CASE NO. 19-3305

IN THE
United States Court of Appeals
FOR THE THIRD CIRCUIT

LAMONT ZAMICHIELI,
Plaintiff - Appellant,

v.

PENNSYLVANIA DEPARTMENT OF CORRECTIONS; CHCA WILLIAM NICHOLSON; PA-C NATALIE D. AUSTIN; CRNP LORI RIDINGS; UNIT MANAGER TINA STALEY; MR. SPIKER, Block Conselor; MEDICAL DIRECTOR MIKE HICE; C/O LIPTAK, Block Officer; C/O PRICE; CCPM KAREN SOKOL, Program Review Committe; MARK DIALESANDRO,DSCS; DAN CARO, Major of Unit Management and other unknown employees responsible who names are not known at this time; SUPERINTENDENT ROBERT GILMORE; TRACY SHAWLEY, Grievance Coordinator, Superintendent Assistant; ROBERT VALLEY,
Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

REPLY BRIEF ON BEHALF OF PLAINTIFF - APPELLANT

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INTRODUCTION

The three briefs filed by different Defendant groups in this Court display a common, and telling, reluctance to defend the actual basis of the decision under review. Instead, Appellees offer a wide variety of different, and sometimes conflicting, arguments for affirmance on alternative grounds. Most of these arguments depend on factual premises that the District Court has not resolved, and therefore should be considered by the District Court in the first instance. Appellees also consistently fail to accord Zamichieli's own testimony the weight it is entitled to on summary judgment. This Court should vacate the District Court's decision, correct its misunderstanding of PLRA exhaustion principles and First Amendment retaliation law, and remand this case for further proceedings.

I. THE DISTRICT COURT ERRED BY GRANTING SUMMARY JUDGMENT AGAINST ZAMICHIELI'S CLAIMS RELATED TO HIS FALL

A. Zamichieli's Claims Are Not Barred By Any Failure To Exhaust Administrative Remedies

On February 14, 2017, Zamichieli sustained injuries from a fall while using the stairs to get from his improperly assigned upper-tier cell placement. The next day, he filed a grievance regarding his injuries, clearly meeting the only timing requirement in the grievance rules: that he must file a grievance within fifteen working days after the "event upon which the claim is based." Policy Statement of

the Department of Corrections for the Commonwealth of Pennsylvania, DC-ADM 804 § 1(A)(8) ("Policy Statement").

The District Court held that Zamichieli could not sue about an injury unless he filed a grievance about the cause of that injury prior to suffering it. As explained in Zamichieli's opening brief, that requirement has no foundation in the actual grievance rules, is inconsistent with basic principles of administrative exhaustion, and would have absurd consequences. *See* Appellant's Br. § I(A). Appellees conspicuously do not defend the District Court's reasoning, and their various arguments for affirmance on alternative grounds should be rejected or left for the District Court to consider in the first instance.

i. The Medical Defendants' Exhaustion Arguments

Appellees Dr. Valley ("Valley") and Appellees Austin, Ridings, and Hice (the "Other Medical Defendants") (collectively, the "Medical Defendants") argue that Zamichieli lost his ability to file a grievance because he waited more than fifteen days *after receiving his initial cell placement*. That supposed requirement misunderstands the Policy Statement's requirements, and would have unacceptable consequences. It also notably depends on a factual premise that the Department of Corrections ("DOC") rejects.

Zamichieli's cell placement was an ongoing condition that did not end until he was moved to a different cell on February 14, 2017. He filed a grievance the

next day on February 15, 2017, which was well within fifteen days of the "event" upon which his claim was based. Policy Statement § 1(A)(8). The Medical Defendants apparently contend that whenever there is a continuing condition that violates an inmate's rights, the inmate is required to file a grievance within fifteen days of the *beginning* of that condition or suffer in silence forever. That cannot be right. The DOC does not understand its rules that way; it did not press this argument in its own brief, and no objection to the timeliness of Zamichieli's grievance was raised or relied upon in the administrative process. *See* JA-301, 298. And if the rules (and the PLRA) were understood that way, very serious constitutional issues would be raised that this Court has a duty to avoid if possible. The PLRA's exhaustion provisions cannot possibly give prison officials a grandfathered privilege to continue violating the legal or constitutional rights of an inmate indefinitely, merely because the inmate failed to object within fifteen days of the beginning of an unlawful condition.

The Medical Defendants' argument also ignores the fact that the Policy Statement invites inmates to pursue informal resolutions before filing an official grievance. *See* Appellant's Br. 19-20. Zamichieli testified that he began complaining about his cell placement almost immediately. *See id.* at 6. The Medical Defendants' argument also depends on a factual premise–that Zamichieli

suffered a meaningful exclusion from program activities from the beginning of his wrongful cell placement–that the DOC explicitly rejects. *See* DOC Br. 26.

ii. DOC Appellees' Exhaustion Arguments

The DOC offers up an entirely different exhaustion argument that also has no connection to the District Court's decision. The DOC contends that because Zamichieli did not file an "Inmate Disability Accommodation Request Form" between December 30, 2016 and February 14, 2017, he has not exhausted his administrative remedies. DOC Br. 18. This argument does not appear to have been raised at the District Court level, and therefore is waived. In its summary judgment motion in the District Court the DOC instead pressed essentially the argument that the District Court adopted. *See* Dkt-102, at 8-10.

The DOC's new argument also is inconsistent with the prison's response to Zamichieli's grievance. The Initial Response Review acknowledged that Zamichieli had a "lower bunk, lower tier order from the medical department as of 3/21/15." JA-301. The Response conceded that "[i]t is a well-known practice that all inmates with documented seizure disorders are to be housed on lower bunk / lower tier status[,]" and concluded that Zamichieli's grievance would be "upheld in part because [he was] mistakenly placed on an upper tier cell after [his] release from the DTU. An error was made in placing [him] on the upper tier . . . ." *Id.* Although we are unaware of any record evidence concerning whether an "Inmate

Disability Accommodation Request Form" was filed in 2015, it is difficult to imagine that Zamichieli obtained that accommodation in his medical file without following whatever the appropriate procedures were. *See* DC-ADM 006 ("Any and all records relevant to and submitted in connection with the accommodation request shall be retained in the inmate's medical file . . . ."). It also is difficult to imagine that Zamichieli would or could be required to file new paperwork requesting an accommodation that he already had, by order of the medical department, that was documented in his file for over a year. Surely the DOC is not administering a system in which inmates are required to re-request, and re-prove an entitlement to, their already-documented medical accommodations on some special form every time that prison officials fail to comply. Nothing in the DOC policy for inmates with disabilities suggests that this is necessary. And DOC's own grievance response states that "[a]ny of the staff that [he] notified of this error would have been able to correct it, if [he] notified them in writing." JA-301.

The DOC next argues (at 19-20) that Zamichieli failed to exhaust his administrative remedies because he alleged only "certain *constitutional* rights" in his grievances without "reference to his *statutory* rights under the ADA and the RA." Neither law nor the DOC grievance process requires this sort of archaic code pleading in a *pro se* prison grievance. This Court has explained that "[a]s long as there is a shared factual basis . . . , perfect overlap between the grievance and a

complaint is not required by the PLRA." *Jackson v. Ivens*, 244 F. App'x 508, 513 (3d Cir. 2007) (citing *Woodford v. Ngo*, 548 U.S. 81, 95 (2006)). In *Porter v. Pennsylvania Department of Corrections*, 974 F.3d 431 (3d Cir. 2020), this Court affirmed the District Court's rejection of the DOC's argument that an inmate failed to exhaust his administrative remedies because he "d[id] not specifically invoke the phrase 'Eighth Amendment' or detail the allegedly cruel conditions of confinement," because "[n]either the prison's grievance process nor legal precedent requires inmates to identify the precise legal theory or statutory source of a claim, but merely to state the claim he or she wishes to raise 'concerning violations of . . . law.'" *Porter v. Pa. Dep't of Corrs.*, No. 17-763, 2018 WL 5846747, at *11 (W.D. Pa. Nov. 8, 2018) (rev'd on other grounds); *see also Brownell v. Krom*, 446 F.3d 305, 310 (2d Cir. 2006) ("In determining whether exhaustion has been achieved, we have drawn an analogy between the contents of an administrative grievance and notice pleading, explaining that '[a]s a notice pleading system, the grievance need not . . . articulate legal theories. All the grievance need do is object intelligibly to some asserted shortcoming.'" (quoting *Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002))).

The DOC cites no cases that would require Zamichieli to detail every possible legal theory in his grievance. It cites *Jones v. Bock*, 549 U.S. 199 (2007), for the proposition that courts take a "claim-by-claim approach" to exhaustion

issues. DOC Br. 19. But the Supreme Court's point was simply that if one claim in a grievance is defective the entire grievance should not be thrown out. The DOC cites *Shifflett v. Korsziak*, 934 F.3d 356 (3d Cir. 2019), but in that case the inmate failed the exhaustion requirement because he did not include a retaliation claim in a grievance regarding distinct Eighth Amendment violations. *Id.* at 366. The defect was in failing to grieve concerning a distinct *factual* claim, not in failing to plead specific legal theories.

iii. Exhaustion Arguments Related To Zamichieli's Failure To Identify All Defendants By Name In Original Grievance

Appellees argue that Zamichieli did not exhaust claims against any Defendants he did not specifically name in his original grievance. This hyper-strict interpretation of grievance procedures also is not supported by the precedents.

The purpose of the Policy Statement's requirement that inmates "should identify any persons who may have information that could be helpful in resolving the grievance" is "to put the prison officials on notice of the persons claimed to be guilty of wrongdoing" in order to facilitate resolution of the grievance. *See Spruill v. Gillis*, 372 F.3d 218, 234 (3d Cir. 2004). This Court has recognized that the Policy Statement's identification requirements are satisfied when individuals are identified by category or job responsibility rather than by name. *See Travillion v. Wetzel*, 765 F. App'x 785, 789 (3d Cir. 2019) (affirming the District Court's holding that though an inmate failed to identify specific individuals then named in

the complaint, "identifying . . . 'RHU Staff and Unit Management' was sufficient for complying with the identification requirements of DC-ADM 804 § 1(A)(11)"); *id.* (vacating the District Court's holding that identifying "SCI-Rockview staff and/or administration" left claims against SCI-Rockview staff individuals not named in the grievance unexhausted). As the District Court explained in *Merritt v. Fogel*, No. 07-1681, 2010 WL 3489152, at *3 (W.D. Pa. July 23, 2010), an inmate whose "grievance [was] broader in scope than a single act or omission by a single actor" can identify the responsible parties by group or by their responsibilities. There the inmate "fairly plac[ed] prison authorities on notice that he believed he had repeatedly been denied treatment over the course of several years for his medical condition," and the court held "that this fairly encompasse[d] all named Defendants for purposes of the exhaustion requirement." *Id.*

Zamichieli's grievance stated that he "contacted multiple block officers, medical department, counselor (Spiker), [and] unit manager (Staley)" and that "all parties failed to protect [him] from injury/fall[.]" JA-302. That statement, and others like it, sufficed to identify at least the Medical Defendants and Defendants Spiker, Staley, Liptak, and Price.

Even if Zamichieli's references to block officers and the medical department did not satisfy the Policy Statement's identification requirement, it would not mean that Zamichieli is procedurally barred from pursuing his claims now. Filing a

grievance is only required if the grievance officer could take some responsive action. *See Booth v. Churner*, 532 U.S. 731 (2001). Here, the grievance officer could not take any action because Zamichieli had already been moved to a lower-bunk, lower-tier cell when he filed his grievance. The DOC argued below that Zamichieli's "grievance, theoretically filed to obtain the relief of getting a lower-tier status, was moot at the time of its filing, at least to this point." Dkt-102, at 10. And although it is possible to request money damages in the DOC grievance process, that process could not, consistent with the Seventh Amendment and due process, have any authority to compel *the Medical Defendants* to pay damages.

B. Appellees' Arguments For Affirmance On Alternative Merits Grounds Should Be Rejected

Obviously recognizing the weakness of the District Court's exhaustion reasoning, Appellees advance arguments for affirmance on a variety of merits grounds. This Court should leave these issues for the District Court to consider in the first instance, but we will address them briefly.

i. The Americans With Disabilities Act And Rehabilitation Act

The DOC appears to be correct that any claim for declaratory or injunctive relief under the Americans with Disabilities Act ("ADA") or the Rehabilitation Act ("RA") is moot because Zamichieli's cell placement was changed and he has since

been transferred to a different facility. Zamichieli is, however, entitled to pursue a claim for monetary relief.

The DOC Appellees argue that Zamichieli cannot establish that he was "denied access to a program, service, or activity because of his alleged disability," because he did sometimes use the staircase from his upper-tier cell to get to prison services. DOC Br. 26. Of course this argument is flatly inconsistent with the factual premises of the argument, pressed by the Other Medical Defendants, that Zamichieli failed to exhaust his administrative remedies because he did not file a grievance within fifteen days of his cell assignment. Other Medical Defs. Br. 8. It also is an incorrect reading of the record and inconsistent with this Court's precedent.

The fact that Zamichieli was able to leave his cell on occasion does not establish that he was never denied access to programs, services, or activities. Zamichieli testified that he missed appointments for medical care and "missed out on yard." JA-418. This Court has recognized that medical care certainly is included in the "program[s], service[s], and activit[ies]" covered by the ADA. *Furgess*, 933 F.3d at 290 (noting that "the Supreme Court has stated [in dictum] that a prison's refusal to accommodate inmates' disabilities 'in such fundamentals as mobility, hygiene, medical care, and virtually all other prison programs' constitutes a denial of the benefits of a prison's services, programs, or activities" (quoting *United*

States v. Georgia, 546 U.S. 151, 157 (2006))). Though this Court has not specifically addressed yard time as a program, service, or activity, at least one other circuit has confirmed that a denial of yard time constitutes exclusion from covered activities. *See Wright v. N.Y. State Dep't of Corrs.*, 831 F.3d 64, 73 (2d Cir. 2016) (stating that a disabled inmate who avoided recreation in prison yard out of fear for his safety was "undoubtedly" "den[ied] . . . meaningful access to prison services, programs, or activities"); *Pierce v. County of Orange*, 526 F.3d 1190, 1222 (9th Cir. 2008) ("Any type of . . . recreational program, service, or activity offered to nondisabled detainees should, . . . be similarly available to disabled detainees . . . ."). This issue is deeply factual and should be resolved by the District Court in the first instance.

The DOC correctly points out that recovering compensatory damages requires a showing of the defendant's "intentional discrimination," *Alexander v. Sandoval*, 532 U.S. 275, 282–83 (2001), which includes "deliberate indifference." *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 272 (3d Cir. 2014). The DOC argues that no reasonable trier of fact could find that it is liable on the basis of deliberate indifference, because no one "'whose actions can fairly be said to represent the actions of [DOC]'" had actual notice of Zamichieli's need for a lower-tier cell. DOC Br. 28–29 (quoting *Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 350 (11th Cir. 2012)).

The DOC's argument that it cannot be held responsible for the alleged deliberate indifference of the Medical Defendants is troubling. The DOC's statutory obligation to avoid disability discrimination applies to facilities and programs administered "either directly or through contractual, licensing, or other arrangements with public or private entities." 28 C.F.R. § 35.152 (2010). And the Eleventh Circuit precedent the DOC relies upon to argue that the holding of *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), under Title IX should be extended to the ADA and RA appears to be the subject of a circuit split that this Court has not, to our knowledge, addressed. *See Gray v. Cummings*, 917 F.3d 1, 17 (1st Cir. 2019) (acknowledging, but not resolving, circuit split over "whether a public entity can be vicariously liable for money damages under Title II of the ADA based on the conduct of a line employee").

But even if Zamichieli is required to prove that his complaints about his cell placement reached the ears of DOC employees, there is a raging factual dispute on that issue that the DOC's brief only partially acknowledges. DOC Br. 29–31 & n.14. The DOC's statement that "[e]ven if Zamichieli's testimony is fully credited" there is no evidence that any DOC official subjectively knew about Zamichieli's need for a lower-tier cell placement, DOC Br. 29, ignores Zamichieli's testimony that he sent multiple "request slips," spoke to defendant Spiker, and wrote to the superintendent, the grievance coordinator and defendant Nicholson. *See*

Appellant's Br. 6–8 (collecting citations). Zamichieli testified that he spoke repeatedly to DOC officials about this issue, and that they told him that they could not help him without further documentation from the medical department. *See, e.g.*, JA-87 (¶¶ 45, 46). (A consistent theme of the Appellees' briefs is that Zamichieli's testimony can be disregarded when it does not match their understanding of the documentary record).

Regardless, the DOC's own hearing officer acknowledged in response to Zamichieli's grievance that Zamichieli had a "lower bunk, lower tier order from the medical department since 3/21/15," and that "[i]t is a well-known practice that all inmates with documented seizure disorders are to be housed in a lower bunk/lower tier status." JA-301. In *Furgess* this Court held that the prisoner had stated a claim that "PDOC knew about Furgess's need for an accessible shower facility" because "at the time that Furgess was held in the general prison population, he requested and was granted an accessible shower stall." 933 F.3d at 292. Similarly here, Zamichieli had already been granted an accommodation requiring a lower bunk/lower tier cell placement. That accommodation was documented in the DOC's own files, and the hearing officer had no difficulty locating it and acknowledging that Zamichieli's upper-tier cell placement was an error and a violation of prison policy. It makes little difference whether we say that the DOC is charged with knowledge of its own documented accommodations, or

instead that routinely assigning prisoners to cells without consulting those documented accommodations is a textbook example of deliberate indifference to them. Either way, this case looks very much like *Furgess*. The DOC cannot credibly maintain that it is entitled to summary judgment on the ground that there is no evidence that it knew about Zamichieli's need for an accommodation, when DOC itself had already granted and documented the accommodation at issue.

The DOC also argues that because they did move Zamichieli once they witnessed him have a seizure there was no failure to act. DOC Br. 30. But the relevant failure to act was ignoring both Zamichieli's documented disability and required accommodation and his repeated requests to relocate for six weeks. *See Furgess*, 933 F.3d at 293 ("For three months, the PDOC did not provide [the inmate] with any accommodation that would allow him to shower; when they did bring him to a shower, it was not handicapped-accessible. . . . [T]hese allegations constitute deliberate indifference."). The DOC's argument would, for example, permit a prison to cease serving peanut butter sandwiches to an inmate with a documented allergy only once it watched him go into anaphylactic shock.

ii. Eighth Amendment Claims

1. Eighth Amendment Claims Against The DOC Defendants

The DOC argues that Zamichieli has no triable claim of deliberate indifference against any DOC Defendant under the Eighth Amendment. Again, this

heavily factbound contention should be addressed by the District Court in the first instance. If this Court reached the issue, it should hold that Zamichieli has a triable claim.

Prison officials violate an inmate's Eighth Amendment rights when they are deliberately indifferent to an inmate's serious medical need. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). Establishing deliberate indifference in this context requires "aware[ness] of a substantial risk of serious harm and disregard [of] that risk." *Dooley v. Wetzel*, 957 F.3d 366, 374 (3d Cir. 2020) (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)).

Zamichieli testified in his verified complaint and his deposition that he notified multiple DOC Defendants, repeatedly, of his need for a lower tier cell assignment–including Defendants Shawley, Nicholson, and Gilmore. Appellant's Br. 6–7 (collecting citations). He testified most extensively about conversations with Defendants Staley (the unit manager) and Spiker (the block counselor). Zamichieli's verified complaint stated that after receiving his improper cell assignment he contacted Staley several times both in writing and orally. JA-87 (¶ 45). When she failed to respond to his written responses, he verbally requested a new cell assignment twice a week between January 3, 2017 and February 13, 2017. JA-399–400. He also showed her the documentation that he had. JA-87 (¶ 45). When Zamichieli alerted Staley to the cell-assignment mistake, she told him to get

medical approval—which, of course, he already had. *Id.* Zamichieli similarly testified that he sent several verbal and written requests to Appellee Spiker "nearly every day dating from 12/31/16 to 2/8/17" and showed him his required-accommodation documentation. JA-87 (¶ 46). Like Appellee Staley, Spiker told Zamichieli that he needed the medical department to approve his (already approved) request for a lower-tier cell. *Id.* Zamichieli also testified that numerous other inmates overheard these conversations. *Id.*

The DOC's brief argues (at 34) that its personnel behaved reasonably given "Spiker's prompt decision to transfer Zamichieli to the lower tier after learning that such an accommodation was needed," *i.e.*, after Zamichieli's return from the hospital. But Zamichieli testified that Spiker and Staley had been alerted repeatedly to what the grievance coordinator described as a clear "error [ ] made in placing [Zamichieli] on the upper tier." JA-301. The grievance response even acknowledges that housing inmates with epilepsy on a lower tier is a "well-known practice" and that "any staff [ ] notified would have been able to correct" the mistake. *Id.* A reasonable trier of fact crediting Zamichieli's testimony could find that Defendants were "aware of a substantial risk of serious harm and disregard[ed] that risk," *Dooley*, 957 F.3d at 374, unjustifiably choosing to give Zamichieli the run-around by insisting that he procure an order from the Medical Defendants when the necessary paperwork was already documented in his file.

The DOC asserts that Staley and Spiker (and, by extension, all the other DOC employees who Zamichieli alerted to this problem) are entitled to qualified immunity based on their "objectively reasonable reliance on existing law." *Kentucky v. Graham*, 473 U.S. 159, 166–67 (1985). But no reasonable officer could believe that it was objectively reasonable to completely ignore an inmate's repeated pleas that he had a safety-related accommodation for a seizure disorder, which this Court has recognized to be a serious medical condition. *See Albert v. Yost*, 431 F. App'x 76, 77 (3d Cir. 2011). Nor could they think it objectively reasonable to insist that Zamichieli remain in a dangerous situation until he could obtain additional paperwork from the medical department himself, when the accommodation apparently was clearly documented and readily available.

2. Eighth Amendment Claims Against The Medical Defendants

The Medical Defendants contend that Zamichieli came forward with no evidence of their deliberate indifference to his need for a lower-tier cell. *See* Other Medical Defs. Br. 24 ("What Zamichieli fails to point out is that these are just claims. At this stage of the litigation, Zamichieli had to produce supporting evidence and not rely on his Amended Complaint or testimony.").[1] Those

[1] The Medical Defendants correctly note that Zamichieli has not appealed the District Court's dismissal of any distinct claim relating to the quality of their medical treatment, *see* JA-39 n.6, and of Zamichieli's sexual assault claims against Appellee Austin.

arguments improperly disregard Zamichieli's own testimony, both in his verified complaint and at his deposition.

Zamichieli's record testimony as to his contacts with Dr. Valley is indeed somewhat ambiguous, *compare, e.g.,* JA-86 (¶ 42) with JA-396, 424-25, and Zamichieli has authorized undersigned counsel to abandon these claims against Dr. Valley. But Zamichieli testified that he wrote multiple sick call slips to request a lower-tier cell, and made repeated verbal requests to the Other Medical Defendants during sick calls on January 3, 5, 11, and 17, 2017. *See, e.g.*, JA-86 (¶ 42); JA-384, 387–88, 392, 426; *see generally* Appellant's Br. 6–7.

Of course the Other Medical Defendants filed affidavits insisting that they never spoke to Zamichieli about his need for a lower-tier cell or received the written communications he alleges. *See* JA-427 (Austin), 431 (Ridings), 436 (Hice). But on summary judgment the District Court would be obliged to view all facts "in the light most favorable to the non-moving party, who is 'entitled to every reasonable inference that can be drawn from the record.'" *Reedy v. Evanson*, 615 F.3d 197, 210 (3d Cir. 2010) (quoting *Merkle v. Upper Dublin Sch. Dist.*, 211 F.3d 782, 788 (3d Cir. 2000)). Crediting Zamichieli's testimony and giving him the benefit of every reasonable inference, the Medical Defendants knew about his need for a lower-tier cell and ignored his repeated entreaties that they help him do something about it.

The Medical Defendants protest that they were not responsible for Zamichieli's cell assignment and therefore cannot be held responsible for it. But the evidence indicates that the DOC Defendants were simultaneously telling Zamichieli that they could not or would not change his cell assignment without paperwork from the Medical Defendants. Perhaps a reasonable trier of fact would need to resolve this exercise in blame-shifting, or perhaps the trier of fact would conclude that both sides were deliberately indifferent to Zamichieli's clear medical needs. But it cannot be that *no one* was responsible for implementing Zamichieli's documented medical accommodations. A prison structure in which everyone feels entitled to disregard an inmate's repeated claim that he has a documented medical accommodation that is not being followed would be, again, practically a textbook example of deliberate indifference.

II. THE DISTRICT COURT APPLIED INCORRECT STANDARDS WHEN GRANTING SUMMARY JUDGMENT AGAINST ZAMICHIELI'S RETALIATION CLAIMS

Zamichieli's opening brief explained that the District Court granted summary judgment for Defendants on his First Amendment retaliation claims simply because Defendants came forward with written documentation of a non-retaliatory reason for their actions, despite Zamichieli's testimony that Defendants and other prison officials admitted a non-retaliatory reason for their actions. Zamichieli explained that in context the District Court's reasoning is

indistinguishable from the Eighth Circuit's "some evidence" standard that this Court specifically rejected in *Watson v. Rozum*, 834 F.3d 417 (3d Cir. 2016). Under *Watson*, summary judgment is inappropriate, even when a misconduct charge against a prisoner is "factually supported," if "a reasonable fact finder could conclude that the misconduct was issued in retaliation . . . and not in furtherance of legitimate penological goals." *Id.* at 425–26. The District Court never asked or answered that question. Defendants do not engage with it either.

A. Zamichieli Has A Triable Individual Capacity Retaliation Claim Against At Least Defendant Gilmore, And Claims For Injunctive Or Declaratory Relief Against The DOC And Other Officials

The DOC Defendants do not genuinely defend the basis of the District Court's grant of summary judgment on the retaliatory transfer claim: that Zamichieli "does not point to any evidence contradicting" the transfer slip other than his own "bald unsupported" testimony. JA-45. Instead the DOC offers a variety of new technical arguments.

The DOC appears to be correct that the Eleventh Amendment precludes monetary liability against the DOC itself, or against DOC employees in their official capacity. But Zamichieli asserted a variety of claims for declaratory and injunctive relief that would not be barred by the Eleventh Amendment. *See, e.g.*, JA-103 (¶ 116). Nor would the Eleventh Amendment bar monetary claims against individual DOC defendants in their personal capacities. *Will v. Michigan Dep't of*

State Police, 491 U.S. 58, 71 n.10 (1989); *Hafer v. Melo*, 502 U.S. 21, 30–31 (1991).

The DOC argues that Zamichieli failed to identify any specific individual alleged to have retaliatory intent in connection with his transfer from SCI Greene to SCI Huntingdon. But his verified complaint repeatedly states that Defendant Robert Gilmore, the Superintendent at SCI Greene, ordered the transfer "to prevent me from complaining more." JA-83, 95, 101 (¶¶ 27, 83, 105). The fact that the transfer paperwork was verified through a declaration by Tracy Shawley, the Superintendent's Assistant at SCI Greene, also supports an inference that the transfer was ordered by Superintendent Gilmore. *See* JA-264. Zamichieli testified that after he arrived at SCI Huntingdon officers told him that he had been transferred in part because of his complaints at SCI Greene. *See, e.g.*, JA-411, 419–20. A reasonable trier of fact crediting that testimony could infer that Defendant Gilmore personally harbored retaliatory intent. At a minimum, the District Court should address this highly factbound issue in the first instance.

The DOC Defendants also argue for summary judgment on the basis of qualified immunity. Again, the District Court did not consider this issue, it raises fact-intensive questions, and it should be decided by the District Court on remand. In any event, defeating qualified immunity requires only a showing that the conduct at issue "violate[s] clearly established statutory or constitutional rights of

which a reasonable person would have known." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). It has been clearly established law for decades that prison officials cannot retaliate against inmates for exercising their First Amendment rights. *See, e.g.*, *Rauser v. Horn*, 241 F.3d 330 (3d Cir. 2001). And because the constitutional standard depends on a retaliatory state of mind, no viable qualified immunity defense can be based on the supposedly "unique circumstances of this case." DOC Br. 46. An official who acts on the basis of a retaliatory motive is aware that he or she is violating clearly established law, by definition, regardless of the circumstances. *See, e.g.*, *Dean v. Jones*, 984 F.3d 295, 310 (4th Cir. 2021).

The DOC argues that Zamichieli has not shown any adverse effect from his transfer. *Rauser* left open whether a transfer must interfere with family visits or cause some additional harm to be "adverse" for First Amendment retaliation purposes. However, at least three panels of this Court have concluded in non-precedential decisions that it need not.[2] Regardless, Zamichieli's verified complaint states repeatedly that the transfer moved him away from family and

[2] *Velasquez v. DiGuglielmo*, 516 F. App'x 91, 96 n.3 (3d Cir. 2013) (The inmate's "transfer constitute[d] sufficient adverse action."); *DeFranco v. Wolfe*, 387 F. App'x 147, 157 (3d Cir. 2010) ("[W]e have no doubt that . . . transfer to another facility is sufficiently adverse."); *Lindsay v. Chesney*, 179 F. App'x 867, 869 (3d Cir. 2006) (explaining that the inmate's "transfer to another facility could constitute [an] "adverse action[]" for purposes of a retaliation claim").

caused him to lose contact with friends and family. JA-83 (¶ 27); JA-101 (¶ 105). It also repeatedly alleges harsh conditions at SCI Huntingdon and requests a transfer away from that facility. *E.g.,* JA-98, 99 (¶¶ 98-101), JA-103 (¶ 116).

The DOC's observation (at 43–44) that it ordinarily has discretion to transfer a prisoner for any reason is irrelevant. An action that would not have been taken "but for" a retaliatory motive violates the First Amendment, regardless of whether the official would have discretion to take that action for non-retaliatory reasons. The DOC argues (at 44–45) that there would be no violation "[e]ven if Zamichieli's contrary testimony is credited," because the DOC could legitimately have transferred Zamichieli to protect him from Defendant Austin if his sexual assault allegations were credited. The "same decision" defense requires a defendant to show that it *would have* made the same decision if the retaliatory motive was removed from the that defendant's consideration. *Rauser*, 241 F.3d at 334; *Watson*, 834 F.3d at 426. This test is a but-for analysis in which all other facts remain the same. It does not allow defendants to retrospectively change the facts by hypothesizing other possible motives that they could lawfully have considered, but did not actually consider. The DOC's argument also purports to credit the wrong testimony. Zamichieli testified that multiple DOC officers told him that he was transferred to SCI Huntingdon in retaliation for his prior complaints. If *that*

testimony is credited, the transfer violated the First Amendment regardless of whether Zamichieli's allegations against Austin also are credited.

B. The District Court Applied Incorrect Standards To Zamichieli's Retaliation Claims Against Defendants Austin And Ridings

Defendants Austin and Ridings correctly point out that *Watson* did not overrule *Carter v. McGrady*, 292 F.3d 152 (3d Cir. 2002), and posit that *Carter* still requires summary judgment for prison officials in retaliation cases when an "established quantum of evidence" shows a "clear and overt violation." Other Medical Defs. Br. 30.

Those words do appear in the decisions, but they shed little light on the actual legal standard. In both *Carter* and *Watson*, there was no dispute that the inmates had committed the acts for which they were disciplined, so both violations were "clear and overt" in the literal sense. *Carter*, 292 F.3d at 158; *Watson*, 834 F.3d at 420. And stating that summary judgment requires a "quantum" of evidence sheds no light on exactly how much evidence is a "quantum," or on how to resolve conflicts when different evidence points in different directions. Austin and Ridings posit (at 31) that "*Watson* is applicable with relatively minor offenses" but not necessarily for "more serious violations." But the better reading of the cases is that in *Carter* there was undeniable and serious misconduct *and no significant direct countervailing evidence of retaliatory motive*–such that a reasonable trier of fact, giving appropriate deference to penological judgment, would have to conclude that

prison officials acted for legitimate reasons. In *Watson*, however, this Court held that undisputed inmate guilt was not an absolute bar to retaliation claims when because of direct evidence of selective enforcement and retaliatory motive "a reasonable fact finder could conclude that the misconduct was issued in retaliation for Watson's statement that he was going to file a grievance, and not in furtherance of legitimate penological goals." *Watson*, 834 F.3d at 426. The critical point, emphasized by both the majority and Judge Ambro's concurrence in *Watson*, is that prison officials are not entitled to summary judgment just because "some evidence" supports the punishment imposed. As always, summary judgment is appropriate only if a reasonable factfinder could not find for the plaintiff, considering *all* of the available evidence.

This case is different from both *Watson* and *Carter* in that Zamichieli's guilt on the underlying misconduct charges is disputed, and Zamichieli testified that Defendants Austin and Ridings had both threatened to "write him up" if he did not drop a prior complaint. *See* JA-334, 359. The violation thus is not as "clear and overt" as it was in *Carter* or *Watson*, and there also is direct evidence of retaliatory intent that, if credited, would weigh strongly against any "same decision" defense. *See Watson*, 834 F.3d at 426–27, 430–31 (Ambro, J., concurring). The hearing examiner's decisions to uphold these misconducts were based entirely on crediting Austin's and Riding's testimony over Zamichieli's, and (in Ridings's case) on

video evidence that does not depict any misconduct and is as consistent with Zamichieli's testimony as with Ridings's. *See* JA-47 (citing JA-359 & JA-342). Austin and Ridings take umbrage at Zamichieli's suggestion that prison hearing examiners reliably credit the testimony of officers over inmates, but Zamichieli's point was that an administrative fact-finder's *assessment of the evidence* is not, itself, *evidence*. If a finding of misconduct at a prison hearing supplies a "quantum of evidence" requiring summary judgment against inmate retaliation claims, then no such claims will ever survive, by definition.

Defendants' discussion of *Rivera v. McCoy*, 729 F. App'x 142 (3d Cir. 2018), and of *Quiero v. Ott*, 799 F. App'x 144 (3d Cir. 2020), also illustrates that the pervasive confusion that Judge Ambro identified in *Watson* persists, and should be addressed by this Court. *Rivera* appears to hold that a misconduct conviction that is supported by the testimony of multiple guards has a sufficient "quantum of evidence." 729 F. App'x at 144. *Quiero* wrongly invokes the Eighth Circuit's "some evidence" standard that this Court explicitly rejected in *Watson,* although the outcome may be explained by the fact that the inmate's own denials were equivocal at best. *Quiero*, 799 F. App'x at 146 & 147 n.3. *Williams v. Folino*, 664 F. App'x 144 (3d Cir. 2016), relied on by the District Court in this case, held that a misconduct conviction is sufficient if it contains "a meaningful written statement

of the evidence relied on and the reasons for the action taken." *Williams* at 148–49. None of these standards are consistent with *Watson*, or with each other.

Austin and Ridings assert (at 33) that "[t]he central theme of Zamichieli's entire appeal is that he should have been believed regardless of his lack of evidence." The central theme of Zamichieli's appeal is that his testimony *is evidence*, and the District Court never even considered whether a reasonable trier of fact would be entitled to believe it. The Court instead treated Zamichieli's verified complaint and sworn deposition testimony as irrelevant, and granted summary judgment because Defendants came forward with some evidence to justify their decisions. That is precisely the approach this Court rejected in *Watson.* The Other Medical Defendants commit the same mistake, by suggesting that *Rivera* automatically requires summary judgment for prison officials in "he said/she said" situations. *Id.* The correct question at this stage is whether a reasonable trier of fact could believe Zamichieli's testimony. He is simply asking for a remand instructing the District Court to address that question under the appropriate standards.

CONCLUSION

The District Court's summary judgment decision should be vacated, and the case remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Appellate Rule 46.1(e), the undersigned hereby certifies that he is counsel of record and is a member of the bar of the United States Court of Appeals for the Third Circuit.

February 18, 2021

/s/ J. Scott Ballenger
J. Scott Ballenger
Counsel for Appellant

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February 18, 2021

/s/ J. Scott Ballenger
J. Scott Ballenger
Counsel for Appellant

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I, J. Scott Ballenger, hereby certify that on February 18, 2021, I caused four (4) copies of Appellant's Reply Brief to be dispatched by FedEx delivery, to the Clerk of the Court for the United States Court of Appeals for the Third Circuit, and filed an electronic copy of the brief via CM/ECF. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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