

PUBLIC VERSION

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF VIRGINIA
Big Stone Gap Division**

WILLIAM THORPE, *et al.*,

Plaintiffs,

V.

VIRGINIA DEPARTMENT OF
CORRECTIONS, *et al.*,

Defendants.

Case No. 2:20-cv-00007-JPJ-PMS

DEFENDANTS' MOTION FOR LEAVE TO FILE AN AMENDED ANSWER

Defendants Virginia Department of Corrections (VDOC), Harold Clarke, Randall Mathena, H. Scott Richeson, A. David Robinson, Henry Ponton, Marcus Elam, Denise Malone, Steve Herrick, Tori Raiford, Jeffrey Kiser and Carl Manis (collectively, Defendants), by counsel and pursuant to Federal Rules of Civil Procedure 16(b), 15(a), and W.D. Va. Civ. R. 11, seeks leave to amend the scheduling order and file an amended answer asserting three affirmative defenses in light of a recently-disclosed expert report served by Plaintiffs on May 26, 2023, in which Plaintiffs specified for the first time the extensive and specific relief they seek for their claims under Title II of the Americans with Disabilities Act and the Rehabilitation Act of 1973. As Plaintiffs themselves acknowledged in their interrogatory responses – which only generically identified the relief sought – the specific relief they are seeking or these two claims could not be identified until they provided their expert reports. Plaintiffs served the relevant expert report on May 26, 2023. Now that Plaintiffs have identified the full scope of the relief they seek, Defendants request leave to add statutory affirmative defenses of fundamental alteration, undue burden, and direct threat.

As set forth more fully below, this motion satisfies each of the requirements of Federal Rule of Civil Procedure 16(b) and 15(a), as Defendants have shown good cause for leave to amend the Court's scheduling order to allow for the filing of an amended answer. Defendants' amendments are not futile, will not prejudice Plaintiffs, and are not made in bad faith.

RELEVANT PROCEDURAL HISTORY AND FACTS

On May 6, 2019, twelve inmates who are or have been confined at the Red Onion State Prison (ROSP) filed this putative class action complaint against VDOC and various VDOC officials and employees, alleging that, since August 1, 2012, their constitutional rights have been violated through administration of the Step-Down Program at ROSP and Wallens Ridge State Prison (WRSP). *See* Complaint (ECF No. 1). The complaint includes a putative sub-class of inmates with alleged mental disabilities, and the putative class representatives for that sub-class are identified as Gary Wall, Brian Cavitt, Steven Riddick, and Dmitry Khavkin. Complaint ¶ 8. Plaintiffs raise one claim for violation of Title II of the Americans with Disabilities Act (ADA) and one claim for violation of Section 504 of the Rehabilitation Act of 1973 (RA). Complaint ¶¶ 250-277. In their Complaint, Plaintiffs do not allege what accommodations they requested from VDOC, or what specific relief they seek from VDOC. *Id.*

In its May 4, 2020 Scheduling Order, the Court stated that any motion "to amend the pleadings must be filed prior to the cutoff date for non-expert fact discovery." ECF No. 56. at 3 (¶ 8). With the exception of certain depositions, non-expert fact discovery closed on February 28, 2023. ECF No. 189.

On May 15, 2023 (May 15 Order), the Court granted Plaintiff's motion to modify the Scheduling Order and set the following deadlines: Plaintiffs' expert reports are due on May 26,

2023; Defendants' expert reports are due on July 3, 2023; and the close of expert discovery is August 16, 2023. ECF No. 328.

On May 26, 2023, Plaintiffs served five expert reports from the following individuals: Dr. Craig Haney, Dan Pacholke, Dr. Michael Hendricks, Richard Wells, and Russell Molter. Combined, Plaintiffs' experts offer more than 100 individual opinions. Of particular importance for this Motion, Richard Wells purports to opine on, among other things, the requirements of the ADA and RA, whether VDOC meets those requirements, and if not, what extensive and specific relief to Plaintiffs is warranted. Wells did not submit an expert report at the class certification stage, nor did Plaintiffs identify Wells as a potential expert before serving his report.

LEGAL STANDARD

If a court's scheduling order sets forth a deadline to amend the pleadings, and that deadline has passed, then the party seeking to amend a pleading must first satisfy the good cause standard under Rule 16 "to justify leave to amend the pleadings." *Nourison Rug Corp. v. Parvizian*, 535 F.3d 295, 298 (4th Cir. 2008). If the moving party satisfies the good cause standard under Rule 16 to amend the scheduling order, then the party must satisfy the more liberal standard under Rule 15(a) to amend the answer. *See Clark v. Quesinberry*, No. 7:20-CV-00057, 2021 WL 5238599, at *3 (W.D. Va. Apr. 26, 2021). The Fourth Circuit states that leave to amend "should be denied *only* when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile." *Franks v. Ross*, 313 F.3d 184, 193 (4th Cir. 2002) (emphasis in original).

ARGUMENT

Good cause exists to amend the Scheduling Order to permit Defendants to amend their Answer to assert three affirmative defenses because it did not know the scope of the extensive

relief Plaintiffs are seeking for their ADA and RA claims, which give rise to these affirmative defenses, until Plaintiffs served the Wells expert report on May 26, 2023, which was three months after the deadline to amend the pleadings. In addition, Defendants have satisfied Rule 15's liberal standard for amendment of pleadings, as Plaintiffs will not be prejudiced by Defendants' assertion of three affirmative defenses, Defendants did not engage in bad faith, and these amendments will not be futile.

I. Defendants Have Shown Good Cause For Leave To Amend The Scheduling Order And Amend Their Answers To Assert Additional Affirmative Defenses.

“The ‘touchstone’ of the Rule 16 good cause requirement is ‘diligence’ and ‘only diligent efforts to comply with the scheduling order can satisfy Rule 16’s good cause standard.’” *Clark v. Quesinberry*, No. 7:20-CV-00057, 2021 WL 5238599, at *2 (W.D. Va. Apr. 26, 2021) (quoting *Faulconer v. Centra Health, Inc.*, 808 F. App’x 148, 152 (4th Cir. 2020)).

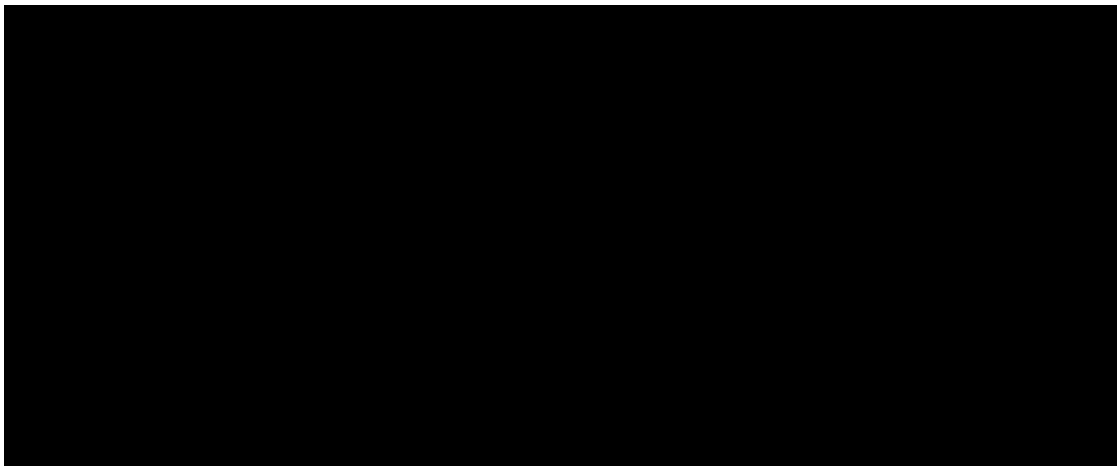
In its diligence analysis, the court’s main focus is on the timeliness of the motion to amend the pleading and the reasons why it was made after the deadline set forth in the scheduling order. *Id.* If the moving party knew the facts supporting the amendment at the time it filed its initial pleading but failed to raise, then the moving party did not act diligently and cannot show good cause. *Id.* However, if the facts giving rise to the amended complaint “did not come to light until after the amendment deadline,” then the moving party can show good cause “for moving to amend at a later date.” *Id.* In its good cause analysis, the court may also assess “whether the moving party acted in good faith, the length of the delay and its effects, and whether the delay will prejudice the non-moving party.” *Id.* Courts in this Circuit regularly find that parties have acted diligently and established good cause when they did not learn of the facts necessitating amendment, including learning facts from deposition testimony or medical reports, until after the deadline to amend has passed. *See, e.g., Clark*, 2021 WL 5238599, at *3 (good cause to amend complaint found where

plaintiff learned of facts supporting additional claim during defendant's deposition after the deadline for amendment had passed); *Walker v. Cardinal Logistics Mgmt. Corp.*, No. 8:19-CV-002130-GLS, 2020 WL 1986451, at *4 (D. Md. Apr. 27, 2020) (good cause to allow assertion of affirmative defense found where "new facts" were learned during plaintiff's deposition, "which occurred more than one month after the deadline to amend," and defendant sought leave to "amend its pleading prior to the conclusion of discovery"); *Stoker v. Home Depot, U.S.A., Inc.*, No. 5:05-CV-571-F3, 2006 WL 8438677, at *2 (E.D.N.C. July 18, 2006) (good cause found to allow defendant to amend answer to include affirmative defense where information supporting defense first learned at plaintiff's deposition, which was two months after deadline to amend passed); *Burton v. United States*, 199 F.R.D. 194, 198–99 (S.D.W. Va. 2001) (good cause for amending answer found where defendant obtained information needed for amendment in deposition after deadline, could not have obtained information sooner, and acted quickly to amend).

Defendants have acted diligently in seeking leave to amend the scheduling order so that it can raise the affirmative defenses of fundamental alteration, undue burden, and direct threat under the ADA and the RA. Under both Title II of the ADA and the RA, while public entities must make "reasonable modifications" to ensure disabled persons receive the services or participate in programs or activities, a public entity is not required to "employ any and all means to make services available to persons with disabilities." *Miller v. Hinton*, 288 F. App'x 901, 902 (4th Cir. 2008). Instead, public entities are only obligated to make modifications that do not "fundamentally alter the nature of the service or activity of the public entity or impose an undue burden." *Id.*; *Wimer v. Greene Cnty. Gen. Cir. Ct.*, No. 3:19-cv-00021, 2019 WL 5580961, at *5 (W.D. Va. Oct. 29, 2019). Thus, defendants may assert fundamental alteration and undue burden as affirmative

defenses under both statutes. 28 C.F.R. § 35.150(a)(3).¹ Likewise, under both ADA Title II and the RA, public entities are not required to “permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others.” 28 C.F.R. § 35.139; *see also Wood v. Maryland Dep’t of Transp.*, 732 F. App’x 177, 181 (4th Cir. 2018) (explaining that “direct threat” is an affirmative defense to Title II and RA claims). Defendants have shown good cause to amend the scheduling order to assert these three affirmative defenses.

Before being served with Wells’ 160-page expert report on May 26, Defendants did not know that Plaintiffs would serve a purported expert report from an individual purporting to opine on the requirements of ADA Title II and the RA, whether VDOC meets those requirements, and if not, what extensive and specific relief Plaintiffs claim is warranted. Defendants did not know the extensive relief Wells would recommend in his report with regard to the scope of accommodations sought, either. For instance, in paragraph 196 of his report, Wells sets forth a non-exhaustive list of relief that Plaintiffs may seek:



¹ Claims under ADA Title II and the Rehabilitation Act are analyzed under the same standard because they are “substantially the same.” *Seremeth v. Bd. of Cnty. Comm’rs Frederick Cnty.*, 673 F.3d 333, 336 n.1 (4th Cir. 2012).

Exhibit A, Wells' Report, ¶ 196 (filed under seal). Wells further opines that VDOC does not meet the requirements of the ADA and RA because:

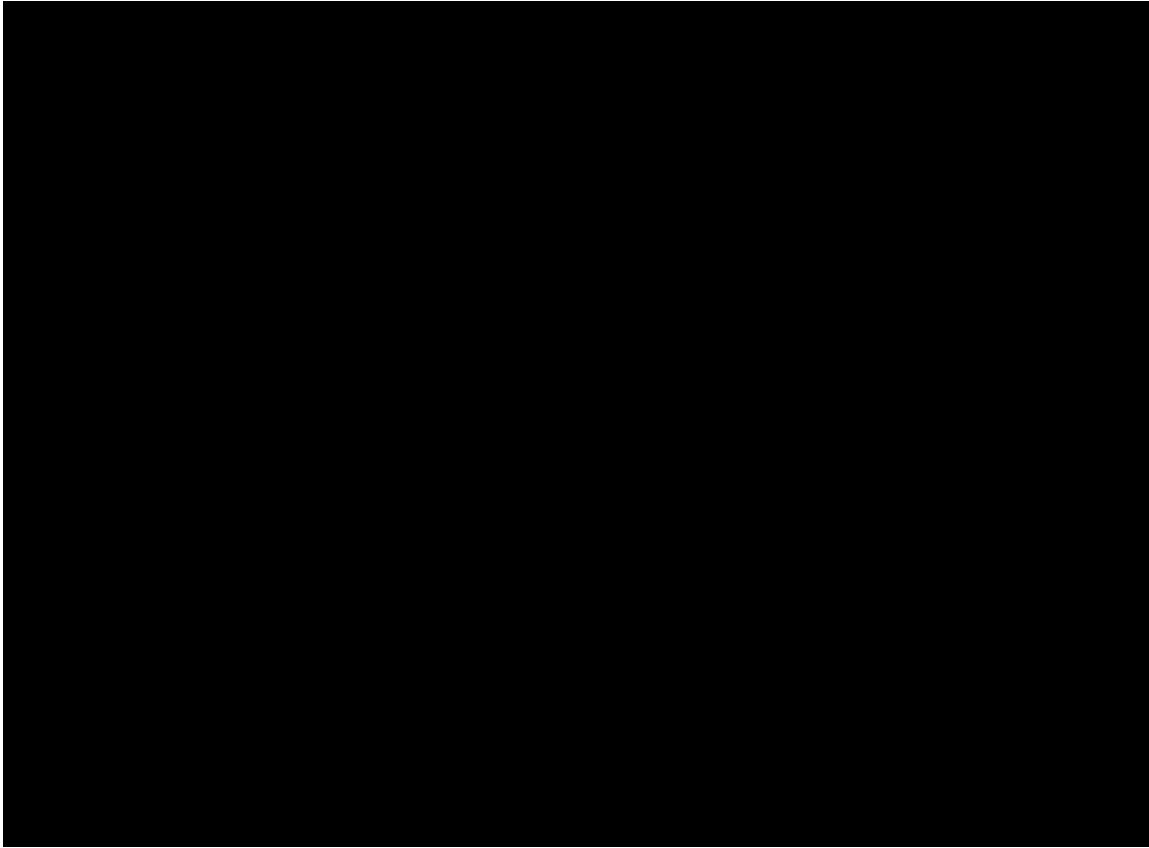


Exhibit A, Wells' Report, ¶ 15 (filed under seal). For each of these alleged insufficient policies and practices, Wells recommends onerous modifications with specific examples pulled from what he deems "best practices" from a number of sources. *See, e.g.*, ¶¶ 59, 209, 212-223. Again, Defendants learned for the first time in this expert report that Plaintiffs may seek this specific relief. In fact, in their interrogatory responses, plaintiffs objected to responding to an interrogatory asking what relief they sought on the basis that "the parties have yet to designate experts [or] exchange expert reports[.]" *See, e.g.*, Class Plaintiff Wall's Answers and Objections to Defendants' First Set of Interrogatories, No. 13 (attached as Exh. B).²

² In interrogatory responses, the named plaintiffs identified only in general terms the changes they believed needed to be made to VDOC's policies and procedures to accommodate inmates with

Defendants are filing this Motion within two weeks of receipt of the Wells Report. Plaintiffs will not be prejudiced because the expert discovery deadline does not close for two more months, which provides Plaintiffs with sufficient time to conduct discovery on these affirmative defenses. Furthermore, as the dispositive motion deadline has not passed, Plaintiffs have the opportunity to timely challenge these defenses on summary judgment should they wish to do so. Thus, Defendants have established good cause to amend the scheduling order because it acted diligently.

II. Under Rule 15's Liberal Policy, Defendants Should Be Granted Leave To Amend Their Answer To Assert The Three Additional Affirmative Defenses.

If the moving party satisfies the good cause standard under Rule 16, it “must then satisfy the liberal standard of Fed. R. Civ. P. 15(a)” to amend a pleading. *Clark*, 2021 WL 5238599, at *3. Rule 15 expressly provides that “[t]he court should freely give leave when justice so requires.” *Herrmann v. Wells Fargo Bank, N.A.*, 529 F. Supp. 3d 549, 562 (W.D. Va. 2021); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962) (“[T]he leave sought should, as the rules require, be ‘freely given’”). “This liberal rule gives effect to the federal policy in favor of resolving cases on their merits instead of disposing of them on technicalities.” *Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006). Courts should deny leave to amend a pleading only when the proposed amendment “would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile.” *Franks*, 313 F.3d at 193. “An amendment is futile if the amended claim would fail to survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).” *Herrmann*, 529 F. Supp. 3d at 562. Furthermore, “delay alone is not

disabilities, including generically providing disabled inmates with “more out-of-cell time, increased mental health treatment and other programming, relaxation of strict property restrictions, and a reduction in the use of strip searches.” Plaintiff Gary Wall’s interrogatory responses are exemplary of all of the named plaintiffs’ interrogatory responses and are attached as Exh. B.

sufficient reason to deny leave to amend” and “must be accompanied by prejudice, bad faith, or futility.” *Id.* Here, Defendants have satisfied Rule 15.

First, the proposed amendments are timely and will not result in undue prejudice to Plaintiffs. Granting Defendants leave to amend their answer will not delay the proceedings in any substantial way, as the deadlines for expert discovery (August 16, 2023) and the filing of dispositive motions (September 8, 2023) have not passed, and trial is not set to begin until March 18, 2024. ECF Nos. 189, 312. Thus, Plaintiffs are not prejudiced because “ample opportunity remains for both parties to investigate” the fundamental alteration and undue burden affirmative defenses asserted by Defendants. *See Whitt v. Yancey*, No. 3:14-cv-582, 2015 WL 4642576, at *2 (E.D. Va. Aug. 4, 2015). Additionally, if Defendants do move for summary judgment on either or both of these affirmative defenses, Plaintiffs will be able to present evidence and arguments in response. *See Alana v. Rose*, No. 7:18-cv-00420, 2020 WL 130586, at *2 (W.D. Va. Jan. 10, 2020) (no prejudice in allowing defendant to amend to add statute of limitations defense because plaintiff “may present whatever evidence and arguments he has against dismissal on that ground”).

Second, Defendants’ proposed amendments are not the result of bad faith or dilatory motive. As set forth above, Defendants were not aware of Richard Wells’ opinions until May 26, 2023, when Plaintiffs served a 160-page expert report from him in which he opined on the requirements of ADA Title II and the RA, whether VDOC meets those requirements, and if not, what extensive and specific relief to Plaintiffs is warranted with regard to the scope of accommodations sought.³

³ Defendants file this motion and seeks the requested relief subject to and without waiving their right to challenge certain requested accommodations as unreasonable, to provide alternative accommodations that are reasonable and appropriate, to oppose providing any requested accommodation as applied beyond any Plaintiff’s or putative class member’s individual circumstances, or to otherwise oppose class-wide relief.

Third, Defendants’ proposed amendments are not futile. “Denial based on futility can only be found where ‘the proposed amendment is clearly insufficient or frivolous on its face.’” *Builders Mut. Ins. Co. v. Dragas Mgmt. Corp.*, No. 2:09CV185, 2011 WL 13229623, at *4 (E.D. Va. Mar. 11, 2011). Here, Defendants state plausible affirmative defenses to Plaintiffs’ ADA Title II and RA claims. *See Giango v. Orlor*, No. 1:22-cv-164MSNTCB, 2022 WL 19692031, at *1 (E.D. Va. June 14, 2022). As set forth above, public entities are not required under these statutes to make modifications to its policies if they would “fundamentally alter the nature of the service or activity of the public entity or impose an undue burden.” *Miller*, 288 F. App’x at 902; *Wimer*, 2019 WL 5580961, at *5. Under these defenses, Defendants “could receive at least partial relief” on Plaintiffs’ claims. *Builders Mut. Ins. Co. v. Dragas Mgmt. Corp.*, No. 2:09CV185, 2011 WL 13229623, at *4 (E.D. Va. Mar. 11, 2011). The proposed fundamental alteration, undue burden, and direct threat affirmative defenses provide Plaintiffs “with adequate notice and relate to the underlying factual context” of their claims on behalf of the putative sub-class of inmates with alleged mental disabilities. *Giango*, 2022 WL 19692031, at *1 Thus, the Court should find that “the proposed affirmative defenses are not futile.” *Id.* !

CONCLUSION

For the reasons set forth above, Defendants request that the Court grant its motion for to amend the scheduling order and to amend its Answer to assert three new affirmative defenses, as Defendants have satisfied the requirements under Rules 16(b) and 15(a). A proposed amended answer is attached to this filing as Exhibit C.

June 12, 2023

Respectfully submitted,

/s/ Maya M. Eckstein

Jason S. Miyares
Attorney General of Virginia

Margaret Hoehl O'Shea (VSB #66611)
Assistant Attorney General,
Criminal Justice & Public Safety Division

OFFICE OF THE ATTORNEY GENERAL
202 North Ninth Street
Richmond, VA 23219
Ph: (804) 786-2206
Fax: (804) 786-4239 Facsimile
moshea@oag.state.va.us

Maya M. Eckstein (VSB #41413)
Thomas R. Waskom (VSB #68761)
Trevor S. Cox (VSB #78396)
R. Dennis Fairbanks (VSB #90435)

HUNTON ANDREWS KURTH LLP
951 E. Byrd St.
Richmond, VA 23219
Ph: (804) 788-8200
Fax: (804) 788-8218
meckstein@HuntonAK.com
twaskom@HuntonAK.com
tcox@HuntonAK.com
dfairbanks@HuntonAK.com

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing to all CM/ECF participants.

By: /s/ Maya M. Eckstein
Maya M. Eckstein (VSB # 41413)
Hunton Andrews Kurth LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
Telephone: (804) 788-8200
Facsimile: (804) 788-8218
meckstein@HuntonAK.com

Counsel for Defendants