No. 24-20163

United States Court of Appeals for the Fifth Circuit

MARTIN PENA, JR.
Plaintiff – Appellant

v.

ED GONZALEZ, SHERIFF OF HARRIS COUNTY; JOSHUA DILLARD, JAILER/PUBLIC SERVANT
Defendants - Appellees

Appeal from the United States District Court for the Southern District of Texas in Case No. 4:22-CV-4216

BRIEF OF APPELLEES ED GONZALEZ AND JOSHUA DILLARD

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellant:	**Counsel for Appellants:**
Martin Pena	Martin Pena Willacy County State Jail Raymondville, Texas
Appellees:	**Counsel for Appellees:**
Sheriff Ed Gonzalez Officer Joshua Dillard	Appeal Counsel: Seth Hopkins Harris County Attorney's Office 1019 Congress, 15th Floor Houston, Texas 77002 Trial Counsel: James Butt Harris County Attorney's Office 1019 Congress, 15th Floor Houston, Texas 77002

/s/ Seth Hopkins
Attorney of record for Appellees

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a) and Fifth Circuit Rule 28.2.3, Appellees believe oral argument is unnecessary because the dispositive issues have been authoritatively decided, the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. This case involves the straightforward interpretation of the statute of limitations for 42 U.S.C. § 1983 cases in Texas, and neither the facts nor the legal arguments are unusually complex.

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STATEMENT OF THE ISSUES

Appellant did not identify specific issues for review. Appellees respectfully suggest that the sole issue is:

Issue 1: Whether the district court correctly dismissed Mr. Pena's claims because he filed his lawsuit after the statute of limitations expired.

STATEMENT OF THE CASE

I.
FACTS

Martin Pena alleges that on October 22, 2019, Detention Officer Joshua Dillard injured him while he was a detainee at the Harris County Jail. Officer Dillard was closing a cell door when Mr. Pena slid in front of the door and squeezed through the opening to the cell. He claims Officer Dillard followed him into the cell and slammed him against the doorframe and cell bars, which resulted in him briefly losing consciousness. ROA.38-39; ROA.42; ROA.103. Mr. Pena stated there was a standoff, Officer Dillard told him to sit down, and Mr. Pena cursed at Officer Dillard and challenged him to "make me." ROA.39; ROA.103. Officer Dillard walked away, and the encounter ended. Mr. Pena noted he had the opportunity to "pounce" on Officer Dillard shortly thereafter but chose not to do so. ROA.39; ROA.103.

Mr. Pena claimed he suffered physical injuries from this encounter and filed an administrative grievance against Officer Dillard on October 29, 2019. ROA.93; ROA.103-104. In November 2019, he was transferred to the Collin County Jail (ROA.93) and then the Galveston County Jail. ROA.94; ROA.104. He was released in February 2020 and then arrested in Kendall County on April 7, 2021. ROA.94-95;

ROA.104. He was convicted in Kendall County for possession of controlled substances and is now serving 25 years in the Texas state prison system.[1]

The Harris County Jail investigated, reviewed surveillance footage and Mr. Pena's medical records, and determined that they did not support Mr. Pena's allegations.[2] While the footage was partially obscured, it showed Mr. Pena forcing a cell door open, taking an aggressive stance toward Officer Dillard, and briefly falling to the ground when Officer Dillard used his hand and arm to move Mr. Pena away from him and into the proper cell. Supplemental Record at SUP. ROA.10. Medical records show Mr. Pena made several trips to the jail clinic between October 27 and November 2, 2019, to check an old abscess on his back. He never reported any injury to his head, arm, or wrist. Supplemental Record at SUP. ROA.12-24.

Internal Affairs Department Deputy Perry Burkeen tried to interview Mr. Pena to gather additional evidence, but he had been released from Harris County. Deputy Burkeen left a voicemail and sent two certified letters (return receipt

[1] ROA.104 at fn.1. The district court reviewed public records maintained by the Texas Department of Criminal Justice Inmate Search and noted this information in its Memorandum and Order.

[2] The record includes the district court's findings (ROA.107-108) and Officer Dillard (ROA.86-87) and Candice Kelley's affidavits regarding Mr. Pena's Internal Affairs File No. 2019-0585. ROA.89. The medical records and Internal Affairs report was filed under seal in the district court on January 23, 2024, in Docket No. 17. Appellees moved to supplement the record with these documents.

requested) on December 4, 2019, to Mr. Pena's last known address and the address on his driver's license. ROA.108, citing Supplemental Record at SUP. ROA.7.

Mr. Pena never responded, and it was uncontroverted "that the Internal Affairs investigation into the October 2019 incident, Case Number IA2019-00585, concluded on December 31, 2019." ROA.106-107, citing Supplemental Record at SUP. ROA.9-10. The Jail found no violation of policy or state law by any Harris County Sheriff's Office employee. Supplemental Record at SUP. ROA.10.

On appeal, Mr. Pena restates his allegations that Officer Dillard assaulted him at the Harris County Jail, that he was denied medical care, and that he filed two redundant grievances. Appellant's Brief at 2-3. He acknowledged that the Jail accepted his grievances, and a sergeant brought him to a small courtroom and told him his complaint was being submitted to Internal Affairs. Appellant's Brief at 3.

Mr. Pena further alleges that Officer Dillard "totally refused to do his job in a professional manner," "did not use verbal skills," and "never accepted responsibility for his actions as a public servant." Appellant's Brief at 4. He concludes that Officer Dillard "ran from the situation which automatically shows his guilt." Appellant's Brief at 5. Finally, he acknowledges that upon arrival at the Jail, he was provided with medical care which included emergency surgery for a preexisting injury. Appellant's Brief at 4.

II.
PROCEDURAL HISTORY

On December 5, 2022, Mr. Pena filed his lawsuit against Detention Officer Joshua Dillard and Harris County Sheriff Ed Gonzalez seeking $5 million in pain and suffering and $5 million in mental anguish. ROA.5-21.

On March 23, 2023, the district court permitted Mr. Pena to proceed *in forma pauperis* and ordered him to provide a more definite statement so the court could better evaluate his claims. ROA.29-36. On April 3, 2023, Mr. Pena complied with the court's order to provide a more definite statement. ROA.37-46.

On September 29, 2023, the district court ordered Appellees Officer Dillard and Sheriff Gonzalez to be served with the summons, complaint, and plaintiff's more definite statement and answer within 40 days of service. The court further ordered appellees to file any dispositive motion within 90 days of their answer. ROA.47-50.

On November 28, 2023, Appellees answered. ROA.55-61. In their answer, they asserted several defenses, including qualified immunity, official immunity, the failure to exhaust administrative remedies, and that the statute of limitations expired. Appellees served their initial disclosures and other written discovery on Mr. Pena on December 20, 2023. ROA.71-72.

On January 23, 2024, Appellees moved for summary judgment and asserted qualified immunity and that the statute of limitations expired. ROA.73-89. Mr. Pena responded on March 7, 2024 (ROA.90-97), and Appellees replied on March 8, 2024. ROA.98-101. The district court prepared a detailed Memorandum and Order granting summary judgment on March 23, 2024. ROA.102-114.

On April 15, 2024, Mr. Pena filed a "Plaintiffs Rebuttal to Dismissal" which the district court interpreted as a notice of appeal. ROA.115.

SUMMARY OF THE ARGUMENT

Mr. Pena had two years after the administrative closure of his complaint to file his lawsuit. The matter was closed on December 31, 2019, and his deadline to file suit was December 31, 2021. He has not shown any legal basis to toll the statute of limitations, and the district court properly dismissed his case.

Even if Mr. Pena had filed within the statute of limitations, each of his claims was subject to dismissal because Mr. Pena did not adequately plead his claims or meet his burden to overcome qualified immunity.

Finally, the district court properly declined to appoint counsel. This case was already time-barred when Mr. Pena requested counsel, his claims did not present exceptional circumstances or complexities unusual in a civil rights claim, and he demonstrated an ability to communicate and file pleadings with the court.

ARGUMENT

I.
STANDARD OF REVIEW

A court of appeals reviews the granting of summary judgment *de novo* and applies the same standards as the district court. *Mason v. Lafayette City-Parish Consolidated Government*, 806 F.3d 268, 274 (5th Cir. 2015). Federal Rule of Civil Procedure 56 requires a court to grant summary judgment if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A dispute is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Westfall v. Luna*, 903 F.3d 534, 546 (5th Cir. 2018). A fact is material "if its resolution could affect the outcome of the action." *Dyer v. Houston*, 964 F.3d 374, 379-380 (5th Cir. 2020) (internal citations omitted).

A moving party bears the burden of initially pointing out the basis of the motion and identifying the portions of the record demonstrating the absence of a genuine issue for trial. *Duckett v. City of Cedar Park, Texas*, 950 F.2d 272, 276 (5th Cir. 1992). Then "the burden shifts to the nonmoving party to show with 'significant probative evidence' that there exists a genuine issue of material fact." *Hamilton v. Seque Software, Inc.*, 232 F.3d 473, 477 (5th Cir. 2000).

A court reviews facts and reasonable inferences in a light most favorable to the nonmovant but "only when there is an actual controversy—that is, when both parties have submitted evidence of contradictory facts." *Laughlin v. Olszewski*, 102 F.3d 190, 193 (5th Cir. 1996). "Unsupported allegations or affidavit or deposition testimony setting forth ultimate or conclusory facts and conclusions of law are insufficient to defeat a motion for summary judgment." *Clark v. America's Favorite Chicken Co.*, 110 F.3d 295, 297 (5th Cir. 1997).

II.
THE DISTRICT COURT PROPERLY FOUND THAT MR. PENA MISSED HIS STATUTE OF LIMITATIONS

(See opinion at ROA.107-112.)

Mr. Pena's appeal does not squarely address the district court's reason for dismissing the case—that Mr. Pena filed his lawsuit after the statute of limitations expired. See ROA.107-112. Civil rights claims brought in Texas under 42 U.S.C. § 1983 are subject to a two-year statute of limitations. Tex. Civ. Prac. & Rem. Code § 16.003(a); *Piotrowski v. City of Houston*, 237 F.3d 567, 576 (5th Cir. 2001); *Wallace v. Kato*, 549 U.S. 384, 388 (2007).

Texas law determines the applicable limitations period, while federal law determines when the cause accrues. *Gartrell v. Gaylor*, 981 F.2d 254, 256 (5th Cir. 1993). Under federal law, a cause of action accrues "when the plaintiff knows or has

reason to know of the injury which is the basis of the action." *Id.* at 257. It is undisputed that Mr. Pena knew of his claim as soon as it occurred—on October 22, 2019. In fact, he admits promptly filing two grievances. ROA.40.

Mr. Pena is a state prisoner in the custody of the Texas Department of Criminal Justice, and his claims are subject to the Prison Litigation Reform Act. The Act requires a prisoner to exhaust all administrative remedies and tolls the statute of limitation while they are pending. 42 U.S.C. § 1997(e)(a); *McBarron v. Federal Bureau of Prisons*, 332 Fed. Appx. 961, 964 (5th Cir. 2009) ("The limitations period is generally tolled while a prisoner exhausts the prison grievance process."); *McKinney v. Williams*, 201 Fed. Appx. 255, 256 (5th Cir. 2006) ("The two-year limitations period was tolled for a total of 116 days while McKinney exhausted his administrative remedies, i.e., from March 19, 2001, through July 12, 2001.").

Deputy Burkeen tried to contact Mr. Pena to gather evidence to evaluate his administrative grievance. He started by calling Mr. Pena's last known number and left a voicemail on December 4, 2019, at 1:46 p.m. The same day, Deputy Burkeen sent two certified (return receipt requested) Ten Day Letters of Cooperation to Mr. Pena's last known address and the address on his Texas driver's license. ROA.108, citing Supplemental Record at SUP. ROA.7. The letter sent to Mr. Pena's last known address was returned as received on December 12, 2019, but the signature

was illegible. ROA.108, citing Supplemental Record at SUP. ROA.7. The district court noted that Deputy Burkeen stated:

> The letters were exactly the same, and indicated that Inmate Pena needed to contact me in order to successfully investigate this case. All contact information was provided, along with a notice that failure to contact me within ten days would result in completion of the case without his information.

ROA.108, citing Supplemental Record at SUP. ROA.7.

The Jail closed the file 18 days after receiving the return receipt, and the district court found it was uncontroverted "that the Internal Affairs investigation into the October 2019 incident, Case Number IA2019-00585, concluded on December 31, 2019." ROA.106-107, Supplemental Record at SUP. ROA.9-10. On that date, the statute of limitations was no longer tolled, and under Texas law, Mr. Pena had until December 31, 2021 to file his lawsuit.

Mr. Pena claims he never received notice of the Internal Affairs file being closed because he was incarcerated in Collin County when the Harris County Jail tried to contact him. He further contends that an unknown person at his address signed for the letter. Appellant's Brief at 1. Because of this, he argues that the statute of limitations continued to be tolled until he filed suit on November 1, 2022—which was three years and 10 months after the administrative grievance was closed and 10 months after his statute of limitations expired.

Mr. Pena cites no legal basis to toll the statute of limitations based on his lack of awareness that the administrative process was completed. Further, the district court pointed out that Mr. Pena was in Houston from April 2020 until at least October 2020 collecting unemployment, yet never inquired about the status of his Internal Affairs case until April 2022. ROA.108. Mr. Pena admits in his complaint:

> April 2022 – Wrote IA and they said my case was no longer in there [sic] office. I wrote them back informing them that I never received anything from them in regards to the case.

ROA.19-20. Even after learning that the administrative process was completed, Mr. Pena waited another six months—until November 1, 2022—to file suit. The district court concluded Mr. Pena "does not show that he exercised diligence regarding his rights and that some extraordinary circumstance prevented him from timely filing his claims." ROA.109-110.

In the court below, Mr. Pena also alleged he was entitled to tolling because of COVID-19 and his attorneys' alleged failure to pursue his claim. State equitable tolling principles apply in § 1983 cases. *Madis v. Edwards*, 347 F. App'x 106, 108 (5th Cir. 2009) (unpublished). "Texas courts sparingly apply equitable tolling and look, *inter alia*, to whether a plaintiff diligently pursued his rights." *Montgomery v. Hale*, 648 F. App'x 444 (5th Cir. May 16, 2016) (unpublished). The party asserting

equitable tolling bears "the burden of showing that equitable tolling is warranted." *Martinez v. Hidalgo County*, 727 F. App'x 77, 78 (5th Cir. 2018) (per curiam).

The COVID-19 pandemic did not toll Mr. Pena's statute of limitations because the Texas Supreme Court's emergency order extending the statute of limitations during COVID-19 only applied to cases where the limitations period expired between March 13 and September 15, 2020. *Twenty-First Emergency Order Regarding COVID-19 State of Disaster*, 609 S.W.3d 128, 129 (Tex. 2020). Mr. Pena's limitations period expired more than a year later—on December 31, 2021.

Under Texas law, a party's inability to secure representation also does not toll the statute of limitations. *Robinson v. Dallas Police Department*, 275 F.3d 1080 (5th Cir. 2001) (unpublished). Thus, each of Mr. Pena's reasons for extending the statute of limitations have been expressly rejected.

III.
EVEN IF MR. PENA HAD MET THE STATUTE OF LIMITATIONS, THE DISTRICT COURT SHOULD HAVE DISMISSED HIS CLAIMS

(See briefing at ROA.76-83.)

A. Mr. Pena failed to overcome qualified immunity in his excessive force claim against Officer Dillard.

The district court properly dismissed Mr. Pena's case based on the statute of limitations. On appeal, Mr. Pena devotes little attention to this and focuses on the merits of the case. If this Court reaches the merits, there are more than sufficient

grounds to dismiss on qualified immunity. Appellees asserted qualified immunity (ROA.57-58) and Officer Dillard provided records and an affidavit showing that Mr. Pena did not suffer the injuries he claimed or denied medical care. ROA.86-87 and Supplemental Record at SUP. ROA.13-22.

A person who alleges his constitutional rights were violated by a public official acting under color of law may sue for money damages under 42 U.S.C. § 1983. However, public employees are entitled to the affirmative defense of qualified immunity for § 1983 civil rights claims. "Qualified immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Reichle v. Howards,* 566 U.S. 658, 664 (2012). Once a defendant invokes qualified immunity, "the burden shifts to the plaintiff to show that the defense is not available." *Cooper v. Brown*, 844 F.3d 517, 522 (5th Cir. 2016) (citation omitted); see also *Spiller v. Harris County, Texas, et al.*, No. 22-20028, 2024 WL 4002382, at *2 (5th Cir. Aug. 30, 2024).

To meet that burden, a plaintiff "must plead specific facts that both allow the court to draw the reasonable inference that the defendant is liable for the harm he has alleged and that defeat a qualified immunity defense with equal specificity." *Asante-Chioke v. Dowdle*, 103 F.4th 1126, 1129 (5th Cir. 2024) (quoting *Backe v. Leblanc*, 691

F.3d 645, 648 (5th Cir. 2012)). This requires a plaintiff to show: "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011).

Mr. Pena was a pretrial detainee, and to defeat the first prong of qualified immunity on his excessive force claim, he had to show that "the force purposefully or knowingly used against him was objectively unreasonable." *Kingsley v. Hendrickson*, 576 U.S. 389, 396-397 (2015). The reasonableness of force must be assessed "from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight." *Id.* Further, Mr. Pena must show "the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose." *Tennyson v. Villarreal*, 801 Fed. App'x, 295 (5th Cir. 2020). To defeat the second prong of qualified immunity, he also needed to show that the right in question was clearly established on October 22, 2019—the date of the incident.

On appeal, Mr. Pena did not address either prong of qualified immunity. Even assuming he had met the statute of limitations deadline, the claims against Officer Dillard were still properly dismissed.

B. Mr. Pena failed to state a failure to train or supervise claim against Sheriff Gonzalez.

In the court below, Mr. Pena acknowledged that the Sheriff "did not physically have any involvement in the altercation" but contends that the Sheriff is "responsible for the proper training and education of these jailers when they are hired." ROA.37. Because Mr. Pena does not allege Sheriff Gonzalez was personally involved in this matter or had any knowledge of the incident that led to this lawsuit, his claim appears to be against the Sheriff in his official capacity.[3] On appeal, Mr. Pena devotes a single sentence to this claim: "Also, the Sheriff is responsible for making sure his officers follow policy." Appellant's Brief at 4.

This Court has explained that for a sheriff to be liable for failure to supervise and train, he must act or fail to act with deliberate indifference to the violations of others' constitutional rights. "In order to establish supervisor liability for constitutional violations committed by subordinate employees, plaintiffs must show that the supervisor act[ed], or fail[ed] to act, with *deliberate indifference* to violations of others' constitutional rights committed by their subordinates." *Parker v. Blackwell*, 23 F.4th 517, 522 (5th Cir. 2022) (emphasis and alterations in original)

[3] When a party makes a claim against a person in his official capacity, that is "only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165-166 (1985) (citation and quotation marks omitted). Thus, Mr. Pena's official capacity claim against Sheriff Gonzalez is actually a claim against Harris County.

(citing *Wernecke v. Garcia*, 591 F.3d 386, 401 (5th Cir. 2009); see also *Porter v. Epps*, 659 F.3d 440, 446 (5th Cir. 2011).

"'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Connick v. Thompson*, 563 U.S. 51, 61 (2011), (quoting *Board of the County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 410 (1997)). "For an official to act with deliberate indifference, 'the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'" *Smith v. Brenoettsy*, 158 F.3d 908, 912 (5th Cir. 1998) (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)).

Mr. Pena failed to provide evidence that would create a genuine issue of material fact on this issue at the district court, and he failed to identify any error on appeal. Even assuming he had met the statute of limitations deadline, the claims against Sheriff Gonzalez were still properly dismissed.

C. Mr. Pena failed to state a denial of medical care claim.

Mr. Pena also failed to state a claim for denial of medical care. To prove deliberate indifference to a serious medical need, Mr. Pena had a duty to show that Harris County Sheriff's Office jail officials were aware of facts from which an inference of substantial risk of serious harm could be drawn, that the officials actually

drew the inference, and that the officials disregarded the risk by failing to take reasonable measures to abate it. *Estate of Bonilla v. Orange County, Texas*, 982 F.3d 298, 305 (5th Cir. 2020).

Medical records establish that Mr. Pena was brought to the clinic several times after the incident to be treated for a pre-existing abscess on his lower back and that he never complained of his head or any other injury as a result of the incident. ROA.82-83 and Supplemental Record at SUP. ROA.13-22. Further, Mr. Pena admits that the Harris County Jail provided him with emergency surgery upon arrival at the jail for a different condition, and he has no apparent complaint about that treatment (although he believes he was placed in general population too soon). Appellant's Brief at 4.

Mr. Pena provided no medical records from any other facility after he was released from the Harris County Jail, no evidence he sought or received treatment in the free world related to this incident, and no evidence that anyone at the Jail was deliberately indifferent to his medical needs. Accordingly, Mr. Pena did not plead sufficient facts to state a claim for denial of medical care.

IV.
THE TRIAL COURT CORRECTLY DECLINED TO APPOINT COUNSEL TO MR. PENA

(See opinion at ROA.112-113.)

Mr. Pena does not appeal the district court's decision not to appoint counsel in this civil case. There is no automatic constitutional right to counsel in civil rights cases. *Baranowski v. Hart*, 486 F.3d 112, 126 (5th Cir. 2007). A court may be required to locate counsel for an indigent litigant if a case presents exceptional circumstances. *Naranjo v. Thompson*, 809 F.3d 793, 803 (5th Cir. 2015). However, none of those circumstances were present here.

The district court correctly found that Mr. Pena's civil rights claim was already time-barred when he requested counsel, and it is not unusually complex. ROA.112. Further, the district court found that Mr. Pena "demonstrated that he is adequately able to communicate and file pleadings with the Court." ROA.112.

CONCLUSION AND PRAYER

Appellees respectfully ask this Court to affirm the district court's judgment in its entirety, award costs, and for any other relief to which they are entitled.

Respectfully submitted,

/s/ Seth Hopkins

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CERTIFICATE OF SERVICE

I certify that on October 9, 2024, I filed a true and correct copy of the foregoing brief via the Court's CM/ECF system, which will automatically serve a copy on all parties' counsel. I further certify that I mailed a copy of this brief by certified and first-class United States mail to the following address:

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of FED. R. APP. P. 32(a)(7)(B) because, excluding the parts of the document exempted by FED. R. APP. P. 32(f), and 5th CIR. R. 32.1: this document contains 3,856 words.

2. This document complies with the typeface requirements of FED. R. APP. P. 32(a)(5), and 5th CIR. R. 32.1 and the type-style requirements of FED. R. APP. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Office 365 in 14-point Equity A.

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