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

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

Plaintiffs,

v.

Case No. 3:23cv127

VIRGINIA DEPARTMENT OF CORRECTIONS, *et al.*,

Defendants.

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

The Virginia Department of Corrections ("VDOC"), Chadwick Dotson, Barry Marano, Darrell Miller, Kevin McCoy, Lakeisha Shaw, and Officer D. Smith ("VDOC" or "Defendants"), by counsel, submit the following Reply in support of their Motion for Summary Judgment. In support of its Reply, VDOC incorporates by reference Ms. DeBerry's Supplemental Declaration, and its Enclosures (ECF No. 219-1), that were filed in Response to the Plaintiffs' Motion for Summary Judgment in this action.

I. Plaintiffs fail to submit admissible evidence in opposition to VDOC's Motion.

As an initial matter, the Plaintiffs have failed to support their Response to VDOC's Motion for Summary Judgment with admissible evidence. "[U]nsworn, unauthenticated documents cannot be considered on a motion for summary judgment. To be admissible at the summary judgment stage, documents must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e)—that the documents be admissible in evidence." *Miskin v. Baxter Healthcare Corp.*, 107 F. Supp. 2d 669, 671 (D.Md.1999) (citation omitted). Here, the Plaintiffs have filed various documents in support of their Response, but none of the documents have been authenticated. (*See generally* ECF No. 235.) The lack of authenticating testimony causes particular problems here

because, as explained below, Plaintiffs conflate VDOC grievance documents (Informal/Written Complaints, Regular Grievances, and appeals), VDOC Offender Request forms, VDOC Facility Request forms, and VDOC Request for Reasonable Accommodation forms. (*See, e.g*, ECF No. 232, at 36 (citing Pls' Exs. 15, 87); *id*. at 44 (citing Pls' Exs. 104, 105).) Because the Plaintiffs have failed to authenticate their supporting documents, the Plaintiffs have failed to support their Response with admissible evidence. VDOC is entitled to summary judgment on this basis. Fed. R. Civ. P. 56; *West Virginia ex rel. McGraw v. Meadow Gold Dairies, Inc*., 875 F. Supp. 340, 343 (W.D. Va. 1994) (holding that "inadmissible evidence fails to establish a genuine issue of material fact").[1]

II. Plaintiffs fail to raise a genuine issue of material fact on the issue of exhaustion.

Plaintiffs bring numerous claims alleging denial of accomodations for reading and writing, prison jobs, in their housing arrangements, in VDOC's educational and vocational programs, on JPay tablets, in VDOC's libraries, in medical settings, and throughout VDOC's institutional disciplinary process. (*See* Am. Compl., ECF No. 136.) However, the Plaintiffs' Grievance Reports and Grievance Files demonstrate that only five of the Plaintiffs' claims are exhausted in this case: (1) Mr. Shabazz's claim that has relies on other inmates to read and/or write documents; (2) Mr. Shabazz's claim that he has been denied a Grade 3 Job Assignment at Deerfield;[2] (3) Mr. Hajacos'

[1] Likewise, the Plaintiffs failed to authenticate many of the documents that they filed in support of their own Motion for Summary Judgment and Reply in Support Thereof. (*See* Pls' Exhibits *generally* at ECF No. 191; EC ECF No. 239-3.) The Plaintiffs filed numerous documents without authenticating those documents as required by the Federal Rules, and therefore these documents are inadmissible.

[2] Plaintiffs claim that the Declaration from Deerfield's Grievance Coordinator, Ms. DeBerry, is "silent" as to Mr. Shabazz's failure to exhaust all of his claims. (ECF No. 232, at 35.) Plaintiffs appear to have misread Ms. DeBerry's Affidavit. In her Affidavit, Ms. DeBerry states that she has "reviewed Mr. Shabazz's Grievance File and Grievance Report" for all of the issues identified in her Affidavit and has determined that "Mr. Shabazz did not exhaust his administrative remedies regarding his allegations," except for his claims that he relies on other inmates to read and/or write documents and that he has been denied a Grade 3 Job Assignment at Deerfield, because there is no evidence that he attempted to exhaust these other issues. DeBerry Aff. ¶ 20. Further, Mr. Shabazz's Grievance Report clearly details that he did not file an

claim that he was fired from the woodshop job at Greensville; (4) Mr. McCann's claim that other inmates read and/or write for him, and, (5) Mr. McCann's claim that additional floor markings have not been available to him in his housing unit. Phillips Decl. ¶¶ 22, 25 and Encls. B and C; DeBerry Aff. ¶¶ 21, 23, 37, 39 and Encls. B, C, D, E. Although the Plaintiffs attempt to muddy the waters by pointing to cherry-picked documents, they fail to raise a genuine dispute of material fact regarding their failure to exhaust the majority of their claims.

a. VDOC has met its prima facie burden of demonstrating the Plaintiffs' failure to exhaust the majority of their claims.

In support of its Motion for Summary Judgment, VDOC has submitted an affidavit and a declaration from two VDOC employees at the relevant facilities, Deerfield and Greensville; each of the individual Plaintiffs' Grievance Reports detailing all of the Informal/Written Complaints, accepted Regular Grievances, and appeals filed by each of the Plaintiffs; and copies of the Plaintiff's grievance files. (*See* ECF No. 210-22, 210-24, 211-1 through 211-24.) Many courts, including this one, have found VDOC Grievance Reports, affidavits from VDOC employees, and grievances themselves are more than sufficient evidence to determine whether a particular plaintiff has failed to exhaust administrative remedies. *See Saint Louis v. Woodson,* E.D. Va. No. 2:19CV437, 2022 WL 2899180, at *3 (E.D. Va. June 17, 2022) (relying on Grievance Report and affidavit from employee at plaintiff's facility to find that plaintiff failed to exhaust), *aff'd,* No. 22-6827, 2022 WL 17266119 (4th Cir. Nov. 29, 2022)*; Scott v. Clarke*, 64 F. Supp. 3d 813, 830 (W.D. Va. 2014) (relying on Grievance Report to determine the plaintiff did exhaust).

Plaintiffs next misrepresent the evidence that VDOC has filed in support of its Motion for Summary Judgment. As explained in VDOC's Motion, the individual Plaintiffs' Grievance Reports

---

Informal/Written Complaint and/or an accepted Regular Grievance regarding his other allegations. *See* DeBerry Aff. Encl. C.

document all Informal/Written Complaints, accepted Regular Grievances, and appeals of Regular Grievances that each Plaintiff has filed. DeBerry Aff. ¶ 12 (ECF No. 210-24); Phillips Decl. ¶ 12 (ECF No. 210-22). Plaintiffs claim these reports are "incorrect" because Plaintiffs have filed various other documents, and in support of this assertion they cite to VDOC Facility Request forms and Reasonable Accommodation Request forms. (ECF No. 232, at 36 (citing Pls.' Exs. 15, 87).) This misstates what the Grievance Reports show. VDOC Grievance Reports accurately reflect the *grievance* documents—Informal/Written Complaints, accepted Regular Grievances, and appeals—an inmate has filed, but they do not reflect other any other forms that inmate has submitted. DeBerry Aff. ¶ 12 (ECF No. 210-24); Phillips Decl. ¶ 12 (ECF No. 210-22.) Although the Plaintiffs attempt to conflate different types of VDOC documents, these distinctions are critical for purposes of exhaustion because it is only the grievance procedure that is relevant to exhaustion of administrative remedies. The Plaintiffs' citation to other, non-grievance forms they have submitted does not show that the Grievance Reports are inaccurate.[3] As further support for their allegation that the records proffered by VDOC are incomplete, the Plaintiffs cite to Mr. Courtney's deposition testimony that he exhausted an issue, but they do not identify any supporting facts, details, or corroborating evidence that would render this vague and self-serving testimony sufficient to create a genuine dispute of fact. *See DiQuollo v. Prosperity Mortg. Corp.*, 984 F. Supp. 2d 563, 570 (E.D. Va. 2013) (citations omitted) ("The law is well established that uncorroborated, self-serving testimony of a plaintiff is not sufficient to create a material dispute of fact sufficient

[3] Plaintiffs also complain of the "unreliability" of VDOC's records. (ECF No. 232, at 37.) To the extent that the Plaintiffs believe VDOC should have produced some documents in discovery that it did not, that issue should have been brought to the attention of VDOC during the discovery phase of this case. And, although Plaintiffs cite to specific grievance documents to argue that VDOC's grievance files are unreliable (ECF No. 232, at 36-37 (citing Pls. Exs. 68, 32, 10, 88)), these documents can also be found in the evidence VDOC submitted in support of its Motion for Summary Judgment (DeBerry Aff. Encls. C, E, G, I; ECF Nos. 210-14; 211-2 through 211-4; 211-1 through 211-17), and it is therefore unclear how this evidence shows that VDOC's grievance files are incomplete.

to defeat summary judgment.").

Because VDOC has met its burden demonstrating the Plaintiffs have failed to exhaust the majority of their claims, the burden shifts to the Plaintiffs to "to show, by a preponderance of the evidence, that exhaustion occurred or that administrative remedies were unavailable." *Knutson v. Hamilton*, No. 7:20-cv-00455, 2021 WL 388444, *4 (W.D. Va. Sept. 13, 2021) (citation omitted); *Graham v. Gentry*, 413 F. App'x 660, 663 (4th Cir. 2011)). The Plaintiffs fail to meet this burden.

b. Plaintiffs fail meet their burden that they were unable to access the grievance procedure because of their vision impairments.

The Plaintiffs argue that VDOC's grievance procedure is inaccessible to blind inmates. (ECF No. 232, at 37.) They do not cite evidence that any individual Plaintiff's vision impairments prevented him from accessing the grievance procedure. Instead, they argue that because certain information about the grievance process is in paper format and because "blind prisoners" generally cannot access these formats, then by implication the individual Plaintiffs, with their various levels of impairment, also cannot access the grievance procedure. (*See id*. at 37–42.)

This is not enough for the Plaintiffs to meet their burden. A party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 586 (1986). That is, once the movant has met its burden to show absence of material fact, the party opposing summary judgment must then come forward with affidavits or other evidence demonstrating there is indeed a genuine issue for trial. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986). Although all justifiable inferences are to be drawn in favor of the non-movant, the non-moving party "cannot create a genuine issue of material fact through mere speculation of the building of one inference upon another." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985).

Critically, the Plaintiffs do not provide evidence that each one of them, individually, could

not access VDOC's grievance procedure because of his vision. And there is no plausible way they could do so. The Plaintiffs' grievance histories clearly demonstrate they regularly use the grievance procedure and have exhausted all sorts of issues while in VDOC custody. (*See* DeBerry Aff. and Kelly Decl. and Encls at ECF No. 210-22, 210-24, 211-1 through 211-24.) There is no allegation in this action that Mr. Courtney and Mr. Stravitz could not independently read and write prior to the filing of this lawsuit. Meanwhile, Mr. McCann, Mr. Hajacos, and Mr. Shabazz, who allege that they have difficulty with reading and writing VDOC forms, boast the three lengthiest grievance histories of all the Plaintiffs. DeBerry Aff. Encls. C, E, G, I (ECF Nos. 210-22; 210-24; 211-2 through 211-4; 211-6 through 211-17; 211-20 through 211-24). They have fully exhausted numerous issues, demonstrating that the grievance procedure is accessible to them.

In the face of this evidence, the Plaintiffs nonetheless ask the Court to find that the grievance procedure is inaccessible to blind inmates and infer that this conclusion applies to them individually.[4] In support, the Plaintiffs cite multiple cases for the proposition that an inmate's testimony about his lack of knowledge as to how to utilize the grievance procedure can create a dispute of fact at the summary judgment stage. (ECF No. 232, at 40 (citing *Snyder v. Riverside Cnty.*, 819 F. App'x 514, 516 (9th Cir. 2020); *Denton v. Pastor*, No. C17-5075 BHS-TLF, 2021 WL 6622137, at *4–5 (W.D. Wash. Dec. 16, 2021); *Reid v. Marzano*, 9:15-CV-0761 (MAD/CFH),

[4] Other cases cited by the Plaintiffs do not support their position. Plaintiffs cite to language in *Lanaghan v. Koch*, which they characterize as the court's "holding," to the effect that a written grievance procedure could be inaccessible to blind inmates. *See* ECF No. 232, at 38 (citing *Lanaghan v. Koch*, 902 F.3d 683, 688 (7th Cir. 2018)). In context, however, it is apparent that the cited language is little more than a hypothetical and properly construed as dicta. Plaintiffs also cite to *Brown v. Department of Public Safety and Correctional Services* for the proposition that there is no obligation to exhaust if a prisoner cannot read print grievance materials. *See* ECF no. 232, at 38 (citing *Brown*, 383 F. Supp. 3d 519, 543–44 (D. Md. 2019)). But, the court in *Brown* simply noted that the purported unavailability of a grievance procedure to blind inmates did not support a claim for denial of access to the courts because those inmates *could* be excused from the exhaustion requirement *if* they could demonstrate that they were unable to use the grievance procedure. *See Brown*, 383 F. Supp. 3d at 543–44. While these cases support a general argument that an inaccessible grievance procedure *could* excuse an inmate's failure to exhaust in the abstract, they do not support the Plaintiffs' position that VDOC's grievance procedure is in fact not accessible to them.

2017 WL 1040420, at *3 (N.D.N.Y. Mar. 17, 2017).) But these cases are inapposite, because the Plaintiffs have not each testified that they are unaware of how to access VDOC's grievance procedure. Mr. Shaw has filed a Supplemental Declaration wherein he explains that he knows the first step in VDOC's grievance procedure is to submit a Written/Informal Complaint—yet he did not do this to exhaust his claims. Shaw Supp. Decl. ¶ 8 (ECF No. 235-14); DeBerry Aff. ¶ 14 and Encl. B[5] (ECF No. 210-24). And, although Mr. Shabazz and Mr. McCann had two relevant Regular Grievances rejected at intake for failing to attach relevant accommodation request forms, neither Mr. Shabazz nor Mr. McCann provide testimony that they did not know this was a requirement. *See* Shabazz Supp. Decl. (ECF No. 235-15); McCann Supp. Decl. (ECF No. 235-11).

The record also belies the Plaintiffs' argument that the June 2022 amendment to VDOC's grievance procedure, which requires that an inmate attach his Request for Reasonable Accommodation form to his Regular Grievance, was not communicated to the Plaintiffs. Mr. Shabazz is unable to testify to his lack of knowledge about this requirement because, after the June 2022 amendment, Mr. Shabazz personally received a letter from VDOC's Regional Ombudsman informing him of the requirement to submit his accommodation request form with a Regular Grievance. DeBerry Supp. Decl. ¶ 14 and Encl. C. (ECF No. 219-1). Mr. Shabazz has provided no explanation as to why he would have been unable to comply with this instruction. And, as stated, one of the only five claims in this case that has been exhausted is Mr. McCann's claim that additional floor markings have not been available to him as an accommodation in his housing unit at Deerfield, which Mr. McCann exhausted in 2023, after the amended policy took effect. DeBerry

[5] Enclosure B to Ms. DeBerry's Affidavit is a copy of Mr. Shaw's Grievance Report, which demonstrates all of the Informal/Written Complaints that have been filed by Mr. Shaw since January 1, 2014. DeBerry Aff. ¶¶ 12, 14 and Encl. B. Mr. Shaw's Grievance Report details that he only filed two Informal/Written Complaint(s) about his JPay tablet in 2017 and 2022 (which he did not exhaust) but he did not file *any* other Informal/Written Complaints about any other issues raised in this case. DeBerry Aff. ¶¶ 14-18 and Encl. B.

Aff. ¶ 39 and Encl. E. (ECF No. 210-24). This demonstrates that Mr. McCann knew to submit a Request for Reasonable Accommodation form with his Regular Grievance to properly exhaust this issue. Although the Plaintiffs cite to the June 2022 amendment in an attempt to demonstrate the inaccessibility of VDOC's grievance procedure, the record instead demonstrates that Mr. Shabazz was personally informed of the June 2022 amendment and Mr. McCann abided by this requirement.

Instead of providing evidence that each individual Plaintiff does not know how to access VDOC's grievance procedure, and what issues that prevented him from exhausting, Plaintiffs ask the Court to infer as a general matter that they cannot access VDOC's grievance procedure because blind inmates cannot read paper documents. This attempt to stack inference upon inference is insufficient to defeat VDOC's properly supported Motion for Summary Judgment on the issue of the Plaintiffs' failure to exhaust. *Beale*, 769 F.2d at 214.

c. ***The Plaintiffs fail to meet their burden of showing that VDOC "thwarted" their attempts to grieve the specific issues raised in this case.***

Again, the Plaintiffs fail to meet their burden to establish the unavailability of VDOC's grievance procedure because they fail to identify how each individual Plaintiff was "thwarted" from exhausting his specific claims in this case. The Plaintiffs do not provide any evidence that Mr. Stravitz and Mr. Shaw attempted to grieve a relevant issue but were prohibited from so doing. Instead, the Plaintiffs rely on a few examples from Mr. Courtney, Mr. Hajacos, Mr. McCann and Mr. Shabazz. But, as to these examples, the Plaintiffs misrepresent the record evidence. And, VDOC employees' statements to the Plaintiffs asking them to "be patient" did not excuse them from exhausting as a matter of law; only threats qualify as making the procedure unavailable.

i. VDOC did not tell Mr. Shabazz and Mr. McCann that they "could not grieve effective communication issues if those issues concerned the actions of contractors."

The Plaintiffs cite examples from Mr. McCann and Mr. Shabazz's grievance histories in an attempt to demonstrate that VDOC has told them had they "could not grieve effective communication issues if those issues concerned the actions of contractors." (ECF No. 232, at 43.) But Plaintiffs misrepresent the grievance documents that they cite. The documents cited demonstrate that Mr. McCann and Mr. Shabazz grieved issues outside the scope of this litigation and that Mr. Shabazz failed to properly follow VDOC's grievance procedure, as required by U.S. Supreme Court precedent, to properly grieve a failure-to-accommodate issue.

First, the Plaintiffs cite their Exhibits 96 and 97 to argue that VDOC prevented Mr. McCann from grieving "effective communication issues," claiming that "in November 2023, Mr. McCann filed a complaint and grievance concerning JPay kiosks." (*Id.*) These documents do not support the Plaintiffs' argument; instead, they pertain to Mr. McCann's complaint about the JPay kiosks being "off-line," (Pls.' Exs. 96–97), an issue that has nothing to do with their accessibility to blind inmates. Further, the Plaintiffs filed their initial Complaint in this action on February 15, 2023. (ECF Nos. 1.) To the extent that this grievance did even raise "effective communications issues," it does not suffice to show exhaustion of that issue because it was filed during the pendency of this lawsuit. *Germain v. Shearin,* 653 Fed. App'x 231, 234 (4th Cir. 2016); *French v. Warden*, 442 Fed. App'x 845, 846 (4th Cir. 2011).

The Plaintiffs then cite their Exhibit Numbers 100 through 103 for their allegation that "in 2022, when Mr. McCann filed a grievance noting that the Deerfield commissary (run by an outside contractor) did not ensure effective communication with blind prisoners, Deerfield rejected that grievance as an issue beyond VDOC's control." (ECF No. 232, at 43.) Again, this substantially misrepresents the cited documents. The documents filed by Mr. McCann at Plaintiffs' Exhibits 100 through 103 appear to pertain to a grievance regarding a commissary price increase. Pls' Exs. 100-

103. This document also has no relation to issues regarding effective communication.

The Plaintiffs next allege that "in December 2022, Mr. Shabazz filed a grievance because JPay tablets are not accessible. VDOC rejected that grievance as 'Beyond the control of the Department of Corrections'; Mr. Shabazz appealed, and the regional ombudsman affirmed." (ECF No. 232, at 43.) While the Plaintiffs are correct that Mr. Shabazz filed a Regular Grievance about the JPay tablets, they are wrong that VDOC informed Mr. Shabazz that he could never grieve "effective communications issues" related to JPay. Instead, Mr. Shabazz's Regular Grievance was rejected at intake because he failed to attach his Request for Reasonable Accommodation form as required under policy. DeBerry Aff. Encl. C. (ECF No. 210-24); Supp. DeBerry Decl. ¶¶ 5-24 (ECF No. 219-1). Mr. Shabazz therefore failed to properly exhaust his administrative remedies as to this issue. *See Newton v. Bowler*, No. 3:22CV122, 2023 WL 8788952, at *4 (E.D. Va. Dec. 19, 2023) (finding VDOC inmate failed to properly exhaust his administrative remedies because he failed to attach the necessary documentation to his Regular Grievance). Had Mr. Shabazz attached the form, it would have been accepted at intake, and Mr. Shabazz could have exhausted his allegations regarding the JPay issue. *See* DeBerry Supp. Decl. ¶¶ 11, 15, 21 (ECF No. 219-1).

Although the Plaintiffs attempt to demonstrate that Mr. McCann and Mr. Shabazz were told that they "could not grieve effective communication issues if those issues concerned the actions of contractors," the record demonstrates that this position is false. Mr. McCann and Mr. Shabazz were never told this—they simply grieved issues outside the scope of this litigation and failed to properly follow VDOC's grievance procedure.

ii. VDOC's statements to the Plaintiffs did not make the grievance process unavailable.

Next, the Plaintiffs attempt to argue that "VDOC has frustrated Plaintiffs' efforts to exhaust administrative remedies by telling Plaintiffs that they should do nothing and 'be patient' because

VDOC was working on a solution—leading Plaintiffs to forfeit their right to fully exhaust their claims." (ECF No. 232, at 44.) Plaintiffs then provide examples of instances in which Mr. Shabazz and Mr. Hajacos filed VDOC Offender Request forms—not grievances—and were told by VDOC employees that they were working on their concerns. (*Id*. citing Pls' Exs. 104, 105.) Plaintiffs' position that these statements made the grievance procedure unavailable fails as a matter of law because these benign statements fall well short of what Courts have held qualify to excuse an inmate's failure to exhaust. Courts have held that some *threats* are sufficient to make a prison grievance procedure unavailable if the inmates demonstrates, "(1) subjectively, that the threat did actually deter the plaintiff inmate from lodging a grievance or pursing a particular part of the process; and (2) objectively, that 'the threat is one that would deter a reasonable inmate of ordinary firmness and fortitude from lodging a grievance or pursuing the part of the grievance process that the inmate failed to exhaust.'" *Knutson v. Hamilton*, W.D. Va. No. 7:20-CV-00455, 2021 WL 388444, at *4 (W.D. Va. Feb. 3, 2021) (internal citations omitted) (citing *Turner v. Burnside*, 541 F.3d 1077, 1085 (11th Cir. 2008)). Here, the Plaintiffs do not allege that any of them were threatened. Statements to "be patient" did not render the grievance procedure unavailable.

iii. Plaintiffs arguments about the burdensome nature of VDOC's grievance procedure does not demonstrate that VDOC prevented any of the Plaintiffs from exhausting their relevant claims.

Finally, the Plaintiffs argue that VDOC "routinely rejects attempted grievances and asks Plaintiffs to provide superfluous and burdensome information" rendering the grievance process unavailable. (ECF No. 232, at 45.) In support of this argument, the Plaintiffs describe two incidents,[6] both of which fail to demonstrate their position that VODC "rejects attempted grievances" on relevant issues in this case. First, the Plaintiffs cite a 2018 Informal/Written

[6] Plaintiffs also describe a third purported incident involving Mr. McCann, but the document cited in their Response was not filed with the Court. (*See* ECF No. 232, at 45 (citing NFBV 009981–82).)

Complaint logged on Mr. Shabazz's Grievance Report. *See* Pls' Ex. 110. There is no evidence that VDOC rejected any Regular Grievance that Mr. Shabazz attempted to file on this issue after that Informal/Written Complaint, and the Plaintiffs have not produced any such grievance. Plaintiffs also complain that Mr. Hajacos attempted to file a Regular Grievance in 2022 about his vision impairment not being logged in VDOC's inmate database (ECF No. 232, at 45), but this is not one of Mr. Hajacos' claims in this case. These two examples do not demonstrate that VDOC's grievance procedure is overly burdensome.

iv. Mr. Shaw and Mr. Stravitz were never prevented from exhausting any claim and the doctrine of vicarious exhaustion does not apply.

Nowhere in their Response do the Plaintiffs cite a single instance in which Mr. Stravitz or Mr. Shaw attempted to grieve one of their claims in this case and were prevented from doing so. (*See* ECF No. 232, at 35-47.) The evidence shows that Mr. Stravitz never took the first step of attempting to exhaust *any* of his claims by filing an Informal/Written Complaint. DeBerry Aff. ¶¶ 31-34 and Encl. D. Likewise, Mr. Shaw did not exhaust any of his claims, and he largely testified to this during his deposition. DeBerry Aff. ¶ 13-6 and Encl. B (ECF No. 210-24); Shaw Dep. 31:5-13, 87:2, 106:10-13, (ECF No. 210-1.) Plaintiffs provide no evidence to rebut this.

The Plaintiffs appear to concede that Mr. Shaw and Mr. Stravitz did not exhaust their claims in this case, but they instead request that "this Court reject Defendants' suggestion that Mr. Stravitz and Mr. Shaw should not benefit from [] exhaustion" and ask the Court to adopt the doctrine of "vicarious exhaustion." (ECF No. 232, at 47.) Although the Plaintiffs allege that the vicarious exhaustion "applies in non-class action cases," the case that the Plaintiffs cite for this proposition *is* a class action case, at the pre-certification stage. In *Jarboe v. Maryland Dep't of Pub. Safety & Corr. Services*, the court adopted the vicarious exhaustion doctrine at the pre-certification stage, and explaining its decision, the court quoted the D.C. Circuit Court of Appeals saying the vicarious

exhaustion doctrine "is invariably applicable, for the very fact that the suit is a class action means that the plaintiffs' claims not only share common questions of law and fact, but those claims are such that representative plaintiffs will fairly and adequately protect the interests of all plaintiffs of the class." No. CIV.A. ELH-12-572, 2013 WL 1010357, at *14 (D. Md. Mar. 13, 2013) (citing *Foster v. Geory*, 655 F.2d 1319, 1322 (D.C. Cir. 1981)).

The vicarious exhaustion doctrine has never been applied in the Fourth Circuit outside of class action cases and is not applicable in this case. *See Mathis v. GEO Group, Inc*., E.D.N.C. No. 2:08-CT-21-D, 2011 WL 2899135, at *5 n.4 (E.D.N.C. July 18, 2011) (explaining that because the court had denied class certification, vicarious exhaustion is not available to the individual plaintiffs). The doctrine of vicarious exhaustion is not available to Mr. Shaw and Mr. Stravitz, and VDOC is therefore entitled to summary judgment based upon their failure to exhaust.

v. Mr. Courtney was required to exhaust and he failed to do so.

Plaintiffs incorrectly argue that Mr. Courtney was not required to exhaust his administrative remedies prior to filing this lawsuit. Plaintiffs filed this action in February 2023, when Mr. Courtney was still incarcerated, alleging that VDOC retaliated against him for requesting accommodations and that VDOC failed to provide him with sufficient accommodations. (*See* ECF No. 1.) Mr. Courtney was released from VDOC custody in March 2023. Plaintiffs filed the Amended Complaint in November 2023, raising substantially the same allegations as were brought in the original Complaint. (*See* Am. Compl., ECF No. 136.) Because Mr. Courtney's claims in the Amended Complaint are based on the same factual allegations as those brought in the original Complaint, the filing of the Amended Complaint does not excuse his failure to exhaust administrative remedies prior to bringing this action. *See Hardin v. Hunt*, No. 21-7195, 2023 WL 3969989, at *3 (4th Cir. June 13, 2023) (explaining that when "claims in the amended complaint

are predicated on the same underlying facts alleged in the original complaint" an inmate must exhaust under the PLRA); *Harris v. Garner*, 216 F.3d 970 (11th Cir. 2000) (*en banc*) (holding that the PLRA exhaustion requirement is determined when the original complaint is filed, not amended complaint); *Makell v. Cnty. of Nassau*, 599 F. Supp. 3d 101, 108 (E.D.N.Y. 2022) (rejecting Third and Ninth Circuit holdings that an inmate need not exhaust claims in an amended complaint).[7]

In the Plaintiffs' Response, they cite to just one relevant example to argue that the grievance procedure was inaccessible to Mr. Courtney specifically.[8] (ECF No. 232, at 44.) Plaintiffs allege that Mr. Courtney filed a complaint that VDOC had not tinted his cell window, but that VDOC staff told him they would address this issue and therefore "there was no apparent reason to continue the grievance process." (*Id.*) However, as explained above, the response that Mr. Courtney received to his Informal/Written Complaint does not qualify as a threat rendering the grievance procedure unavailable to him. *Knutson*, 2021 WL 388444, at *4 (citation omitted). Mr. Courtney failed to exhaust every one of his claims in this case, Phillips Decl. ¶¶ 16- 17 and Encl. C (ECF No. 210-22), and VDOC is therefore entitled to summary judgment as to Mr. Courtney's claims.

vi. Plaintiffs are incorrect that they needed not exhaust "each precise legal allegation"

Finally, the Plaintiffs argue that they did not need to exhaust "each precise legal allegation." (ECF No. 232, at 46.) Plaintiffs are, again, incorrect on the law. "[T]he PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general

---

[7] The Plaintiffs cite to these Third and Ninth Circuit cases, *Garrett v. Wexford Health*, 938 F.3d 69, 84 (3d Cir. 2019) and *Jackson v. Fong*, 870 F.3d 928, 934 (9th Cir. 2017), in support of their argument. However, the Fourth Circuit, and other courts, have held otherwise, *Hardin*, 2023 WL 3969989, at *3; *Makell*, 599 F. Supp. 3d at 108; *Bargher v. White*, 928 F.3d 439, 447–448 (2019).

[8] Elsewhere, the Plaintiffs cite to two additional grievances that Mr. Courtney filed related to issues that are outside the scope of his claims in this case. (*See* ECF No 232, at 42 (citing Pls' Ex. 89 and Ex. 95).) Although these grievances are irrelevant to whether Mr. Courtney exhausted his specific claims in this case, they nonetheless demonstrate that he had access to VDOC's grievance procedure at Greensville.

circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter v. Nussle*, 534 U.S. 516, 532 (2002) (citation omitted). "If an inmate exhausts administrative remedies with respect to some, but not all, of the claims he raises . . . the Court must dismiss the unexhausted claims and proceed with the exhausted ones." *Green v. Rubenstein*, 644 F. Supp. 2d 723, 743 (S.D.W. Va. 2009) (citing *Jones v. Bock*, 549 U.S. 199 (2007)).

Plaintiffs argue that the five issues that have been exhausted in this case are sufficient to have put VDOC on notice that it was "failing to meet [its] obligations under the ADA to ensure effective communication with blind prisoners and accommodate their needs." (ECF No. 232, at 46.) But here, Plaintiffs allege that VDOC discriminates against blind and low vision inmates in a variety of contexts—via retaliation, in the disciplinary process, in medical settings, in educational and vocational programs, in VDOC's libraries, in hiring for prison jobs, and by failing to provide accessible JPAY tablets. The issues that have been exhausted do not implicate the numerous issues that the Plaintiffs bring in this case. Instead, the five issues are limited to Mr. Shabazz and Mr. McCann relying on others to read/write, Mr. Shabazz, specifically, being denied a Grade 3 job, Mr. Hajacos being fired from his woodshop job, and Mr. McCann requesting additional floor markings in his housing unit. Although it is true that the purpose of the grievance procedure is to "alert[] the prison to the nature of the wrong for which redress is sought" *Strong v. David*, 297 F.3d 646, 650 (7th Cir.), VDOC cannot be said to have been alerted of the numerous issues that are raised in this lawsuit but which were never exhausted.

III. The Plaintiffs' claims were not made possible by the ADAAA, and the Plaintiffs do not cite to any evidence that the continuing violation doctrine applies.

Plaintiffs attempt to argue that the one-year statute of limitations from the VDA, which also applies to ADA and RA claims, is not applicable here. Instead, they contend that their claims

qualify under the ADA Amendments Act of 2008 ("ADAAA") and therefore the four-year limitations period applicable to claims brought under that statute should apply. This is incorrect.

The four-year limitations period under 28 U.S.C. § 1658 applies to claims "made possible" under the ADAAA that could not have previously been brought under the ADA's previous definition of disability. *See Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382 (2004) (holding that the limitations period under § 1658 applies to claims that were made possible by statute enacted after 1990). Prior to enactment of the ADAAA, an impairment did not qualify as a "disability" under the ADA if that impairment "is corrected by medication or other measures" such that "it does not 'substantially limit' a major life activity." *Sutton v. United Air Lines*, 527 U.S. 471, 482–83 (1999). The ADAAA rejected this definition and provided instead that "[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as . . . low-vision devices . . . [or] use of assistive technology . . . ." 42 U.S.C. § 12102(4)(E)(i). Plaintiffs therefore contend that because they "use 'low-vision devices' and 'auxiliary aids or services' to access information," their claims are made possible by the ADAAA and are subject to the four-year statute of limitations. (ECF No. 232, at 48.)

The simple fact that Plaintiffs use assistive devices, however, does not show that their claims are only made possible by the ADAAA. Although Plaintiffs do make use of assistive devices, they do not claim that these devices mitigate their impairment to such a degree as to enable them to fully engage in activities of daily living. In fact, through this litigation, Plaintiffs have claimed the opposite—that they experience substantial limitations notwithstanding their use of low-vision devices and auxiliary aids and services.

Plaintiffs cannot argue at this late stage that their impairments do not fall within the scope of "disability" as originally set forth in the ADA. In a decision issued before the enactment of the ADAAA, the Fourth Circuit observed that blindness would always constitute a disability. *Runnebaum v. NationsBank of Maryland, N.A.*, 123 F.3d 156, 166 n.5 (4th Cir. 1997) (en banc), *abrogated on other grounds*, *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998). The court acknowledged that while "a finding of disability under the [ADA] must be made on a case-by-case basis . . . some conditions will always constitute impairments that substantially limit the major life activities of the afflicted individuals." *Id.* (citation omitted). It found one of these conditions was "blindness" and "[i]n such cases, an individualized determination of whether the condition is an impairment that substantially limits one of more of the major life activities is unnecessary." *Id.*; *see also Fernandez v. Duke Univ.*, No. 1:20cv492, 2021 WL 3207244, at *6 (M.D.N.C. July 29, 2021) (rejecting the National Federation of the Blind's argument that blindness would not have been recognized as a disability prior to the ADAAA). Accordingly, the one-year statute of limitations found in the VDA applies to the Plaintiffs' ADA, RA, and VDA claims.

Next, the Plaintiffs argue that even if the Court finds that the one-year statute of limitations applies, the continuing violation doctrine makes their claims timely. They do not, however, cite to any evidence to support this position. Instead, the Plaintiffs broadly assert that "for years, Plaintiffs repeatedly have asked VDOC to live up to its ADA obligation to ensure effective communication by providing assistive technology." (ECF No. 232, at 49.) But this is not enough. To establish a continuing violation, a Plaintiff must demonstrate that the illegal act occurred "in a series of separate acts[,] and [that] the same alleged violation was committed at the time of each act." *A Soc'y Without A Name v. Virginia*, 655 F.3d 342, 348 (4th Cir. 2011) (citation omitted). Here, the Plaintiffs fail to identify, for each individual Plaintiff, how VDOC has "repeatedly" failed "to live

up to their ADA obligation[s]", when this occurred, and in what context. Any claim in this action that is premised on a denial of an accommodation that occurred one year prior to February 15, 2023 (the date of the filing of the initial complaint) is barred in this case. And, as specifically detailed in VDOC's Motion for Summary Judgment, Mr. Hajacos' woodshop claim, Mr. Shabazz's Grade 3 job claim, and all of Mr. Shaw's claims are barred by the one-year statute of limitations. (ECF No. 210, at 50, 52, 54.) The Plaintiffs provide no evidence to demonstrate how the continuing violation doctrine applies to Mr. Shabazz, Mr. Hajacos, and Mr. Shaw's claims. (*See* ECF No. 232, at 49-52.) VDOC is therefore entitled to summary judgment.

IV. VDOC is entitled to summary judgment on numerous claims because Plaintiffs do not raise a genuine dispute of fact.

In their Amended Complaint, the Plaintiffs allege that VDOC denies "Grade 3" skilled jobs to blind and low vision inmates. Contrary to this position, two of the very Plaintiffs in this case—Mr. Hajacos and Mr. Stravitz—held Grade 3 jobs in VDOC. In response, the Plaintiffs argue that Mr. Hajacos' Grade 3 job was a Virginia Correctional Enterprises ("VCE") job and that Mr. Stravitz got his Grade 3 library job with assistance from a previous VDOC employee. (ECF No. 232, at 15-16.) Even taking the Plaintiffs' statements as true, this does not raise a genuine dispute of fact that VDOC denies blind inmates Grade 3 jobs. Mr. Hajacos' VCE job is a Grade 3 Skilled job offered by VDOC, as demonstrated by the Greensville Master Job List attached to Counselor Stith's Declaration. (Stith Decl. Encl. A., ECF No. 210-34.) Plaintiffs also concede that Mr. Stravitz held a Grade 3 job while he was visually impaired. VDOC is therefore entitled to summary judgment as to Plaintiffs' claims that VDOC denies blind inmates Grade 3 jobs.

The Plaintiffs do not dispute that Mr. Hajacos testified at his deposition that his textbook is accessible to him. (*See* ECF No. 232, at 51.) In response, the Plaintiffs attempt to broaden Mr. Hajacos' claim to argue that there is a dispute of whether *all* of the various accommodations given

to Mr. Hajacos in his computer class were sufficient for him. (*Id*.). But in the Amended Complaint, the Plaintiffs alleged only that Mr. Hajacos did not have an accessible textbook and they cannot amend their complaint in response to VDOC's Motion on this issue. *See Turner Contracting Co. v. Liberty Mut. Ins*. Co., 912 F. Supp. 2d 321, 334 (D. Md. 2012) (holding that a "complaint may not be amended by [] briefs in opposition"). Because there is no dispute that Mr. Hajacos had an accessible textbook for his computer class, VDOC is entitled to summary judgment on this claim.

With respect to Mr. Hajacos' woodshop claim, the Defendants have established that the only reason he was terminated from his job in 2021 was to mitigate the spread of COVID-19. In response, the Plaintiffs do not dispute this evidence but argue that "the causation standard for failure to accommodate claims is that, but for Mr. Hajacos's disability, he would not have needed these accommodations and but for the lack of auxiliary aids and services, Mr. Hajacos would have been able to continue his Wood Shop job." (ECF No. 232, at 51.) This is inaccurate. The relevant inquiry is what was the motivating and sole reason that Mr. Hajacos was fired from his woodshop job. *See Baird ex rel. Baird v. Rose*, 192 F.3d 462, 469 (4th Cir. 1999) (holding that that the "motivating factor" causation standard applied to ADA Title II claims and that the RA contains a causation standard prohibiting discrimination "solely by reason of [the plaintiff's] disability.") The *only* evidence in this case is that Mr. Hajacos was terminated from the woodshop to mitigate the spread of COVID-19, and Plaintiffs provide no evidence in rebuttal. VDOC is entitled to summary judgment on Mr. Hajacos' ADA, RA and VDA claims related to his job in the woodshop.

Mr. Shabazz's claim that he was discriminated against by being denied the pod clerk job is both barred by the statute of limitations and meritless because there is no such job at Deerfield. (ECF No. 210, at 53.) In response, the Plaintiffs argue that "Mr. Shabazz used the term 'pod clerk' in his deposition, but he has produced his job application for the pod tutor position." (ECF No.

232, at 52.) But, in their Amended Complaint, Plaintiffs explicitly pleaded that Mr. Shabaz had been discriminated against because he had been denied the "pod clerk" job. (Am. Compl, ECF No., 136 ¶ 152.) Plaintiffs cannot amend their complaint now to claim it was actually the pod tutor job, *Turner Contracting*, 912 F. Supp. 2d at 334, and therefore VDOC is entitled to summary judgment on this claim.

Finally, Mr. Shaw failed to exhaust all of his claims and his claims are barred by the one-year statute of limitations in this case. Plaintiffs produce no evidence to demonstrate the unavailability of the grievance procedure to Mr. Shaw and do not provide any evidence demonstrating that his claims are subject to the continuing violation doctrine. VDOC is entitled to summary judgment as to all of Mr. Shaw's claims.

CONCLUSION

Only five (5) of the Plaintiffs' claims are exhausted under the PLRA in this case. And, as to those five claims, all of those claims are either barred by the statute of limitations or meritless. Accordingly, VDOC is entitled to judgment as a matter of law.

Respectfully submitted,

VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL.

By: s/ Timothy E. Davis
Timothy E. Davis, VSB #87448, AAG
Office of the Attorney General
202 North 9th Street
Richmond, Virginia 23219
(804) 225-4226; Email: tdavis@oag.state.va.us

By: s/ Ann-Marie White Rene
Ann-Marie White, AAG, VSB #91166
Office of the Attorney General
202 North 9th Street
Richmond, Virginia 23219
804-371-2084; E-mail: arene@oag.state.va.us

CERFIFICATE OF SERVICE

I hereby certify that on the 25th day of March, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing ("NEF") to all counsel of record.

/s/ Timothy E. Davis
Timothy E. Davis, VSB #87448
Assistant Attorney General