participation opportunities in athletic programs; and (3) retaliation. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I

On April 19, 2007, Plaintiffs filed a class action complaint against Sweetwater alleging unlawful sex discrimination under Title IX of the Education Amendments of 1972 ("Title IX"), *see* 20 U.S.C. § 1681 *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment, *see* 42 U.S.C. § 1983.[2] They **[**5]** alleged that Sweetwater "intentionally discriminated" against female students at Castle Park High School ("Castle Park") by "unlawfully fail[ing] to provide female student athletes equal treatment and benefits as compared to male athletes." They said that female student athletes did not receive an "equal opportunity to participate in athletic programs," and were "deterred from participating" by Sweetwater's "repeated, purposeful, differential treatment of female students at Castle Park." Plaintiffs alleged that Sweetwater ignored female students' protests and "continued to unfairly discriminate against females despite persistent complaints by students, parents and others."

Specifically, Plaintiffs accused Sweetwater of "knowingly and deliberately discriminating against female students" by providing them with inequitable (1) practice and competitive facilities; (2) locker rooms and related storage and meeting facilities; (3) training facilities; (4) equipment and supplies; (5) transportation vehicles; (6) coaches and coaching **[**6]** facilities; (7) scheduling of games and practice times; (8) publicity; (9) funding; and (10) athletic participation opportunities. They also accused Sweetwater of not properly maintaining the facilities given to female student athletes and of offering "significantly more participation opportunities to boys than to girls[.]" Citing Sweetwater's "intentional and conscious failure to comply with Title IX," Plaintiffs sought declaratory and injunctive relief under 20 U.S.C. § 1681 *et seq.* for three alleged violations of Title IX: (1) unequal treatment and benefits in athletic programs; (2) unequal participation opportunities in athletic programs; and (3) retaliation.[3]

[*852] **A**

In July 2008, Plaintiffs moved for partial summary judgment on their Title IX claim alleging unequal participation opportunities in athletic programs. Sweetwater conceded that "female athletic participation" at Castle **[**7]** Park was "lower than overall female enrollment," but argued that the figures were "substantially proportionate" for Title IX compliance purposes, and promised to "continue to strive to lower the percentage." As evidence, Sweetwater noted that there are "more athletic sports teams for girls (23) than . . . for boys (21)" at Castle Park.

The district court gave summary judgment to Plaintiffs on their unequal participation claim in March 2009. *See Ollier v. Sweetwater Union High Sch. Dist.*, 604 F. Supp. 2d 1264 (S.D. Cal. 2009). The court found that "substantial proportionality requires a close relationship between athletic participation and enrollment," and concluded that

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[1] Neither of Sweetwater's briefs on appeal includes argument on Plaintiffs' unequal treatment and benefits claim. Thus, Sweetwater has waived its appeal on that claim. *See Hall v. City of L.A.*, 697 F.3d 1059, 1071 (9th Cir. 2012).

[2] Plaintiffs' 42 U.S.C. § 1983 sex-based discrimination claim dropped out of the case in July 2010, when the district court severed it from the Title IX claims upon agreement of the parties.

[3] Plaintiffs' retaliation claim was premised on (1) the July 2006 firing of Chris Martinez, "a highly qualified and well-loved softball coach," which occurred shortly after Castle Park received a formal Title IX complaint; (2) a ban on a parent-run snack stand during softball games; and (3) a ban on parental assistance in softball coaching.

Sweetwater had not shown such a "close relationship" because it "fail[ed] to provide female students with opportunities to participate in athletics in substantially proportionate numbers as males." *Id.* at 1272. Rejecting one of Sweetwater's arguments, the district court reasoned that it is the "actual number and the percentage of females participating in athletics," not "the number of teams offered to girls," that is "the ultimate issue" when evaluating participation opportunities. *Id.* After finding that Plaintiffs had met their burden on each prong of the relevant Title IX compliance test, the district court determined **[**8]** that Sweetwater "failed to fully and effectively accommodate female athletes and potential female athletes" at Castle Park, and that it was "not in compliance with Title IX based on unequal participation opportunities in [the] athletic program." *Id.* at 1275; *see Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 767-68 (9th Cir. 1999) (laying out the three-prong test for determining whether a school has provided equal opportunities to male and female students).

B

Before trial, the district court decided three other matters at issue in this appeal. First, it granted Plaintiffs' motion to exclude the testimony of two Sweetwater experts because (1) the experts' conclusions and opinions "fail[ed] to meet the standard of Federal Rule of Evidence 702" because they were based on "personal opinions and speculation rather than on a systematic assessment of [the] athletic facilities and programs" at Castle Park, and (2) the experts' methodology was "not at all clear."

Second, it granted Plaintiffs' motion to exclude 38 of Sweetwater's witnesses because they were not timely disclosed, reasoning that "[w]aiting until long after the close of discovery and on the eve of trial to disclose allegedly relevant and non-cumulative witnesses is harmful and without substantial justification." Because Sweetwater "offered no justification **[**9]** for [its] failure to comply with" Federal Rule of Civil Procedure 26(a) and (e), the district court concluded that exclusion of the 38 untimely disclosed witnesses was "an appropriate sanction" under Federal Rule of Civil Procedure 37(c)(1).

Third, it considered Sweetwater's motion to strike Plaintiffs' Title IX retaliation claim as if it were a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss that claim, and denied it on the merits. *See Ollier v. Sweetwater Union High Sch. Dist.*, 735 F. Supp. 2d 1222 (S.D. Cal. 2010). In so doing, the district court determined that Plaintiffs had standing to bring their Title IX retaliation claim—a claim the court viewed as premised on harm to the class, not harm to the softball coach whose **[*853]** firing Plaintiffs alleged was retaliatory. *See id.* at 1226 ("Plaintiffs . . . have set forth actions taken against the plaintiff class members after they complained of sex discrimination that are concrete and particularized."). The district court also concluded that Plaintiffs' retaliation claim was not moot after finding that class members were still suffering the effects of Sweetwater's retaliatory conduct and that Sweetwater's actions had caused a "chilling effect on students who would complain about continuing gender inequality in athletic programs at the school." *Id.* at 1225.

C

After a 10-day bench trial, the district court granted Plaintiffs declaratory and injunctive **[**10]** relief on their Title IX claims alleging (1) unequal treatment of and benefits to female athletes at Castle Park, and (2) retaliation. *See Ollier v. Sweetwater Union High Sch. Dist.*, 858 F. Supp. 2d 1093 (S.D. Cal. 2012).

The district court concluded that Sweetwater violated Title IX by failing to provide equal treatment and benefits in nine different areas, including recruiting, training, equipment, scheduling, and fundraising. *Id.* at 1098-1108, 1115. Among other things, the district court found that female athletes at Castle Park were supervised by overworked coaches, provided with inferior competition and practice facilities, and received less publicity than male athletes. *Id.* at 1099-1104, 1107. The district court found that female athletes received unequal treatment and benefits as a result of "systemic administrative failures" at Castle Park, and that Sweetwater failed to implement "policies or procedures designed to cure the myriad areas of general noncompliance with Title IX." *Id.* at 1108.

The district court also ruled that Sweetwater violated Title IX when it retaliated against Plaintiffs by firing the Castle Park softball coach, Chris Martinez, after the father of two of the named plaintiffs complained to school administrators about "inequalities for girls in the school's athletic programs." *Id.* at 1108; *see id.* at 1115. The district **[**11]** court found that Coach Martinez was fired six weeks after the Castle Park athletic director told him he could be fired at any time for any reason—a comment the coach understood to be a threat that he would be fired "if additional complaints were made about the girls' softball facilities." *Id.* at 1108.

Borrowing from "Title VII cases to define Title IX's applicable legal standards," the district court concluded (1) that Plaintiffs engaged in protected activity when they complained to Sweetwater about Title IX violations and when they filed their complaint; (2) that Plaintiffs suffered adverse actions—such as the firing of their softball coach, his replacement by a less experienced coach, cancellation of the team's annual awards banquet in 2007, and being unable to participate in a Las Vegas tournament attended by college recruiters—that caused their "long-term and successful softball program" to be "significantly disrupted"; and (3) that a causal link between their protected conduct and Sweetwater's retaliatory actions could "be established by an inference derived from circumstantial evidence"—in this case, "temporal proximity." *Id.* at 1113-14. Finally, the district court rejected Sweetwater's non-retaliatory **[**12]** reasons for firing Coach Martinez, concluding that they were "not credible and are pretextual." *Id.* at 1114. The district court determined that Sweetwater's suggested non-retaliatory justifications were *post hoc* rationalizations for its decision to fire Coach Martinez—a decision the district court said was impermissibly retaliatory. *See id.*

D

Sweetwater timely appealed the district court's decisions (1) to grant partial **[*854]** summary judgment to Plaintiffs on their Title IX unequal participation claim; (2) to grant Plaintiffs' motions to exclude expert testimony and 38 untimely disclosed witnesses; (3) to deny Sweetwater's motion to strike Plaintiffs' Title IX retaliation claim; and (4) to grant a permanent injunction to Plaintiffs on their Title IX claims, including those alleging (a) unequal treatment of and benefits to female athletes at Castle Park, and (b) retaliation.[4]

II

HN1[↑] We review *de novo* a district **[**13]** court's grant of a motion for summary judgment to determine whether, viewing the evidence in the light most favorable to the nonmoving party, there exists a genuine dispute as to any material fact and whether the district court correctly applied the substantive law. *See* Fed. R. Civ. P. 56(a); *Cameron v. Craig*, 713 F.3d 1012, 1018 (9th Cir. 2013).

HN2[↑] Title IX of the Education Amendments of 1972 states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Title IX's implementing regulations require that schools provide "equal athletic opportunity for members of both sexes." 34 C.F.R. § 106.41(c). Among the factors we consider to determine whether equal opportunities are available to male and female athletes is "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." *Id.* § 106.41(c)(1). In 1979, the Office of Civil Rights of the Department of Health, Education, and Welfare—the precursor to today's Department of Health & Human Services and Department of Education—published a "Policy Interpretation" of Title IX setting ***HN3***[↑] a three-part test to determine whether an institution is complying **[**14]** with the "effective accommodation" requirement:

> (1) Whether . . . participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

[4] Sweetwater also gave notice of its intent to appeal the district court's decision to certify the Plaintiffs' proposed class. However, neither of Sweetwater's briefs on appeal includes argument on the district court's decision to grant class certification. Sweetwater's appeal on that issue is waived. *See Hall*, 697 F.3d at 1071.

(2) Where the members of one sex have been and are underrepresented among . . . athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
(3) Where the members of one sex are underrepresented among . . . athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

See 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979). We have adopted this three-part test, which by its terms provides that an athletics program complies with Title IX if it satisfies any one of the above conditions. *See Neal*, 198 F.3d at 767-68.[5]

[*855] A

Sweetwater contends that the district court erred in granting summary judgment to Plaintiffs on their Title IX unequal **[**15]** participation claim because (1) there is "overall proportionality between the sexes" in athletics at Castle Park; (2) Castle Park "expanded the number of athletic teams for female participation over a 10-year period"; (3) "the trend over 10 years showed increased female participation in sports" at Castle Park; and (4) Castle Park "accommodated express female interest" in state-sanctioned varsity sports. Relatedly, Sweetwater argues that there was insufficient interest among female students to sustain viable teams in field hockey, water polo, or tennis.

Plaintiffs, on the other hand, contend that (1) the number of female athletes at Castle Park has consistently lagged behind overall female enrollment at the school—that is, the two figures are not "substantially proportionate"; (2) the number of *teams* on which girls could theoretically participate is irrelevant under Title IX, which considers only the number of female *athletes*; and (3) "girls' interest and ability were not slaked by existing programs."

The United States as *amicus curiae* sides with Plaintiffs and urges us to affirm the district court's award of summary judgment. The Government says that the district court "properly analyzed" **[**16]** Castle Park's athletic program under the three-part "effective accommodation" test, and that it correctly concluded that Sweetwater "failed to provide nondiscriminatory athletic participation opportunities to female students" at Castle Park. The Government's position rejects Sweetwater's argument that Title IX should be applied differently to high schools than to colleges, as well as the idea that the district court's "substantial proportionality" evaluation was flawed.[6] We agree with the Government that the three-part test applies to a high school. This is suggested by the Government's regulations, *See* 34 C.F.R. § 106.41(a) (disallowing sex discrimination "in any interscholastic, intercollegiate, club or intramural athletics"), and, accordingly, apply the three-part "effective accommodation" test here. Although this regulation does not explicitly refer to high schools, it does not distinguish between high schools and other types of interscholastic, club or intramural athletics. We give *Chevron* deference to this regulation. *See* note 5, supra. *See also McCormick ex rel. McCormick v. School Dist. of Mamaroneck*, 370 F.3d 275, 300 (2d Cir. 2004) (applying three-part test to high school districts); *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 272-75 (6th Cir. 1994) (same).

B

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[5] We give deference to the Department of Education's guidance according to *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 843-44, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). *See Mansourian v. Regents of Univ. of Cal.*, 602 F.3d 957, 965 n.9 (9th Cir. 2010).

[6] On appeal, Sweetwater propounds a new theory that, with respect to the first prong of the "effective **[**17]** accommodation" test, "the idea of proportionality relies on percentages, rather than absolute numbers." The Government calls this theory, which has no precedential support, "flatly incorrect."

In 1996, the Department of Education clarified that ***HN4***[↑] our analysis under the first prong of the Title IX "effective accommodation" test—that is, our analysis of whether "participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments," 44 Fed. Reg. at 71,418—"begins with a determination of the number of participation opportunities afforded to male and female athletes." Office of Civil Rights, U.S. Dep't of Educ., **[*856]** *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (Jan. 16, 1996) ("1996 Clarification"). In making this determination, we count only "actual athletes," not "unfilled slots," because Title IX participation opportunities are "real, not illusory." Letter from Norma V. Cantú, Assistant Sec'y for Civil Rights, Office of Civil Rights, U.S. Dep't of Educ., to Colleagues (Jan. 16, 1996) ("1996 Letter").

The second step of our analysis under the first prong of the three-prong test is to consider whether the number **[**18]** of participation opportunities—*i.e.*, athletes—is substantially proportionate to each sex's enrollment. *See* 1996 Clarification; *see also Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 94 (2d Cir. 2012). Exact proportionality is not required, and there is no "magic number at which substantial proportionality is achieved." *Equity in Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 110 (4th Cir. 2011); *see also* 1996 Clarification. Rather, "substantial proportionality is determined on a case-by-case basis in light of 'the institution's specific circumstances and the size of its athletic program.'" *Biediger*, 691 F.3d at 94 (quoting 1996 Clarification).[7] As a general rule, there is substantial proportionality "if the number of additional participants . . . required for exact proportionality 'would not be sufficient to sustain a viable team.'" *Id.* (quoting 1996 Clarification).

Between 1998 and 2008, female enrollment at Castle Park ranged from a low of 975 (in the 2007-2008 school year) to a high of 1133 (2001-2002). Male enrollment ranged from 1128 (2000-2001) to 1292 (2004-2005). Female athletes ranged from 144 (1999-2000 and 2003-2004) to 198 (2002-2003), **[**19]** while male athletes ranged from 221 (2005-2006) to 343 (2004-2005). Perhaps more helpfully stated, girls made up 45.4-49.6 percent of the student body at Castle Park but only 33.4-40.8 percent of the athletes from 1998 to 2008. At no point in that ten-year span was the disparity between the percentage of female athletes and the percentage of female students less than 6.7 percent. It was less than 10 percent in only three years, and at least 13 percent in five years. In the three years at issue in this lawsuit, the disparities were 6.7 percent (2005-2006), 10.3 percent (2006-2007), and 6.7 percent (2007-2008).[8]

There is no question that exact proportionality is lacking at Castle Park. Sweetwater concedes as much. Whether there is substantial **[**20]** proportionality, however, requires us to look beyond the raw numbers to "the institution's specific circumstances and the size of its athletic program." 1996 Clarification. Instructive on this point is the Department of Education's guidance that substantial proportionality generally requires that "the number of additional participants . . . required for exact proportionality" be insufficient "to sustain a viable team." *Biediger*, 691 F.3d at 94 (internal quotation marks omitted).

At Castle Park, the 6.7 percent disparity in the 2007-2008 school year was equivalent to 47 girls who would have played **[*857]** sports if participation were exactly proportional to enrollment and no fewer boys participated.[9] As the district court noted, 47 girls can sustain at least one viable competitive team.[10] Defendants failed to raise more than a conclusory assertion that the specific circumstances at Castle Park explained the 6.7% disparity between female participation opportunities and female enrollment, or that Castle Park could not support a viable competitive team

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[7] An institution that sought to explain a disparity from substantial proportionality should show how its specific circumstances justifiably explain the reasons for the disparity as being beyond its control.

[8] That there are "more athletic sports teams for girls (23) than . . . for boys (21)" at Castle Park is not controlling. We agree with Plaintiffs that counting "sham girls' teams," like multiple levels of football and wrestling, despite limited participation by girls in those sports, is "both misleading and inaccurate." It is the number of female athletes that matters. After all, Title IX "participation opportunities must be real, not illusory." 1996 Letter.

[9] In 2005-2006 (6.7 percent; 48 girls) and 2006-2007 (10.3 percent; 92 girls), the disparity was even greater.

[10] The Department of Education says only that a 62-woman gap would likely preclude a finding of substantial proportionality, but that a six-woman gap would likely not. 1996 Clarification.

drawn from the 47 girls. As a matter of law, then, we conclude that female athletic participation and overall female enrollment were not "substantially proportionate" at Castle **[**21]** Park at the relevant times.

C

HN5[↑] Participation need not be substantially proportionate to enrollment, however, if Sweetwater can show "a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of" female athletes. 44 Fed. Reg. at 71,418; *see also Neal*, 198 F.3d at 767-68. This second prong of the Title IX "effective accommodation" test "looks at an institution's past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion." 1996 Clarification. The Department of Education's 1996 guidance is helpful: "There are no fixed intervals of time within which an institution must have added participation opportunities. Neither is a particular number of sports dispositive. Rather, the focus is on whether the program expansion was responsive to developing interests and abilities of" female students. *Id.* The guidance also makes clear **[**22]** that an institution must do more than show a *history* of program expansion; it "must demonstrate a continuing (*i.e.*, present) practice of program expansion as warranted by developing interests and abilities." *Id.*

Sweetwater contends that Castle Park has increased the number of teams on which girls can play in the last decade, showing evidence of the kind "history and continuing practice of program expansion" sufficient to overcome a lack of "substantial proportionality" between female athletic participation and overall female enrollment. But Sweetwater's methodology is flawed, and its argument misses the point of Title IX. The number of *teams* on which girls could theoretically participate is not controlling under Title IX, which focuses on the number of female *athletes. See Mansourian*, 602 F.3d at 969 ("The [Prong] Two analysis focuses primarily . . . on increasing the number of women's athletic opportunities rather than increasing the number of women's teams.").

The number of female athletes at Castle Park has varied since 1998, but there were more girls playing sports in the 1998-1999 school year (156) than in the 2007-2008 school year (149). The four most recent years for which we have data show that a graph **[**23]** of female athletic participation at Castle Park over time looks nothing like the upward trend line that Title IX requires. The number of female athletes shrank from 172 in the 2004-2005 school year to 146 in 2005-2006, before growing to 174 in 2006-2007 and shrinking again to 149 in 2007-2008. As Plaintiffs suggest, these "dramatic ups and downs" are far from the kind of "steady march **[*858]** forward" that an institution must show to demonstrate Title IX compliance under the second prong of the three-part test. We conclude that there is no "history and continuing practice of program expansion" for women's sports at Castle Park.

D

Female athletic participation is not substantially proportionate to overall female enrollment at Castle Park. And there is no history or continuing practice of program expansion for women's sports at the school. And yet, ***HN6***[↑] Sweetwater can still satisfy Title IX if it proves "that the interests and abilities of" female students "have been fully and effectively accommodated by the present program." 44 Fed. Reg. at 71,418; *see also Neal*, 198 F.3d at 767-68. This, the third prong of the Title IX "effective accommodation" test, considers whether a gender imbalance in athletics is the product of impermissible discrimination **[**24]** or merely of the genders' varying levels of interest in sports. *See* 1996 Clarification. Stated another way, a school where fewer girls than boys play sports does not violate Title IX if the imbalance is the result of girls' lack of interest in athletics.

The Department of Education's 1996 guidance is again instructive: In evaluating compliance under the third prong, we must consider whether there is (1) "unmet interest in a particular sport"; (2) ability to support a team in that sport; and (3) a "reasonable expectation of competition for the team." *Id.* Sweetwater would be Title IX-compliant unless all three conditions are present. *See id.* Finally, if an "institution has recently eliminated a viable team," we presume "that there is sufficient interest, ability, and available competition to sustain" a team in that sport absent strong evidence that conditions have changed. *Id.*; *see also Cohen v. Brown Univ.*, 101 F.3d 155, 180 (1st Cir. 1996).

Sweetwater contends that (1) Plaintiffs were required to, but did not, conduct official surveys of female students at Castle Park to gauge unmet interest; (2) field hockey is irrelevant for Title IX purposes because it is not approved by the California Interscholastic Federation ("CIF"); and (3) in any **[**25]** event, field hockey was eliminated only because interest in the sport waned.

Sweetwater's arguments are either factually wrong or without legal support. First, ***HN7***[↑] Title IX plaintiffs need not themselves gauge interest in any particular sport. It is the school district that should evaluate student interest "periodically" to "identify in a timely and responsive manner any developing interests and abilities of the underrepresented sex." 1996 Clarification. Second, field hockey *is* a CIF-approved sport.[11] But even if it were not, Sweetwater's position is foreclosed by ***HN8***[↑] Title IX's implementing regulations, which state that compliance "is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association." 34 C.F.R. § 106.6(c); *see also Biediger*, 691 F.3d at 93-94 (noting that we are to determine whether a particular "activity qualifies as a sport by reference to several factors relating to 'program structure and administration' and 'team preparation and competition'" (quoting Letter from Stephanie Monroe, Assistant Sec'y for Civil Rights, Office of Civil Rights, U.S. Dep't of Educ., to Colleagues (Sept. 17, 2008))). Third, the record makes clear that Castle Park cut its field hockey team **[**26]** not because interest in the sport waned, but because it was unable to **[*859]** find a coach. And the school's inability to hire a coach does not indicate lack of student interest in the sport.

Castle Park offered field hockey from 2001 through 2005, during which time the team ranged in size from 16 to 25 girls. It cut the sport before the 2005-2006 school year before offering it again in 2006-2007. It then cut field hockey a second time before the 2007-2008 school year. The Department of Education's guidance is clear on this point: ***HN9***[↑] "If an institution has recently eliminated a viable team . . . , there is sufficient interest, ability, and available competition to sustain a[] . . . team in that sport unless an institution can provide strong evidence that interest, ability, or available competition no longer exists." 1996 Clarification; *see also Cohen*, 101 F.3d at 180. Castle Park's decision to cut field hockey twice during the relevant time period, coupled with its inability to show that its motivations were legitimate, is enough to show sufficient interest, ability, and available competition to sustain a field hockey team.

E

We conclude that **[**27]** Sweetwater has not fully and effectively accommodated the interests and abilities of its female athletes. The district court did not err in its award of summary judgment to Plaintiffs on their Title IX unequal participation claim, and we affirm the grant of injunctive relief to Plaintiffs on that issue.

III

HN10[↑] We review a district court's evidentiary rulings, such as its decisions to exclude expert testimony and to impose discovery sanctions, for an abuse of discretion, and a showing of prejudice is required for reversal. *See Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 462 (9th Cir. 2014) (en banc); *see also United States v. Chao Fan Xu*, 706 F.3d 965, 984 (9th Cir. 2013) (exclusion of expert testimony); *R & R Sails, Inc. v. Ins. Co. of Pa.*, 673 F.3d 1240, 1245 (9th Cir. 2012) (imposition of discovery sanctions for Rule 26(a) and (e) violations).

HN11[↑] In non-jury cases such as this one, "the district judge is given great latitude in the admission or exclusion of evidence." *Hollinger v. United States*, 651 F.2d 636, 640 (9th Cir. 1981). The Supreme Court has said that district courts have "broad latitude" to determine whether expert testimony is sufficiently reliable to be admitted. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 153, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). And "we give particularly wide latitude to the district court's discretion to issue sanctions under Rule 37(c)(1)," which is "a recognized

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[11] *See Field Hockey*, Cal. Interscholastic Fed'n, http://www.cifstate.org/index.php/other-approved-sports/field-hockey (last visited July 28, 2014).

broadening of the sanctioning power." *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001); *see also R & R Sails*, 673 F.3d at 1245 (same); *Jeff D. v. Otter*, 643 F.3d 278, 289 (9th Cir. 2011) ("[A] district court has wide discretion in controlling discovery.") (alteration in original) (internal **[**28]** quotation marks omitted).

A

We first address the exclusion of defense experts. ***HN12***[↑] Federal Rule of Evidence 702 governs the admissibility of expert testimony. It provides that a witness "qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if":

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> **[*860]** (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

HN13[↑] "It is well settled that bare qualifications alone cannot establish the admissibility of . . . expert testimony." *United States v. Hermanek*, 289 F.3d 1076, 1093 (9th Cir. 2002). Rather, we have interpreted Rule 702 to require that "[e]xpert testimony . . . be both relevant and reliable." *Estate of Barabin*, 740 F.3d at 463 (alteration and ellipsis in original) (internal quotation marks omitted). A proposed expert's testimony, then, must "have a reliable basis in the knowledge and experience of his discipline." *Kumho Tire*, 526 U.S. at 148 (internal quotation marks omitted). This requires district courts, acting in a "gatekeeping role," to assess "whether the reasoning or **[**29]** methodology underlying the testimony" is valid and "whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592-93, 597, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) ("*Daubert I*"). It is not "the correctness of the expert's conclusions" that matters, but "the soundness of his methodology." *Estate of Barabin*, 740 F.3d at 463 (internal quotation marks omitted).

The district court excluded the proposed testimony of Peter Schiff—a retired superintendent of a different school district who would have testified about "the finances of schools and high school athletic programs, as well as equitable access to school facilities at Castle Park,"—because it could not "discern what, if any, method he employed in arriving at his opinions." The district court also found that Schiff's "conclusions appear to be based on his personal opinions and speculation rather than on a systematic assessment of . . . athletic facilities and programs at [Castle Park]." Further, the district court called Schiff's site visits "superficial," and noted that "experience with the non-relevant issue of school finance" did not qualify him "to opine on Title IX compliance."

Similarly, the district court excluded the proposed testimony of Penny Parker—an assistant principal at a different **[**30]** high school who would have testified about the "unique nature of high school softball and its role at Castle Park,"—because her "methodology is not at all clear" and "her opinions are speculative . . . inherently unreliable and unsupported by the facts."

We assume without deciding that (1) Schiff and Parker's proposed testimony was relevant, and (2) Schiff and Parker were qualified as Title IX experts under Rule 702. Nonetheless, we conclude that the district court did not abuse its discretion when it struck both experts' proposed testimony. The record suggests that the district court's determination that Schiff and Parker's proposed testimony was based on, at best, an unreliable methodology, was not illogical or implausible.

Schiff did not visit Castle Park to conduct an in-person investigation until *after* he submitted his initial report on the case. And when he did visit, his visit was cursory and not in-season: Schiff only walked the softball and baseball fields. His opinion that the "girls' softball field was in excellent shape," then, was based on no more than a superficial visual examination of the softball and baseball fields. Schiff—who Sweetwater contends is qualified "to assess the **[**31]** state of the athletic facilities for both boys and girls teams" at Castle Park because of his

"experience on the business side of athletics," his "extensive[]" work with CIF, and his high school baseball coaching tenure—did not enter the softball or baseball dugouts (or batting **[*861]** cages), and yet he sought to testify "on the renovations to the softball field, including new fencing, bleachers, and dugout areas."

Parker's only visit to Castle Park lasted barely an hour. And that visit was as cursory as Schiff's: Parker—a former softball coach who Sweetwater offered as an expert on "all aspects of the game of softball,"—"toured the Castle Park facilities," including the softball and baseball fields and boys and girls locker rooms, and "was present while both a baseball and a softball game were being played simultaneously." She "observed the playing surfaces, dugout areas, field condition, fencing, bleachers, and amenities," but only from afar. Like Schiff, Parker took no photographs and no measurements. She did not speak to anyone at Castle Park about the fields. And she admitted that her proposed testimony about the softball team's allegedly inferior fundraising and accounting practices **[**32]** was speculative.

Schiff and Parker based their proposed testimony on superficial inspections of the Castle Park facilities. Even if a visual walkthrough, without more, *could* be enough in some cases to render expert testimony admissible under Rule 702, it certainly does not *compel* that conclusion in all cases. Moreover, as the district court found, Schiff and Parker's conclusions were based on their "personal opinions and speculation rather than on a systematic assessment of [Castle Park's] athletic facilities and programs." But ***HN14***[↑] personal opinion testimony is inadmissible as a matter of law under Rule 702, *see Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995)("*Daubert II*"), and speculative testimony is inherently unreliable, *see Diviero v. Uniroyal Goodrich Tire Co.*, 114 F.3d 851, 853 (9th Cir. 1997); *see also Daubert I*, 509 U.S. at 590 (noting that expert testimony based on mere "subjective belief or unsupported speculation" is inadmissible). We cannot say the district court abused its discretion when it barred Schiff and Parker from testifying at trial after finding their testimony to be "inherently unreliable and unsupported by the facts." The district court properly exercised its "gatekeeping role" under *Daubert I*, 509 U.S. at 597.

B

We next address the exclusion of fact witnesses. The general issue is whether witnesses not listed in Rule 26(a) disclosures—and who were identified **[**33]** 15 months after the discovery cutoff and only ten months before trial—were identified too late in the process.

HN15[↑] The Federal Rules of Civil Procedure require parties to provide to other parties "the name . . . of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses." Fed. R. Civ. P. 26(a)(1)(A)(i). And "[a] party who has made a disclosure under Rule 26(a) . . . must supplement or correct its disclosure" in a "timely manner if the party learns that in some material respect the disclosure . . . is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." *Id.* R. 26(e). A party that does not timely identify a witness under Rule 26 may not use that witness to supply evidence at a trial "unless the failure was substantially justified or is harmless." *Id.* R. 37(c)(1); *see also Yeti by Molly*, 259 F.3d at 1105. Indeed, Rule 37(c)(1) is "intended to put teeth into the mandatory . . . disclosure requirements" of Rule 26(a) and (e). 8B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2289.1 (3d ed. 2014).

[*862] The district court excluded 38 Sweetwater witnesses as **[**34]** untimely disclosed, in violation of Rule 26(a) and (e), in part because it found "no reason why any of the 38 witnesses were not disclosed to [P]laintiffs either initially or by timely supplementation." The district court concluded that "the mere mention of a name in a deposition is insufficient" to notify Plaintiffs that Sweetwater "intend[s] to present that person at trial," and that to "suggest otherwise flies in the face of the requirements of Rule 26." And the district court reasoned that "[w]aiting until long after the close of discovery and on the eve of trial to disclose allegedly relevant and noncumulative witnesses is harmful and without substantial justification."

HN16[↑] A "district court has wide discretion in controlling discovery." *Jeff D.*, 643 F.3d at 289 (internal quotation marks omitted). And, as we noted earlier, that discretion is "particularly wide" when it comes to excluding witnesses under Rule 37(c)(1). *Yeti by Molly*, 259 F.3d at 1106.

Sweetwater argues that exclusion of 30 of its 38 witnesses was an abuse of discretion because (1) "Plaintiffs were made aware" of those witnesses during discovery—specifically, during Plaintiffs' depositions of other Sweetwater witnesses, and (2) any violation of Rule 26 "was harmless to Plaintiffs." Of the remaining eight witnesses, Sweetwater contends that **[**35]** untimely disclosure was both justified because those witnesses were not employed at Castle Park before the discovery cutoff date, and harmless because they were disclosed more than eight months before trial. We conclude that the district court did not abuse its discretion by imposing a discovery sanction. The record amply supports the district court's discretionary determination that Sweetwater's lapse was not justified or harmless.

Initial Rule 26(a) disclosures were due October 29, 2007. At least 12 of Sweetwater's 38 contested witnesses were Castle Park employees by that date. The discovery cutoff was August 8, 2008, and lay witness depositions had to be completed by September 30, 2008. At least 19 of the 38 witnesses were Castle Park employees by those dates. And yet, Sweetwater did not disclose any of the 38 witnesses until November 23, 2009, more than 15 months after the close of discovery and less than a year before trial.

Sweetwater does not dispute that it did not formally offer the names of any of the 38 witnesses by the October 29, 2007, deadline for initial Rule 26(a) disclosures (or by the August 8, 2008, discovery cutoff, for that matter). Nor does it dispute that it did not "supplement or **[**36]** correct its disclosure or response," *see* Fed. R. Civ. P. 26(a)(1), by offering the witnesses' names in accord with Rule 26(e). Instead, Sweetwater contends that because other disclosed witnesses had mentioned the contested witnesses at their depositions, Plaintiffs were on notice that the contested witnesses might testify and were not prejudiced by untimely disclosure. Sweetwater contends, in essence, that it complied with Rule 26 because Plaintiffs knew of the contested witnesses' existence.

The district court did not abuse its discretion by rejecting Sweetwater's argument. ***HN17***[↑] The theory of disclosure under the Federal Rules of Civil Procedure is to encourage parties to try cases on the merits, not by surprise, and not by ambush. After disclosures of witnesses are made, a party can conduct discovery of what those witnesses would say on relevant issues, which in turn informs the party's judgment about which witnesses it may want to call at trial, either to controvert testimony or to put it in context. Orderly procedure requires timely disclosure so that trial efforts **[*863]** are enhanced and efficient, and the trial process is improved. The late disclosure of witnesses throws a wrench into the machinery of trial. A party might be able **[**37]** to scramble to make up for the delay, but last-minute discovery may disrupt other plans. And if the discovery cutoff has passed, the party cannot conduct discovery without a court order permitting extension. This in turn threatens whether a scheduled trial date is viable. And it impairs the ability of every trial court to manage its docket.

With these considerations in mind, we return to the governing rules. ***HN18***[↑] Rule 26 states that "a *party* must, without awaiting a discovery request, provide to the other parties . . . the name and, if known, the address and telephone number of each individual likely to have discoverable information." Fed. R. Civ. P. 26(a)(1)(A) (emphasis added). Compliance with Rule 26's disclosure requirements is "mandatory." *Republic of Ecuador v. Mackay*, 742 F.3d 860, 865 (9th Cir. 2014).

The rule places the disclosure obligation on a "party." That another witness has made a passing reference in a deposition to a person with knowledge or responsibilities who could conceivably be a witness does not satisfy a party's disclosure obligations. An adverse party should not have to guess which undisclosed witnesses may be called to testify. We—and the Advisory Committee on the Federal Rules of Civil Procedure—have warned litigants not to "'indulge in gamesmanship with respect to **[**38]** the disclosure obligations'" of Rule 26. *Marchand v. Mercy Med. Ctr.*, 22 F.3d 933, 936 n.3 (9th Cir. 1994) (quoting Fed. R. Civ. P. 26 advisory committee's note (1993 amend.)). The record shows that the district court did not abuse its discretion when it concluded that Sweetwater's attempt to obfuscate the meaning of Rule 26(a) was just this sort of gamesmanship. There was no error in the district court's conclusion that "the mere mention of a name in a deposition is insufficient to give notice to" Plaintiffs that Sweetwater "intend[ed] to present that person at trial."

The district court did not abuse its discretion when it concluded that Sweetwater's failure to comply with Rule 26's disclosure requirement was neither substantially justified nor harmless. *See* Fed. R. Civ. P. 37(c)(1). Sweetwater does not argue that its untimely disclosure of these 30 witnesses was substantially justified. Nor was it harmless. Had Sweetwater's witnesses been allowed to testify at trial, Plaintiffs would have had to depose them—or at least to consider which witnesses were worth deposing—and to prepare to question them at trial. *See Yeti by Molly*, 259 F.3d at 1107. The record demonstrates that the district court's conclusion, that reopening discovery before trial would have burdened Plaintiffs and disrupted the court's and the parties' schedules, was well within its discretion. **[**39]** The last thing a party or its counsel wants in a hotly contested lawsuit is to make last-minute preparations and decisions on the run. The late disclosures here were not harmless. *See Hoffman v. Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1180 (9th Cir. 2008).

Nor did the district court abuse its discretion by finding that the untimely disclosure of the eight remaining witnesses also was not harmless. Allowing these witnesses to testify and reopening discovery would have had the same costly and disruptive effects. Nor was it substantially justified merely because the eight witnesses were not employed at Castle Park until after the discovery cutoff date. Sanctioning this argument would force us to read the supplementation requirement out of Rule 26(e). We will not do that.

[*864] Sweetwater did not comply with the disclosure requirements of Rule 26(a) and (e). That failure was neither substantially justified nor harmless. The district court did not abuse its discretion when it excluded Sweetwater's 38 untimely disclosed witnesses from testifying at trial.

C

The next issue concerns whether the district court abused its discretion by declining to consider contemporaneous evidence at trial. On April 26, 2010, the district court set a June 15, 2010, cutoff date for Sweetwater to provide evidence **[**40]** of "continuous repairs and renovations of athletic facilities at Castle Park" for consideration at trial. Improvements made after June 15, 2010, but before the start of trial on September 14, 2010, the district court explained, would not be considered. Sweetwater did not then object to the district court's decision.

On appeal, however, Sweetwater argues that injunctive relief should be based on contemporaneous evidence, not on evidence of past harm. And if the district court had considered contemporaneous evidence at trial, Sweetwater speculates, it would have found Castle Park in compliance with Title IX and would not have issued an injunction.

This argument fails for several reasons. First, ***HN19***[↑] a "trial court's power to control the conduct of trial is broad." *United States v. Panza*, 612 F.2d 432, 438 (9th Cir. 1979). Establishing a cutoff date after which it would not consider supplemental improvements to facilities at Castle Park—especially one that was only 90 days before trial—aided orderly pre-trial procedure and was well within the district court's discretion.

Second, the district court *did* consider some of Sweetwater's remedial improvements, "particularly with respect to the girls' softball facility," but concluded that "those steps have **[**41]** not been consistent, adequate or comprehensive" and that "many violations of Title IX have not been remedied or even addressed." Sweetwater's contention that "the District Court appeared to ignore key evidence of changed facilities" is unpersuasive.

Third, even if contemporaneous evidence showed that Sweetwater was complying with Title IX at the time of trial, the district court *still* could have issued an injunction based on past harm. *See United States v. Mass. Mar. Acad.*, 762 F.2d 142, 157-58 (1st Cir. 1985). The plaintiff class included *future* students, who were protected by the injunction. ***HN20***[↑] "Voluntary cessation" of wrongful conduct "does not moot a case or controversy unless subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.* No. 1, 551 U.S. 701, 719, 127 S. Ct. 2738, 168 L. Ed. 2d 508 (2007) (alteration in original) (internal quotation marks omitted).

Fourth, the district court found no evidence that Sweetwater had "addressed or implemented policies or procedures designed to cure the myriad areas of general noncompliance with Title IX." In light of the systemic problem of

gender inequity in the Castle Park athletics program, the district court did not abuse its discretion by issuing an injunction requiring Sweetwater to comply with Title IX.

IV

HN21[↑] We review **[**42]** *de novo* a district court's decision to deny a Rule 12(b)(6) **[*865]** motion to dismiss.[12] *See Dunn v. Castro*, 621 F.3d 1196, 1198 (9th Cir. 2010). Similarly, whether a party has standing to bring a claim is a question of law that we review *de novo. See Jewel v. Nat'l Sec. Agency*, 673 F.3d 902, 907 (9th Cir. 2011). But we review a district court's fact-finding on standing questions for clear error. *See In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 747 (9th Cir. 2012).

HN22[↑] Article III of the Constitution requires a party to have standing to bring its suit. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). The elements of standing are well-established: the party must have suffered (1) an "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical"; (2) "there must be a causal connection between the injury and the conduct complained of," meaning the injury has to be "fairly traceable to the challenged action of the defendant"; and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 560-61 (alteration, ellipsis, citations, and internal quotation marks omitted).[13] "In a class action, standing is satisfied if at least one named plaintiff meets the **[**43]** requirements." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc).

The district court held that Plaintiffs had standing to bring their Title IX retaliation claim, but gave few reasons for its decision. *See Ollier*, 735 F. Supp. 2d at 1226. On appeal, Sweetwater argues, as it did before the district court, that Plaintiffs lack standing to enjoin the retaliatory action allegedly taken against Coach Martinez because students may not "recover for adverse retaliatory employment actions taken against" an educator, even if that educator "engaged in protected activity on behalf of the students." Sweetwater contends that while Coach Martinez would have had standing to bring a Title IX retaliation claim himself, the "third party" students cannot "maintain a valid cause of action for retaliation under Title IX for their coach's protected activity and the adverse employment action **[**44]** taken against the coach."

We reject this argument. It misunderstands Plaintiffs' claim, which asserts that Sweetwater impermissibly retaliated against *them* by firing Coach Martinez in response to Title IX complaints he made on Plaintiffs' behalf. With their softball coach fired, Plaintiffs' prospects for competing were hampered. Stated another way, Plaintiffs' Title IX retaliation claim seeks to vindicate not Coach Martinez's rights, but Plaintiffs' own rights. Because Plaintiffs were asserting their own "legal rights and interests," not a claim of their coach, the generally strict limitations on third-party standing do not bar their claim. *See Warth v. Seldin*, 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).

[*866] Justice O'Connor correctly said that "teachers and coaches . . . are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators. Indeed, sometimes adult employees are the only effective adversaries of discrimination in schools." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005) (alteration and internal quotation marks omitted). Sweetwater's position—that Plaintiffs lack standing because it was not they who made the Title IX complaints—would allow any school facing a Title IX retaliation **[**45]** suit brought by students

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[12] Because the district court construed Sweetwater's motion to strike Plaintiffs' Title IX retaliation claim as a Rule 12(b)(6) motion to dismiss that claim, *see Ollier*, 735 F. Supp. 2d at 1224, we do the same.

[13] Sweetwater does not contest that Plaintiffs' alleged harm is "fairly traceable" to them. Sweetwater's argument against redressability is premised on the idea that prospective injunctive relief cannot redress past harm. Because Plaintiffs' harm is ongoing, that argument fails. *See McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 284-85 (2d Cir. 2004); *see also N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 553 n.15, 102 S. Ct. 1912, 72 L. Ed. 2d 299 (1982) (Powell, J., dissenting). Only Plaintiffs' alleged injury in fact, then, is at issue in our analysis.

who did not themselves make Title IX complaints to insulate itself simply by firing (or otherwise silencing) those who made the Title IX complaints on the students' behalf. We will "not assume that Congress left such a gap" in Title IX's enforcement scheme. *Id.*

HN23[↑] An injured party may sue under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, if he "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 131 S. Ct. 863, 870, 178 L. Ed. 2d 694 (2011) (internal quotation marks omitted). Plaintiffs, of course, do not bring their suit under the APA, but the Supreme Court has extended its "zone of interests" jurisprudence to cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, whose anti-retaliation provisions are analogous here. *See Thompson*, 131 S. Ct. at 870. And students like Plaintiffs surely fall within the "zone of interests" that Title IX's implicit antiretaliation provisions seek to protect. *See Jackson*, 544 U.S. at 173-77.

Finally, the Supreme Court has foreclosed Sweetwater's position. Faced with the argument that anti-retaliation provisions limit standing to those "who engaged in the protected activity" and were "the subject of unlawful retaliation," the Court has said **[**46]** that such a position is an "artificially narrow" reading with "no basis in text or prior practice." *Thompson*, 131 S. Ct. at 869-70.[14] Rather, ***HN24***[↑] "any plaintiff with an interest arguably sought to be protected by" a statute with an anti-retaliation provision has standing to sue under that statute. *Id.* at 870 (alteration and internal quotation marks omitted). ***HN25***[↑] Students have "an interest arguably sought to be protected by" Title IX—indeed, students are the statute's very focus.

Coach Martinez gave softball players extra practice time and individualized attention, persuaded volunteer coaches to help with specialized skills, and arranged for the team to play in tournaments attended by college recruiters. The softball team was stronger with Coach Martinez than without him. After Coach Martinez was fired, Sweetwater stripped the softball team of its voluntary assistant coaches, canceled the team's 2007 awards banquet, and forbade the team from participating in a Las Vegas tournament attended by college recruiters. The district court found these injuries, among others, sufficient to confer standing on Plaintiffs. **[**47]** We agree.

Plaintiffs have alleged judicially cognizable injuries flowing from Sweetwater's retaliatory responses to Title IX complaints **[*867]** made by their parents and Coach Martinez. The district court's ruling that Plaintiffs have Article III standing to bring their Title IX retaliation claim and its decision to deny Sweetwater's motion to strike that claim were not error.

V

HN26[↑] We review a district court's decision to grant a permanent injunction for an abuse of discretion, but we review for clear error the factual findings underpinning the award of injunctive relief, *see Momot v. Mastro*, 652 F.3d 982, 986 (9th Cir. 2011), just as we review for clear error a district court's findings of fact after bench trial. *See Spokane Arcade, Inc. v. City of Spokane*, 75 F.3d 663, 665 (9th Cir. 1996). However, we review *de novo* "the rulings of law relied upon by the district court in awarding injunctive relief." *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1177 (9th Cir. 2011) (internal quotation marks omitted).

We come to the substance of Plaintiffs' retaliation claim, an important part of this case. ***HN27***[↑] "Title IX's private right of action encompasses suits for retaliation, because retaliation falls within the statute's prohibition of intentional discrimination on the basis of sex. . . . Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel." *Jackson*, 544 U.S. at 178, 180. The Supreme Court **[**48]** "has often looked to its Title VII interpretations . . . in illuminating Title IX," so we apply to Title IX retaliation claims "the familiar framework used to decide retaliation claims under Title VII." *Emeldi v. Univ. of Or.*, 698 F.3d 715, 724-25 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 1997, 185 L. Ed. 2d 866 (2013) (internal quotation marks omitted).

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[14] *Thompson v. North American Stainless, LP* was a Title VII case, but the Supreme Court's reasoning applies with equal force to Title IX.

Under that framework, a "plaintiff who lacks direct evidence of retaliation must first make out a *prima facie* case of retaliation by showing (a) that he or she was engaged in protected activity, (b) that he or she suffered an adverse action, and (c) that there was a causal link between the two." *Id.* at 724. The burden on a plaintiff to show a *prima facie* case of retaliation is low. Only "a minimal threshold showing of retaliation" is required. *Id.* After a plaintiff has made this showing, the burden shifts to the defendant to "articulate a legitimate, non-retaliatory reason for the challenged action." *Id.* If the defendant can do so, the burden shifts back to the plaintiff to show that the reason is pretextual. *See id.*

A

The district court found that Plaintiffs had made out a *prima facie* case of retaliation: They engaged in protected activity when they complained about Title IX violations in May and July 2006 and when they filed their complaint **[**49]** in April 2007. They suffered adverse action because the softball program was "significantly disrupted" when, among other things, Coach Martinez was fired and replaced by a "far less experienced coach." And a causal link between Plaintiffs' protected conduct and the adverse actions they suffered "may be established by an inference derived from circumstantial evidence"—in this case, the "temporal proximity" between Plaintiffs' engaging in protected activity in May 2006, July 2006, and April 2007, and the adverse actions taken against them in July 2006 and spring 2007.

Sweetwater contends that these findings were clearly erroneous because (1) "At most, the named plaintiffs who attended CPHS at the time of the complaints can legitimately state they engaged in protected activity"; (2) the district court did not **[*868]** articulate the standard it used to determine which actions were "adverse" and did not, as Sweetwater says was required, evaluate whether Plaintiffs "were denied access to the educational opportunities or benefits provided by the school as a direct result of retaliation"; and (3) there was no causal link between protected activity and adverse action because Coach Martinez was fired **[**50]** to make way for a certified, on-site teacher, not because of any Title IX complaints.

HN28[↑] "In the Title IX context, speaking out against sex discrimination . . . is protected activity." *Id.* at 725 (alteration and internal quotation marks omitted). Indeed, "Title IX empowers a woman student to complain, without fear of retaliation, that the educational establishment treats women unequally." *Id.* That is precisely what happened here. The father of two of the named plaintiffs complained to the Castle Park athletic director in May 2006 about Title IX violations; Plaintiffs' counsel sent Sweetwater a demand letter in July 2006 regarding Title IX violations at Castle Park; and Plaintiffs filed their class action complaint in April 2007. These are indisputably protected activities under Title IX, and the district court's finding to that effect was not clearly erroneous.

It is not a viable argument for Sweetwater to urge that a class may not "sue a school district for retaliation in a Title IX athletics case." As we have previously held: ***HN29***[↑] "The existence of a private right of action to enforce Title IX is well-established." *Mansourian v. Regents of Univ. of California*, 602 F.3d 957, 964 n.6 (9th Cir. 2010). Further, a private right of action under Title IX includes a claim for retaliation. **[**51]** As the United States Supreme Court has said: "Title IX's private right of action encompasses suits for retaliation, because retaliation falls within the statute's prohibition of intentional discrimination on the basis of sex. . . . Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel." *Jackson*, 544 U.S. at 178, 180. Nor is it a viable argument for Sweetwater to complain that only some members of the plaintiff's class who attended CPHS when complaints were made can urge they engaged in protected activity. That the class includes students who were not members of the softball team at the time of retaliation, and who benefit from the relief, does not impair the validity of the relief. *See Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 131 S. Ct. 863, 870, 178 L. Ed. 2d 694 (2011) (holding that Title VII "enabl[es] suit by any plaintiff with an interest arguably sought to be protected.") (internal quotations and alteration omitted); *Mansourian*, 602 F.3d at 962 (approving a class of female wrestlers "on behalf of all current and future female" university students). ***HN30***[↑] The relief of injunction is equitable, and the district court had broad powers to tailor equitable relief so as to vindicate the rights of former and future students. *See generally* Dobbs on Remedies, §§ 2.4, 2.9.

HN31[↑] Under Title IX, as under Title VII, "the adverse **[**52]** action element is present when 'a reasonable [person] would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable [person] from making or supporting a charge of discrimination.'" *Id.* at 726 (alterations in original) (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006)). Sweetwater does not argue—because it cannot argue—that the district court's adverse action findings do not satisfy this standard.[15] The district court found that **[*869]** Plaintiffs' "successful softball program was significantly disrupted to the detriment of the program and participants" because: (1) Coach Martinez was fired and replaced by a "far less experienced coach"; (2) the team was stripped of its assistant coaches; (3) the team's annual award banquet was canceled in 2007; (4) parents were prohibited from volunteering with the team; and (5) the team was not allowed to participate in a Las Vegas tournament attended by college recruiters. It was not clear error for the district court to conclude that a reasonable person could have found any of these actions "materially adverse" such that they "well might have dissuaded [him] from making or supporting a charge of discrimination." *Id.* (internal quotation marks **[**53]** omitted).

We construe the causal link element of the retaliation framework "broadly"; a plaintiff "merely has to prove that the protected activity and the [adverse] action are not completely unrelated." *Id.* (internal quotation marks omitted). In Title VII cases, causation "may be inferred from circumstantial evidence, such as the [defendant's] knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory" conduct. *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987). *Emeldi* extended that rule to Title IX cases. *See* 698 F.3d at 726 ("[T]he proximity in time between" protected activity and allegedly retaliatory action can be "strong circumstantial evidence of causation."). Plaintiffs have met their burden: They engaged in protected activity in May 2006, July 2006, and April 2007. Coach Martinez **[**54]** was fired in July 2006 and the annual awards banquet was canceled in Spring 2007. The timing of these events is enough in context to show causation in this Title IX retaliation case. That the district court found as much was not clearly erroneous. Plaintiffs state a *prima facie* case of Title IX retaliation.

B

Sweetwater offered the district court four legitimate, nonretaliatory reasons for firing Coach Martinez: First, Castle Park wanted to replace its walk-on coaches with certified teachers. Second, Coach Martinez mistakenly played an ineligible student in 2005 and forced the softball team to forfeit games as a result. Third, he allowed an unauthorized parent to coach a summer softball team. Fourth, he filed late paperwork related to the softball team's participation in a Las Vegas tournament—a mishap that Sweetwater said created an unnecessary liability risk. The district court rejected each reason, concluding that all four were "not credible and are pretextual."

Sweetwater argues on appeal that the district court committed clear error by disregarding these legitimate, nonretaliatory reasons because it "failed to evaluate and weigh the evidence before it" when it "looked past the abundance **[**55]** of uncontradicted information preexisting the Title IX complaints . . . and focused almost entirely" on Coach Martinez's termination. Sweetwater also adds that Castle Park did not renew Coach Martinez's contract in part because "he was a mean and intimidating person" who often spoke in a "rough voice" and could be "abrasive." Coach Martinez, Sweetwater contends, "did not possess the guiding principles required **[*870]** of a coach because he constantly failed to follow the rules" at Castle Park.

Sweetwater disregards the salient fact that the district court held a trial on retaliation. The district court could permissibly find that, on the evidence it considered, Sweetwater's non-retaliatory reasons for firing Coach Martinez were a pretext for unlawful retaliatory conduct. First, Sweetwater contends that Castle Park fired Coach Martinez "primarily" because he allowed an unauthorized parent to coach a summer league team, but also that this incident merely "played a role" in his firing, and that the reason given Martinez when he was fired was that Castle Park

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[15] Rather, Sweetwater contends that the district court applied the wrong standard and that Plaintiffs, to show adverse action, must prove "that they were denied access to the educational opportunities or benefits provided by the school as a direct result of retaliation." Our decision in *Emeldi v. University of Oregon*, however, illustrates that Sweetwater's position is simply not the law.

"wanted an on-site coach." These shifting, inconsistent reasons for Coach Martinez's termination are themselves evidence of pretext. *See **[**56]** Hernandez v. Hughes Missile Sys. Co.*, 362 F.3d 564, 569 (9th Cir. 2004) ("From the fact that Raytheon has provided conflicting explanations of its conduct, a jury could reasonably conclude that its most recent explanation was pretextual.").

Second, the district court's findings underlying its conclusion that Sweetwater's "stated reasons for Martinez's termination are not credible and are pretextual" are convincing and not clearly erroneous. Coach Martinez was not fired as part of a coordinated campaign to replace walk-on coaches with certified teachers, as Sweetwater contends. There was a preference for certified teachers in place long before Coach Martinez was hired, and there was no certified teacher ready to replace him after he was fired. Nor was the district court required by the evidence to find that Coach Martinez was fired because he played an ineligible student and forced the softball team to forfeit games as a result. This incident occurred during the 2004-2005 school year, but Coach Martinez was not reprimanded at the time and was not fired until more than a year later. Also, eligibility determinations were the responsibility of school administrators, not athletics coaches.

Sweetwater's argument that it fired Coach Martinez because he let an **[**57]** unauthorized parent coach a summer softball team is specious. Not only was Coach Martinez absent when the incident occurred, but he forbade the parent from coaching after learning of his ineligibility to do so. Moreover, the summer softball team in question "was not conducted under the auspices of the high school." Finally, while Coach Martinez did file late paperwork for the Las Vegas tournament, he was not then admonished for it. As with the ineligible player incident, the timing of his termination suggests that Sweetwater's allegedly non-retaliatory reason is merely a *post hoc* rationalization for what was actually an unlawful retaliatory firing. *See Gaffney v. Riverboat Servs. of Ind., Inc.*, 451 F.3d 424, 452 (7th Cir. 2006) (concluding that a district court's finding that "defendants first fired the plaintiffs and then came up with *post hoc* rationalizations for having done so" was not clearly erroneous).

On the record before it, the district court correctly could find that Coach Martinez was fired in retaliation for Plaintiffs' Title IX complaints, not for any of the pretextual, non-retaliatory reasons that Sweetwater has offered.

C

Having determined that the district court did not clearly err when it found (1) that Plaintiffs established a *prima facie* case **[**58]** of Title IX retaliation, and (2) that Sweetwater's purported non-retaliatory reasons for firing Coach Martinez were pretextual excuses for unlawful retaliation, we conclude that it was not an abuse of **[*871]** discretion for the district court to grant permanent injunctive relief to Plaintiffs on their Title IX retaliation claim. We affirm the grant of injunctive relief to Plaintiffs on that issue.[16]

VI

We reject Sweetwater's attempt to relitigate the merits of its case. Title IX levels the playing fields for female athletes. In implementing this important principle, the district court committed no error.

AFFIRMED.

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[16] We also affirm the grant of injunctive relief to Plaintiffs on their Title IX unequal treatment and benefits claim, any objection to which Sweetwater waived on appeal by not arguing it. *See Hall*, 697 F.3d at 1071.

APPENDIX

F.

[F.1], Board of Veterans Appeals, (Docket No. 240213-416239).

[F.2], Board of Veterans Appeals, (Docket No. 230921-382108).

BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
FRANK JOHN RICHARD
Represented by
Disabled American Veterans

SS XXX XX 4342
Docket No. 240213-416239

DATE: April 2, 2024

ORDER

Service connection for tinnitus is granted.

FINDING OF FACT

Tinnitus began in service.

CONCLUSION OF LAW

The criteria for service connection for tinnitus have been met. 38 U.S.C. §§ 1110, 1131, 5107; 38 C.F.R. § 3.303

REASONS AND BASES FOR FINDING AND CONCLUSION

The Veteran has active service from August 1985 to December 1988.

This matter is on appeal from a December 2023 rating decision. In February 2024, the Veteran submitted a VA Form 10182, notice of disagreement, requesting Direct Review by a Veterans Law Judge. The Board will consider evidence of record at the time of the December 15, 2023 rating decision notification letter. 38 C.F.R. § 20.301.

Also in the December 2023 decision, the Agency of Original Jurisdiction (AOJ) held new and relevant evidence had been submitted to readjudicate service connection for tinnitus.

Service Connection

Service connection will be granted if the evidence demonstrates a current disability resulted from an injury or disease incurred in or aggravated by active military service, even if the disability was initially diagnosed after service. 38 U.S.C. §§ 1110, 1131; 38 C.F.R. § 3.303(a). Establishing service connection generally requires (1) medical evidence of a current disability; (2) medical or, in certain circumstances, lay evidence of in-service incurrence or aggravation of a disease or injury; and (3) evidence of a nexus between the claimed in-service disease or injury and the present disability. *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004). Service connection may be granted for any disease initially diagnosed after service when all the evidence establishes the disease was incurred in service. 38 C.F.R. § 3.303(d).

Alternatively, service connection may be established by (a) evidence of (i) the existence of a chronic disease in service or during an applicable presumption period under 38 C.F.R. § 3.307 and (ii) present manifestations of the same chronic disease, or (b) when a chronic disease is not present during service, evidence of continuity of symptomatology. 38 C.F.R. § 3.303(b). However, the use of continuity of symptoms to establish service connection is limited only to those diseases listed in 38 C.F.R. § 3.309(a) and does not apply to other disabilities which might be considered chronic from a medical standpoint. *See Walker v. Shinseki*, 708 F.3d 1331 (Fed. Cir. 2013).

1. Service connection for tinnitus is granted.

The first element is met. The Veteran is considered competent to testify regarding tinnitus because such symptomatology is within the knowledge and personal observations of lay witnesses. *Barr v. Nicholson*, 21 Vet. App. 303, 309 (2007).

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The second element is met. In a July 2019 claim form, the Veteran described experiencing tinnitus in July 1986 and December 1988. In a September 2021 claim form, the Veteran revealed tinnitus began during service, in March 1987.

Tinnitus is one of the chronic diseases under 38 C.F.R. § 3.307(a) for which service connection is available based on continuity of symptomatology. Therefore, based on the Veteran's competent, credible evidence of in-service noise exposure, in-service tinnitus, and continuity of symptomatology, service connection for tinnitus is warranted under 38 C.F.R. § 3.303(b).

VA medical opinions draw contrary conclusions, but they do not actually contradict the Veteran's claim or the Board's decision.

A May 2023 VA medical opinion concludes tinnitus is less likely than not related to service. The examiner notes the Veteran's testimony that he only noticed tinnitus when loud noises occur. A December 2023 VA medical opinion concludes tinnitus is less likely than not due to in-service exposure to asbestos. This is based on the lack of evidence of any such relationships.

Neither of these opinions undermines the Veteran's account of when and how his tinnitus arose. The appeal is granted.

Timothy Cothrel
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board

Cannon, Brian

IN THE APPEAL OF
FRANK JOHN RICHARD

SS XXX XX 4342
Docket No. 240213-416239

The Board's decision in this case is binding only with respect to the instant matter decided. This decision is not precedential and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.

BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
FRANK JOHN RICHARD
Represented by
Disabled American Veterans

SS XXX XX 4342
Docket No. 230921-382108

DATE: March 12, 2024

ORDER

An initial rating of 50 percent, but no greater, for posttraumatic stress disorder (PTSD) is granted.

FINDING OF FACT

PTSD most nearly approximates occupational and social impairment with reduced reliability and productivity due to such symptoms as disturbances of motivation and mood.

CONCLUSION OF LAW

The criteria for an initial rating of 50 percent, but no greater, for posttraumatic stress disorder (PTSD) have been met. 38 U.S.C. §§ 1155, 5107; 38 C.F.R. §§ 3.159, 4.1–4.14, 4.130, Diagnostic Code 9411.

REASONS AND BASES FOR FINDING AND CONCLUSION

The Veteran has active service from August 1985 to December 1988.

This matter is on appeal from an August 2023 rating decision. In September 2023, the Veteran submitted a VA Form 10182, notice of disagreement, requesting Direct review by a Veterans Law Judge. The Board will consider evidence of record at the time of the August 23, 2023 rating decision notification letter. 38 C.F.R. § 20.301.

Increased Ratings

Disability ratings are determined by applying the criteria set forth in the VA Schedule for Rating Disabilities, found in 38 C.F.R. Part 4. The percentage ratings are based on the average impairment of earning capacity as a result of a service-connected disability, and separate diagnostic codes identify the various disabilities and the criteria for specific ratings. 38 U.S.C. § 1155; 38 C.F.R. § 4.1.

VA has a duty to consider all regulations that are potentially applicable through the assertions and issues raised in the record. *Schafrath v. Derwinski*, 1 Vet. App. 589 (1991). Where there is a question as to which of two evaluations shall be applied, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria for that rating. Otherwise, the lower rating will be assigned. 38 C.F.R. § 4.7. The Board will consider whether separate ratings may be assigned for separate periods of time based on facts found, a practice known as "staged ratings." *Hart v. Mansfield*, 21 Vet. App. 505 (2007).

Psychiatric Disorders – Rating Criteria

Diagnostic Code 9411 provides compensation for PTSD under the General Formula for Rating Mental Disabilities. 38 C.F.R. § 4.130. Under that code, a 30 percent rating is provided when there is occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self-care, and conversation normal), due to such symptoms as: depressed mood, anxiety, suspiciousness, panic attacks (weekly or less often), chronic sleep impairment, mild memory loss (such as forgetting names, directions, recent events). 38 C.F.R. § 4.130.

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A 50 percent rating is provided when there is occupational and social impairment with reduced reliability and productivity due to such symptoms as: Flattened affect; circumstantial, circumlocutory, or stereotyped, speech; panic attacks more than once a week; difficulty in understanding complex commands; impairment of short and long term memory (e.g., retention of only highly learned material, forgetting to complete tasks); impaired judgment; impaired abstract thinking; disturbances of motivation and mood; difficulty in establishing and maintaining effective work and social relationships. 38 C.F.R. § 4.130.

A 70 percent rating is provided for occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood, due to such symptoms as: Suicidal ideation; obsessional rituals which interfere with routine activities; speech intermittently illogical, obscure, or irrelevant; near continuous panic or depression affecting the ability to function independently, appropriately and effectively; impaired impulse control (such as unprovoked irritability with periods of violence); spatial disorientation; neglect of personal appearance and hygiene; difficulty in adapting to stressful circumstances (including work or a worklike setting); inability to establish and maintain effective relationships. 38 C.F.R. § 4.130.

Suicidal ideation alone may cause occupational and social impairment with deficiencies in most areas. *Bankhead v. Shulkin*, 29 Vet. App. 10, 21 (2017).

A 100 percent rating is provided for total occupational and social impairment, due to such symptoms as: Gross impairment in thought processes or communication; persistent delusions or hallucinations; grossly inappropriate behavior; persistent danger of hurting self or others; intermittent inability of the veteran to perform activities of daily living (including maintenance of minimal personal hygiene); disorientation to time or place; memory loss for names of close relatives, own occupation, or own name. 38 C.F.R. § 4.130.

The symptoms associated with the rating criteria are not intended to constitute exhaustive lists, but rather serve as examples of the type and degree of the symptoms, or their effects, that would justify a particular rating. *Mauerhan v. Principi*, 16 Vet. App. 436 (2002). A Veteran may only qualify for a disability rating under 38 C.F.R. § 4.130 by demonstrating the particular symptoms

associated with that percentage, or others of similar severity, frequency, and duration that result in the levels of occupational and social impairment provided. *Vazquez-Claudio v. Shinseki*, 713 F.3d 112 (Fed. Cir. 2013). To adequately evaluate and assign the appropriate disability rating to the Veteran's service-connected psychiatric disability, the Board must analyze the evidence as a whole and the enumerated factors listed in 38 C.F.R. § 4.130. *Mauerhan*, 16 Vet. App. at 436. As this claim was certified to the Board after August 4, 2014, DSM-5 is applicable to the claim.

Psychiatric Disorders – Evidence

In August 2023, the AOJ awarded service connection for PTSD at an initial rating of 30 percent from October 7, 2021. The Veteran timely appealed.

The Veteran is service-connected for PTSD, but not for other mental disorders. The Board is precluded, however, from differentiating between the symptoms of the Veteran's service-connected disorder and any other psychiatric symptoms in the absence of clinical evidence that clearly shows such a distinction. *Mittleider v. West*, 11 Vet. Ap. 181, 182 (1998).

Because the claim being appealed is an initial claim (as opposed to a claim based on increased severity of a service-connected disability downstream from the initial rating), the Board will consider evidence of symptomatology from the date that the claim was filed. 38 C.F.R. § 3.400(o).

A November 3, 2021 medical record contains a "Request Summary" that reads as follows: "I just thought you should know, my sister received a liver on 10/25/21. Seems to be working out well at this point." This record further states: "[I]nmate is not active to [mental health] services ... last seen 8/20/21 ...."

In a November 4 2021 mental health progress note, the Veteran presented no communication barriers. The Veteran was "not active to [mental health] services ... last seen 8/20/21 ...." He was "doing good" and "continue[d] to self-advocate for another chance in the dog program." The Veteran "denie[d] any emergent mental health problems/[symptoms] and [was] functioning adequately ...." He was alert

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and oriented, cooperative, displayed appropriate mood, and displayed appropriate thought process. Psychomotor activity and thought content were normal.

Psychiatric impairment is not listed on the January 2022 "Health Problems" list from the Michigan Department of Corrections.

An April 2022 medical record describes the Veteran's "Mental Status" as follows: "Oriented X3 with appropriate mood and affect." Additionally, he was "cooperative" and "in no acute distress."

A June 2022 medical record describes the Veteran's "Mental Status" as follows: "Oriented X3 with appropriate mood and affect, able to articulate well with normal speech/language, rate, volume and coherence and attention span and ability to concentrate are normal." Additionally, he was "cooperative" and "in no acute distress."

A July 2022 medical record describes the Veteran's psychiatric symptoms as follows: "Denies depression, change in sleep patterns, anxiety, difficulty concentrating, [and] paranoia ...." The medical provider later states: "The patient has normal judgment and insight. The patient is oriented to time, place, and person with no memory loss."

An October 2022 medical record describes the Veteran's psychiatric symptoms as follows: "The patient has normal mood and affect."

A December 2022 medical record states: "The patient is alert and oriented x3, in no acute distress.... The patient has normal judgment and insight. The patient is oriented to time, place, and person with no memory loss."

An April 2023 medical record states: "The patient has normal judgment and insight. The patient is oriented to time, place, and person with no memory loss."

In the July 2023 VA PTSD examination, the Veteran was incarcerated. He had "never been able to maintain relationships with anybody more than a few months." The Veteran "denie[d] close relationships with fellow inmates." Symptoms included persistent negative emotional state, irritable behavior, angry outbursts, hypervigilance, and "clinically significant distress or impairment in social,

occupational, or other important areas of functioning." The Veteran "was cooperative and polite throughout the interview" and "oriented to all spheres with grossly intact cognitive functioning." The Veteran denied suicidal ideation, delusions, and hallucinations. He lost track of most friends during incarceration, but kept in touch with one sister.

Psychiatric Disorders – Analysis

1. An initial rating of 50 percent, but no greater, for posttraumatic stress disorder (PTSD) is granted.

In the July 2023 VA PTSD examination, the Veteran endorsed symptoms of persistent negative emotional state, irritable behavior, angry outbursts, hypervigilance, and "clinically significant distress or impairment in social, occupational, or other important areas of functioning." Medical evidence dated prior to this examination in not to the contrary. Resolving doubt in the Veteran's favor, the Board finds these symptoms most nearly approximate occupational and social impairment with reduced reliability and productivity due to such symptoms as disturbances of motivation and mood. An initial rating of 50 percent is warranted.

An initial rating of 70 percent is not warranted. Importantly, medical records for the period on appeal consistently describe the Veteran as cooperative, oriented, and in no acute distress. Regarding "suicidal ideation," the Veteran denied this symptom in the July 2023 examination, and presented no significant psychiatric distress in medical evidence dated prior to the examination. Regarding "obsessional rituals which interfere with routine activities," the July 2023 examination indicated unspecified hypervigilance, but neither that examination nor prior medical evidence suggests any negative impact on routine activities. Regarding "speech intermittently illogical, obscure, or irrelevant," there is no evidence of any such impairment. Regarding "impaired impulse control (such as unprovoked irritability with periods of violence)," there is no evidence during the period on appeal that the Veteran's symptoms are accompanied by responses approximating "unprovoked irritability" or "violence." Regarding "spatial disorientation," the majority of the Veteran's medical records contain a specific finding that he is oriented in all spheres, and the lucidity of his written

correspondence is consistent with such findings. Regarding "neglect of personal appearance and hygiene," there is no evidence of this symptom during the period on appeal. Regarding "difficulty in adapting to stressful circumstances (such as work or a worklike environment)," there is no evidence of this symptom during the period on appeal.

Regarding "near-continuous panic or depression affecting the ability to function independently, appropriately and effectively," the July 2023 examination indicates significant distress with irritability and outbursts, but other medical records do not. But neither the examination nor the other medical evidence supports a finding that these symptoms preclude the Veteran from functioning "independently, appropriately and effectively."

Regarding "inability to establish and maintain effective relationships," during the July 2023 examination the Veteran endorsed longstanding difficulties establishing friendships for more than a few months. But he was able to maintain such relationships for short periods, and he has stayed in touch with a sister during the time of his incarceration.

Further, in November 2021, he reached out to mental health services simply to share good news about his sister's liver condition, even though he had not spoken with them since the previous August. Finally, he was described advocating for himself with respect to participation in a dog program at the prison. Such advocacy presumably requires some level of personal interaction.

When adjudicating appeals, the Board applies an intentionally generous standard of proof unique in American jurisprudence, created in recognition of the nation's great debt to its veterans. *Wise v. Shinseki*, 26 Vet. App. 517, 531 (2014).

"Reasonable doubt" exists when the evidence does not "satisfactorily prove or disprove the claim." A veteran is entitled to the benefit of the doubt when there is an approximate balance of positive and negative evidence on any issue material to the claim. 38 U.S.C. § 5107; 38 C.F.R. § 3.102.

Thus, when the evidence in favor of the veteran on a given issue is at least nearly equal to the evidence against them, the Board finds in the veteran's favor. *See,*

e.g., Ortiz v. Principi, 274 F.3d 1361, 1365 (Fed. Cir. 2001). Conversely, when after assessing the probative value of the positive and negative evidence the Board finds the evidence on the whole is persuasively against the veteran, reasonable doubt is extinguished, the benefit of the doubt doctrine does not apply, and the Board finds accordingly. *See, e.g., Lynch v. McDonough*, 21 F.4th 776, 781-82 (Fed. Cir. 2021); *Mattox v. McDonough*, 56 F.4th 1369, 1378-79 (Fed. Cir. 2023).

For the above reasons, the evidence is not approximately balanced or nearly equal with regard to whether an initial rating in excess of 50 percent is warranted. Rather, the evidence persuasively weighs against such a finding. Therefore, the appeal is granted only to that extent.

Timothy Cothrel
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board

Cannon, Brian

The Board's decision in this case is binding only with respect to the instant matter decided. This decision is not precedential and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.

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