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' OPPOSITION TO PLAINTIFFS' MOTION TO RECONSIDER THE COURT'S AUGUST 8, 2023 ORDER

I. INTRODUCTION

One year after class certification briefing, months after the Court's class certification ruling, months after the close of fact discovery, and weeks after the close of expert discovery, Plaintiffs seek to re-litigate class certification all over again. Despite the Court's rejection of their proposed representative (Named Plaintiff Peter Mukuria) for the constitutional violation injunction class, *see* Plaintiffs' Motion to Reconsider the Court's August 8, 2023 Order ("August 8 Order") (ECF No. 358), Plaintiffs implore the Court to allow him to represent a class for which he does not qualify. And despite the Court's well-reasoned basis for modifying the definitions of the disability classes, *see id.*, Plaintiffs ask the Court to redefine the classes once more, but this time so that they include an ever-expanding group of inmates that undoubtedly will require extensive individual determinations of class eligibility.

Plaintiffs' motion is too little and certainly too late. Not only do their arguments lack in substance, but they should not be allowed, at this late stage – long after class certification briefing, the Court's class certification order, the close of fact discovery, and the close of expert discovery,

and just six months before trial – to identify new class representatives (and, thus, new named plaintiffs) from the pool of potential class members and to re-define the classes yet again. If accepted, Plaintiffs' proposals likely will require the re-opening of fact and expert discovery, the filing of a supplemental motion for summary judgment, and certainly disrupt the case schedule.[1] For these reasons alone, Plaintiffs' motion should be rejected.

Plaintiffs' motion should be rejected on its merits, too. Mukuria simply does not qualify for the Constitutional Violation Injunction Class and, thus, cannot represent it. No exception to the general rule that only a class member may represent a class applies here. Rather, the most Plaintiffs should be permitted to do is identify another Named Plaintiff as class representative, even though doing so likely will require some modification of the case schedule, as noted above and further discussed below.

Additionally, the Court's August 8 Order, which Plaintiffs now move to reconsider, rejected the disabilities classes proposed by Plaintiffs because they posed "fundamental" problems concerning ascertainability and would necessitate extensive individualized fact-finding. August 8 Order at 6-7. The Court correctly ruled that determining membership for the classes as then-defined by Plaintiffs was not "administratively feasible based on some identifiable, objective criteria," cannot necessarily be gleaned from a review of VDOC documents, and will require fact-

[1] Plaintiffs paired their motion for reconsideration with an opposed motion to extend the deadline to comply with the Court's instructions. *See* ECF No. 363. The Court granted the motion to extend one day after the motion was filed (ECF No. 364), before VDOC had an opportunity to respond. VDOC would have opposed the motion, as Plaintiffs sought to extend the deadline to identify proposed class representatives past the Court's deadline for the filing of dispositive motions, which prejudices VDOC. If and when Plaintiffs identify new proposed class representatives, VDOC reserves the right to conduct expedited discovery as to the newly-named representatives (particularly if they also are newly-named plaintiffs, which will require Plaintiffs to amend their Complaint), to challenge the proposed class representatives as inadequate, and to file a supplemental motion for summary judgment on claims asserted by the newly-named class representatives.

finding that is "too extensive." *Id*. To remediate these problems, the Court exercised its discretion to decertify the disabilities classes as then-defined by Plaintiffs, amend the definitions for the disabilities classes to include only those inmates classified by VDOC at the MH-2S "Substantial Impairment" code and higher, and to certify the amended disabilities class definitions. *Id.* at 7. The Court then instructed Plaintiffs to, among other things, identify new proposed class representatives who meet the Court's revised class definitions.

Rather than comply with the Court's instructions, Plaintiffs file a motion to "reconsider" in which they ask for more than mere reconsideration – they ask the Court to redefine the disabilities classes once again in a way they never proposed previously. Their motion should be summarily denied ignores both the Court's rationale for amending the disabilities class definitions and the Court's explanation as to why inmates who did not fall within the amended definition would not be unjustly affected. Worse, granting the relief Plaintiffs seek – in particular, expanding the Court's revised definitions for the disabilities classes to include inmates classified by VDOC at the MH-2 "Minimal Impairment" code – would reinstate the same "fundamental" problems the Court sought to remediate in its August 8 Order. Accepting Plaintiff's overly-broad MH-2 "Minimal Impairment" class definition would condemn the parties and the Court to the very "extensive and individualized fact-finding and mini-trials" the Court sought to avoid by amending the class definitions.

Accordingly, Plaintiffs' motion should be denied.

II. LEGAL STANDARD

Motions for reconsideration "are disfavored," *Warner v. Centra Health, Inc.*, No. 6:19-cv-55, 2020 WL 9598944, at *1 (W.D. Va. Dec. 21, 2020), and will be granted only "sparingly." *Downie v. Revco Disc. Drug Ctrs., Inc.*, No. Civ.A.3:05CV00021 2006 WL 1171960, at *1 (W.D. Va. May 1, 2006). To prevail, a movant must point to "(1) an intervening change in the law, (2)

new evidence that was not previously available, or (3) [the need to] correct[] a clear error of law or to prevent manifest injustice." *Wootten v. Virginia*, 168 F. Supp. 3d 890, 893 (W.D. Va. 2016). A motion for reconsideration is emphatically "***not*** . . . an opportunity to relitigate issues already ruled upon because a party is dissatisfied with the outcome."[2] *Regan v. City of Charleston, S.C.*, 40 F. Supp. 3d 698, 702 (D.S.C. 2014) (emphasis added).

III. ARGUMENT

A. Plaintiffs' Arguments for Reconsidering the Court's Rejection of Mr. Mukuria as the Representative of the Constitutional Violation Injunction Class Should Be Rejected.

The Court correctly ruled that Named Plaintiff Mukuria could not represent the Constitutional Violations Injunction Class, and Plaintiffs have not identified any valid basis for the Court to reconsider that ruling. Plaintiffs must propose another individual to represent that proposed class. At the same time, the Court should not permit Plaintiffs to search among absent class members for a new named plaintiff who could meet the requirements of a class representative.

First, Plaintiffs do not point to any "intervening change in the law," "new evidence," "clear error of law," or issue of "manifest injustice" that merits a reconsideration of the Court's ruling. *See Wootten*, 168 F. Supp. 3d at 893. The Court correctly recognized that Mukuria is not a proper class representative for the Injunction Class, which seeks prospective relief regarding the current Step-Down Program and conditions at Red Onion, because he "completed the Step-Down Program

[2] Plaintiffs incorrectly assert that their motion for reconsideration is governed by Fed. R. Civ. P. 54. ECF No. 359-1 at p. 2. But Rule 54 applies to orders that adjudicate some but not all claims or that adjudicate claims as to some but not all parties. Fed. R. Civ. P. 54(b) ("the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties"). No such adjudication has occurred here. The Court's rulings regarding class certification issues are not "final judgments" subject to Rule 54(b). Regardless, this Court has held that even motions for reconsideration appropriately brought under Fed. R. Civ. P. 54(b) "are disfavored and should be granted 'sparingly.'" *Warner*, 2020 WL 9598944, at * 1 (quoting *Downie*, 2006 WL 1171960, at *1).

in 2020," and "is currently housed in a Maryland prison." August 8 Order at 4. Thus, Mukuria (a) has no basis to testify about current conditions at Red Onion, and (b) is not a member of the Constitutional Violations Injunctive Relief class because he currently is not subject to the Step-Down Program and it is "too speculative" to assume he will return to Virginia and be reassigned to the Step-Down Program at some point in the future. *Id.* at 11.

Notably, Plaintiffs do not dispute that Mukuria is ***not*** a member of the Constitutional Violations Injunction Class. Instead, they argue that Mukuria can represent the class under "exceptions to the general rule that a litigant must be a member of the class which he or she seeks to represent at the time the class action is certified by the district court." ECF No. 359-1 at 3 (cleaned up). In particular, Plaintiffs argue that the Court should reconsider its ruling because it purportedly "overlooked" the "relation back" exception to "the general rule that a litigant must be a member of the class that he or she seeks to represent." ECF No. 359-1 at 4 (citing *Jonathan R. by Dixon v. Justice*, 41 F.4th 316, 325-26 (4th Cir. 2022). The "relation back" exception applies where "it is by no means certain that any given individual, named as a plaintiff, would be in custody long enough for a district judge to certify the class." *Jonathan R.*, 41 F.4th at 325-26 (quoting *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975)).

But the Court's August 8 Order directly addressed this exception and rejected its application here. ECF No. 358 at 10 (citing *Gerstein v. Pugh*, 420 U.S. 103 (1975) and *Sosna v. Iowa*, 419 U.S. 393 (1975)). Indeed, the Court held that "the plaintiffs' own class certification filings" establish that the exception does not apply here. *Id.* The Court concluded that while "the Step-Down Program is temporary in nature . . . it is not so temporary that it is uncertain that an

individual could have his claim determined before class certification."[3] ECF No. 358 at 10. Moreover, Plaintiffs' reliance on *Jonathan R.* is misplaced. *Jonathan R.* relies on *Gerstein*, which the Court addressed in its decision. *See id.* at 10-11. And *Jonathan R.* addressed whether a plaintiff in a putative class action whose claims have become moot can ***state a claim***, not whether he or she can serve as an adequate class representative. *Jonathan R.*, 41 F.4th at 324.

Accordingly, Plaintiffs have offered the Court nothing new, nothing that they could not have said in the initial briefing, and certainly nothing that affects the Court's August 8 Order regarding Mukuria.

Second, the Court should not permit Plaintiffs to dive back into the pool of absent class members to select a new named plaintiff to represent the Constitutional Violations Injunction Class. As Plaintiffs note, "[c]ourts in the Fourth Circuit routinely permit identification of new named plaintiffs ***if no current named plaintiff meets the class definition***." ECF No. 359-1 at 6 n.3 (emphasis added). But Plaintiffs have not established that "no current named plaintiff meets the class definition." *Id.* Aside from the fact that he completed the Step-Down Program, Mukuria is outside the class because he currently is not in a Virginia facility – a fact Plaintiffs knew when they proposed Mukuria as class representative. His confinement in Maryland means "he does not retain a personal stake in the outcome of the case as to the Constitutional Violations Injunction Class beyond pure conjecture." ECF 358 at 11-12.

[3] Plaintiffs' (incorrect) argument that that the Court "overlooked" the relation back exception and *Jonathan R.* elides the fact that Plaintiffs never addressed either in their filings regarding class representatives. *See* ECF Nos. 310, 316. A motion for "reconsideration is not meant to re-litigate issues already decided, provide a party the chance to craft new or improved legal positions, highlight previously-available facts, or otherwise award a proverbial 'second bite at the apple' to a dissatisfied litigant." *Wootten*, 168 F. Supp. 3d at 893.

Unlike Mukuria, other Named Plaintiffs still are housed at VDOC facilities. It is more likely that one of them, as opposed to Mukuria, "could be . . . classified at Security Level S or Level 6, and then be subjected to the Step-Down Program again." *Id*. at 11. Those individuals are members of the Constitutional Violations Injunctive Relief class as currently defined. Other Named Plaintiffs—like Steven Riddick—also have more recent experience in the Step-Down Program.

Thus, permitting Plaintiffs to select a new named plaintiff as class representative is unnecessary. Moreover, doing so would prejudice Defendants and upend the case schedule, as the parties would have to conduct additional fact discovery and possibly additional expert discovery as to the newly-named plaintiff/class representative. It is difficult to see how the current trial schedule could remain in place. Indeed, Plaintiffs' failure to identify appropriate class representatives already is impeding progress of the case.[4] Their selection of improper class representatives was entirely preventable. The Court should not permit them to compound that error by adding new parties, reopening discovery, and further disturbing the case schedule.

B. Plaintiffs' Arguments for Reconsidering and Amending the Disabilities Class Definitions Should Be Rejected.

As for Plaintiffs' request to re-define the disabilities classes, Plaintiffs again fail to point to any "intervening change in the law," "new evidence," or "clear error of law" meriting reconsideration. *See Wootten*, 168 F. Supp. 3d at 893. Rather, they argue only that reconsideration is required to "prevent manifest injustice," which (they claim) necessitates substantially expanding the definition of the disabilities classes to now include inmates classified by VDOC at the MH-2

[4] For example, because class representatives have yet to be named, Defendants are unable to pursue certain arguments on summary judgment. Defendant reserve the right to file a supplemental motion for summary judgment, if warranted, after Plaintiffs finally identify appropriate class representatives.

"Mild Impairment" code while in Level S or Level 6 and subject to any phase of the Step-Down Program, as well as inmates classified at the MH-2S "Substantial Impairment" code "or admitted to Marion Correctional Treatment Center for treatment, at any point prior to classification at Level S or Level 6 or while subject to any phase of the Step-Down Program."[5] ECF No. 359-1 at 7.

These belated arguments should be rejected. They ignore the Court's clear reasons for exercising its discretion to amend the disabilities class definitions, as well as the Court's explanation as to why inmates who did not fall within its amended definition would not be unjustly affected. Moreover, allowing this lawsuit to proceed as a class action using the overly broad class definitions that Plaintiffs now propose would reintroduce the same "fundamental" problems the Court sought to remediate, inviting a "clear error of law" and creating "manifest injustice."

1. Plaintiffs' Belated, Expansive Class Definitions Would Reintroduce The Same "Fundamental" Problems The Court Sought To Remediate.

As a matter of procedure, VDOC objects to Plaintiffs' attempt to introduce new, expansive class definitions via a motion for reconsideration months after the parties briefed class certification issues. Class definitions were proposed, debated, and thoroughly briefed ***one year ago***, and Plaintiffs were well-aware then of VDOC's use of mental health codes, including its MH-2 "Mild Impairment" code; yet, Plaintiffs never proposed a disabilities class definition tracking VDOC's MH-2 "Mild Impairment" code until just two weeks ago – not only months after the Court's April

[5] Notably, while Plaintiffs now characterize the Court's amended class definition (inmates "who were at the time of their Level S or Level 6 security level classification also classified at the Mental Health Classification Code MH-2S or higher" ECF No. 359-1 at 6) as "overly restrict[ive]" and resulting in "manifest injustice," (*id.* at 6 n.3, they previously acknowledged that "***individuals who have spent some time assigned a mental health code of MH-2S or above in VDOC mental health records would necessarily meet the definition of disability under the ADA and RA***," Plaintiffs' Reply Memorandum of Law in Support of Class Certification (ECF No. 206) at 50 (emphasis added), which essentially restates the Court's rationale for remediating the "fundamental" problems that doomed the prior disabilities classes definitions. ECF No. 358 at 6.

12, 2023 class certification decision (ECF No. 299), but months after fact discovery closed, weeks after expert discovery closed, and just two weeks before the deadline for dispositive motions. If Plaintiffs truly believed such a class definition was viable, they could have – and should have – proposed it previously and in a timely manner. Changing horses at this late date will unfairly prejudice VDOC, disrupt the case schedule, and should not be entertained.[6]

As a matter of substantive law, allowing this lawsuit to proceed as a class action using Plaintiffs' new, belated, expansive class definitions for the disabilities classes would only reintroduce the "fundamental" problems the Court sought to remediate with its August 8 Order. In its Order, the Court identified multiple "fundamental" problems with the definitions for the disabilities classes then proposed by Plaintiffs, including that determining membership for those classes is not "administratively feasible based on some identifiable, objective criteria," cannot "necessarily be gleaned from a review of VDOC documents," and will require fact-finding that is "too extensive." August 8 Order at 6-7. By exercising its discretion to narrow the disabilities class definitions to include only those classified by VDOC at the MH-2S "Substantial Impairment" code and higher – a definition Plaintiffs previously ***conceded*** "would necessarily meet the definition of disability under the ADA and RA" (ECF No. 206 at 50)– the Court resolved concerns about "fundamental" problems concerning ascertainability and extensive fact-finding (which were

[6] As discussed below, VDOC believes it is beyond reasonable dispute that "mild impairments," including those identified under the MH-2 "Mild Impairment" code, do not necessarily rise to the level of "disabilities" under applicable legal standards. Thus, if Plaintiffs' new class definitions are accepted, extensive individualized fact-finding will be required to determine which inmates (if any) qualify for class membership. Had Plaintiffs proposed their new MH-2 "Mild Impairment" class definition in a timely fashion, VDOC would have conducted discovery on this issue when deposing fact witnesses (including the Named Plaintiffs who allege they have mental impairments) and expert witnesses (including medical and prison officials).

important to Defendants) and informed decision-making (which was important to Plaintiffs and their individual class members).

But expanding the definition of the disabilities classes from inmates "classified by the VDOC at the MH-2S 'Substantial Impairment' code and higher" (the Court's definition) (ECF No. 358 at 8) to inmates classified by VDOC at the MH-2 "Mild Impairment" code and higher (Plaintiffs' new, proposed modified definition) would undo what the Court sought to accomplish in its August 8 Order. That is because the MH-2 "Mild Impairment" code is of no use in "readily identifying" class members, because not all "mild impairments" rise to the level of what the law deems to be a "disability." *See Israelitt v. Enter. Servs. LLC*, No. 22-1382, 2023 WL 5249614, at *5 (4th Cir. Aug. 16, 2023) (affirming summary judgment for defendant, finding plaintiff was not disabled because his "impairment is minor, not substantial"); *see also E.E.O.C. v. Sara Lee Corp.*, 237 F.3d 349, 353 (4th Cir. 2001) (recognizing that a plaintiff's "milder form of epilepsy imposed no substantial limitation on her ability to think" and does "not rise to the level of a substantial limitation"); *Easter v. Virginia*, No. 4:05cv162, 2006 WL 5915495, at *10 (E.D. Va. Sept. 5, 2006) (a "mild memory / cognitive impairment" did not "rise to the level of a substantial impairment"); *Thomas v. City of Annapolis*, No. BPG-16-3823, 2018 WL 4206951, at *11 (D. Md. Sept. 4, 2018) (holding that a plaintiff's "mild limitations" were not "significantly restricting" and noting "the Fourth Circuit has 'consistently held that similar restrictions are not evidence of a permanent impairment that substantially limits any major life activity under the ADA'" (quoting *Pollard v. High's of Baltimore, Inc.,* 281 F.3rd 462, 470-72 (4th Cirucit 2002)).[7]

[7] For the same reasons, Plaintiffs' proposed definitions do not comport with the ADA's definition of disability. *See* ECF No. 359-1 at 10.

Indeed, VDOC's definition of the MH-2 code explicitly requires that the inmate's symptoms be "mild to moderate but stable" and that the inmate "can typically function satisfactorily in a general population setting for extended periods." *See* Declaration of Dr. Denise Malone (attached as Exh. A). In other words, the inmate does not have a substantial impairment that limits major life activities. *Id.*

In short, Plaintiffs incorrectly assume that the classification of an inmate as MH-2 "Mild Impairment" *ipse dixit* means that "the individual has a mental health impairment . . . that limits one or more major life activities . . . ." ECF No. 359-1 at 10. That is simply not the case. Rather, "[e]xtensive and individualized fact-finding and mini-trials" would be required to determine whether any particular inmate classified by VDOC at the MH-2 "Mild Impairment" code while subject to the Step-Down Program could establish that he (1) had a mental "disability," (2) while participating in the VDOC Step-Down program, such that (3) an adverse action taken against him by VDOC, (4) due to his mental disability, (5) during the relevant limitations period, would be actionable.[8] Stating the obvious, since no "common evidence" exists to adjudicate these issues on

[8] These are first-level "individualized issue" problems created by Plaintiffs' new, overly broad "MH-2 'Mild Impairment'" proposed class definition. There are others. Plaintiffs' own expert witness, Richard Wells, who seeks to testify regarding ADA/RA issues, identified during his deposition numerous other individualized issues that arise with ADA/RA claims. He acknowledged at deposition that inmates have varying impairments and accommodation needs ("that is true that inmates are going to have different disabilities, or even if they have a similar disability may have varying or different accommodation needs"); need different accommodations ("[e]ach individual is going to be different . . . . [w]hat one inmate may deem as a concern -- one inmate … may not have a problem . . . so there's a lot of variables"); present different and varying security threats ("I think that kind of goes without saying"); and that assessments of requested accommodations against direct safety and security threats differs from inmate-to-inmate ("everything needs to be looked at on-case-by-case basis . . . obviously it's a case-by-case basis . . . [these concerns] must be handled on a case-by-case basis, not with a blanket approach""). *See* Deposition of Richard Wells (August 11, 2023) at 62-66, 68-72, 75, 87-90, 118-122 (attached as Exh. B).

a class-wide basis, the "extensive and individualized fact-finding" the Court previously sought to avoid would be required again, in spades.[9]

2. The Court's Amended Class Definition Is Not "Underinclusive To The Point That It Would Create A Manifest Injustice".

Plaintiffs complain that the Court's amended definitions for the disabilities classes are "far more stringent than the definition of "disability" under the ADA and RA," that the process VDOC uses to assign inmates the MH-2S "Substantial Impairment" code "under-designates people with qualifying disabilities," and, as a result, referencing the MH-2S "Substantial Impairment" code or higher means "the disabilities classes will be underinclusive to the point that it would create a manifest injustice." ECF No. 359-1 at 8-10.

As a threshold matter, Plaintiffs present ***no competent evidence*** to support their arguments that assigning the MH-2S "Substantial Impairment" code "under-designates" inmates with mental disabilities. While Plaintiffs argue that the form that VDOC uses to identify inmates with possible serious mental illness ("SMI") "requires a person to have a 'severe' rather than a 'substantial' impairment," ECF No. 359-1at 9, Plaintiffs offer ***no evidence*** that VDOC officials distinguish between the terms "severe" and "substantial" in this context, or that this difference in terminology results in any undercounting of inmates with SMI. Plaintiffs merely offer speculation and conclusory assertions.

[9] In addition, Plaintiffs state "[w]hile [purported expert witness] Molter's report did not identify which individuals carried which mental health codes while they were participating in the Step-Down Program, his analysis demonstrates that it would not be difficult to do so." ECF No. 359-1 at 8. It is unclear what this statement means, other than Plaintiffs seem to concede that they would need to serve a supplemental report from Molter. This, of course, would require additional expert discovery, including allowing Defendants the opportunity to submit a response to the supplemental report and to depose Molter.

Similarly, Plaintiffs argue that VDOC's Psychology Associates "receive no training on administering" the SMI form, citing deposition testimony from Donnie Trent, a VDOC Psychology Associate. ECF No. 359-1at 9. But their citations are incomplete. While Trent testified that VDOC did not train him how to complete the SMI form, he also testified that he relied on "knowledge from his education" (which includes a BSN in 2000, and a M. Ed. in 2012, focusing on mental health), his "common sense," "guidance [that] would come from the licensed clinical psychologist that's making the decision on whether the form is approved," and that he and other Psychology Associates "certainly [ ] can seek [a Psychiatrist's] input if needed" to complete an SMI form. Deposition of Donnie Trent (June 17, 2022) ("Trent Dep.") at 257-258 (attached as Exh. C). And, again, Plaintiffs offer ***no evidence*** that Trent, or any VDOC Psychology Associate, undercounted inmates as SMI.

Plaintiffs also argue that, "[w]hen presented with an example of a person who has difficulty sleeping, [Trent] acknowledged that [he] would not consider that to be the type of impairment contemplated by VDOC's SMI form," thereby purportedly contravening "the clear requirements of the ADA." ECF No. 359-1 at 9, n.3 (asserting that "a mental illness that substantially limits sleeping alone would qualify as a disability"). This argument is disingenuous. Trent was not asked whether he would recognize that "a mental illness that substantially limits sleeping alone would qualify as a disability," and did not testify that "[he] would not consider [having difficulty sleeping] to be the type of impairment contemplated by VDOC's SMI form." He actually testified as follows:

> Q: What are the types of impairments that count as severe functional impairments?
>
> A: An inmate not being able to advocate for their day-to-day needs. There may be a severe impairment in their ability to verbally express themselves. They are not able to socialize with other inmates. They are impaired to the point that they're not taking care of their health, their hygiene. They may not be eating enough nutrition to sustain a healthy weight. So those are the kind of impairments that would be considered severe.

> Q: What if they are having difficulty sleeping?
>
> A: I think that would probably be something that would be considered more by a medical professional than by a psychiatrist. . . .
>
> Q: Would psychology associates consult with a psychiatrist to fill out the functional impairment section of the SMI determination form?
>
> A: Not always. But certainly we can seek his input if needed.

Trent Dep. at 255-257. Nothing in Trent's testimony supports Plaintiffs' argument that VDOC "under-designates" inmates who should be designated SMI.

Moreover, notwithstanding that there is no competent evidence of under-designating inmates with mental disabilities, the Court already addressed this concern in its August 8 Order. Specifically, the Court explained that, while there may be inmates who do not fall within its amended definitions who might otherwise be disabled under the ADA and RA, there is no prejudice to these inmates since "[n]arrowing the disabilities class definitions does not prevent any such person from filing suit individually under the ADA and RA," where, among other things, the individualized issue of whether an inmate has a mental disability can be asserted, challenged, and adjudicated. August 8 Order at 8. Contrary to Plaintiffs' rhetoric, this result is not "manifest injustice."

3. Plaintiffs' Proposed Revision to the Class Definitions As They Relate to Inmates Classified as MH-2S Also Should Be Rejected.

Plaintiffs also propose modifying the disabilities class definition to include all persons who "have been classified as MH-2S or higher or admitted to the Marion Correctional Treatment Center for treatment, at any point prior to classification at Level S or Level 6." ECF No. 359-1at 7. This revision, they argue, reflects the ADA's determination that "the diagnoses required for VDOC to assign a MH-2S code are permanent." *Id.* at 10.

But neither the ADA nor the regulation Plaintiffs cite (28 C.F.R. § 35.108(d)(2)(iii)(K)) state that certain diagnoses are "permanent." That proposition simply does not appear in the ADA itself, and while § 35.108(d)(2)(iii)(K) states that it "should easily be concluded" that certain types of impairments will substantially limit certain activities, it is not say this "***must*** be concluded" and certainly not that this "must be concluded ***permanently***." Indeed, the very same regulation also explicitly states that "[t]he determination of whether an impairment substantially limits a major life activity ***requires*** an individualized assessment." 28 C.F.R. § 35.108(d)(vi) (emphasis added).[10]

Indeed, courts recognize that "whether an individual is disabled is an individualized inquiry, dependent on factors such as the severity of the condition ***and the duration of the condition***." *Morant v. Vaughn*, No. 2:08-cvl-55, 2009 WL 6651941, at *5 (E.D. Va. Jan. 8, 2009) (emphasis added), *aff'd*, 330 F. App'x 36 (4th Cir. 2009); *see Summers v. Altarum Inst., Corp.*, 740 F.3d 325, 329 (4th Cir. 2014) (the "duration of an impairment is one factor that is relevant in determining whether the impairment substantially limits a major life activity");*West v. J.O. Stevenson, Inc.*, 164 F. Supp. 3d 751, 770 (E.D.N.C. 2016) (dismissing claim because plaintiff "did not plead with specificity the expected duration of his impairment," reasoning "an impairment's duration . . . must be considered in concert with the impairment's severity"); *accord*, Am. Jur. 2d Americans with Disabilities Act § 14 ("The question of whether a temporary impairment is a disability must be resolved ***on a case-by-case basis***, taking into consideration both ***the duration (or expected duration) of the impairment*** and the extent to which it actually limits a

[10] And, as applied here, the individualized inquiry "required" by the regulation Plaintiffs rely upon would determine, among other things, whether an inmate classified as MH-2S or higher, or admitted to the Marion Correctional Treatment Center for treatment, at any point before classification at Level S or Level 6, could establish that he (1) continued to have a mental impairment (2) that substantially limited a major life activity (3) at the time the inmate participated in the VDOC Step-Down program, such that (3) an adverse action taken against him by VDOC, (4) due to his mental disability, (5) during the relevant limitations period, would be actionable.

major life activity of the affected individual."[11] (citing Appx. A and B to 28 C.F.R. 35.104) (emphasis added)).

Finally, Plaintiffs' argument that "numerous individuals with mental health disabilities who participated in the Step-Down Program *before* 2018 are excluded from the Disabilities Classes" by virtue of the fact that VDOC introduced the MH-2S classification in 2018, ECF No. 359-1at 11 (emphasis in original), is both speculative and immaterial. Again, Plaintiffs present no competent evidence that "numerous individuals" were excluded. But even assuming for purposes of argument that inmates who had mental disabilities before 2018 were excluded from the Court's amended class definitions, and further assuming that they could assert claims that were not barred by the applicable statute of limitations, the Court already has recognized that "[n]arrowing the disabilities class definitions does not prevent any such person from filing suit individually under the ADA and RA." August 8 Order at 8.

IV. CONCLUSION

Accordingly, Defendants respectfully ask the Court to deny Plaintiffs' motion.

[11] *See also* 56 F.R. 35544-01 at 35549, 1991 WL 304374 (F.R.) (same); ADA Title II Technical Assistance Manual 2.4000 (same).

September 5, 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) 786-4239Facsimile
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 September 5, 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