NO. 18-20353
CONSOLIDATED WITH 18-20592

United States Court of Appeals for the Fifth Circuit

OTIS GRANT

Plaintiff–Appellant

v.

HARRIS COUNTY

Defendant–Appellee

Appeal from the United States District Court for the Southern District of Texas
in Case No. 4:16-CV-03529, the Honorable Kenneth Hoyt presiding
and Case No. 4:18-CV-01953, the Honorable Gray Miller presiding

PRINCIPAL BRIEF OF DEFENDANT-APPELLEE HARRIS COUNTY, TEXAS

A CIVIL PROCEEDING

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CERTIFICATE OF INTERESTED PERSONS

Appeal from *Otis Grant v. Harris County, Texas* United States District Court for the Southern District of Texas, No. 4:16-CV-03529, the Honorable Kenneth Hoyt presiding and *Otis Grant v. Harris County, Texas,* United States District Court for the Southern District of Texas, No. 4:18-CV-01953, the Honorable Gray Miller presiding

The undersigned counsel of record certifies that the following listed persons and entities as described in 5th Cir. R. 28.2.1 have an interest in the outcome of this case. These representations are made so the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 5th Cir. R. 28.2.3 and Fed. R. App. P. 34(a)(1), Appellee Harris County believes the facts and legal arguments in this appeal 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 application of law to the district courts' decisions to: (1) grant an unopposed motion for summary judgment, (2) deny a motion to amend final judgment where the movant failed to address any of the requirements of Federal Rule of Civil Procedure 59, (3) deny leave to file a Fourth Amended Complaint six weeks after the close of discovery when the purpose of the amendment was to add a new cause of action that had prescribed two years earlier, and the effect of the amendment would have been to reopen discovery and upset the trial date, (4) deny a motion for sanctions for spoliation when the moving party presented no evidence of spoliation and declined to conduct a forensic inspection when offered, (5) disallow trial witnesses who were not timely disclosed under Rule 26 or in discovery, and (6) dismiss a case under *res judicata* when the same claim had been adjudicated in another court.

The record clearly shows that the district courts acted well within their discretion on matters of settled law.

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RESPONSE TO STATEMENT OF JURISDICTION

A. Judge Hoyt had jurisdiction over Case No. 4:16-CV-03529.

Plaintiff-Appellant filed two lawsuits based on the same facts. The Southern District of Texas had federal question jurisdiction of the First Case (4:16-CV-03529) under 28 U.S.C. § 1331, which grants district courts "original jurisdiction of all civil actions arising under the…laws…of the United States." Plaintiff-Appellant's First Case was based on a 2013 EEOC charge which asserted claims under the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

B. Judge Miller properly recognized he did not have jurisdiction over Case No. 4:18-CV-01953.

After the First Case was dismissed, Plaintiff-Appellant filed a Second Case (4:18-CV-1953) based on the same EEOC charge. The Honorable Gray Miller properly recognized he had no jurisdiction over the Second Case because it was barred by the doctrine of *res judicata*. (ROA.18-20592.220-223.) Judge Miller also lacked jurisdiction over the Second Case because it was filed two years and four months after Plaintiff-Appellant received his 90-day right-to-sue letter from the EEOC and was, thus, barred by the statute of limitations.

RESPONSE TO STATEMENT OF ISSUES PRESENTED FOR REVIEW

Harris County respectfully disagrees with Plaintiff-Appellant's six Statements of the Issues and responds with Statements which more accurately reflect the issues before the Court:

1. Did the First Court properly grant Harris County's Motion for Summary Judgment under Rule 56 after Plaintiff-Appellant failed to respond and failed to show the existence of any disputed material fact?

2. Did the First Court abuse its discretion by finding Plaintiff-Appellant was not entitled to amend Final Judgment under Rule 59 when: (1) Plaintiff-Appellant failed to show manifest error or newly discovered evidence that could not have been raised before judgment was issued, (2) Plaintiff-Appellant failed to show good cause for being in default, (3) Plaintiff-Appellant failed to show the late-submitted evidence could have overcome summary judgment, (4) Harris County was not provided this evidence before Final Judgment, and (5) the late submission would have caused unfair prejudice to Harris County?

3. Did the First Court abuse its discretion by denying Plaintiff-Appellant leave to file a Fourth Amended Complaint to assert a prescribed Title VII claim six weeks after the close of discovery?

4. Did the First Court abuse its discretion by denying Plaintiff-Appellant's Motion for Sanctions for spoliation when there was no evidence of spoliation and Plaintiff-Appellant failed to accept Harris County's offer to allow a forensic examination of its computers?

5. Did the First Court abuse its discretion by instructing Plaintiff-Appellant he could not call trial witnesses who had not be disclosed under either Rule 26 or in discovery?

6. Did the Second Court properly dismiss Plaintiff-Appellant's Second Case on the basis of *res judicata*?

STATEMENT OF THE CASE

I.
INTRODUCTION

Plaintiff Otis Grant was a Harris County Juvenile Probation Department ("Center") Juvenile Supervision Officer ("JSO") who was fired on November 23, 2013 for using an unauthorized electronic device in a secure facility, falsifying a government document, and altering his supervisor's report to hide his misconduct. That was the second time in a year Grant was caught altering documents to cover up his dereliction of duty, and his eighth disciplinary infraction in 20 months.

Grant filed an EEOC charge alleging he was fired either because he had diabetes or because—two years earlier—he complained that a supervisor was discourteous to another employee. That employee was born outside the United States, and Grant asserted he was entitled to bring his *own* national origin claim on that employee's behalf. On February 17, 2016, Grant received a right-to-sue letter and chose to file an ADA case, but abandon the Title VII national origin claim.

As litigation proceeded, Grant's evidence and case theories became a moving target, and he continued to plead new claims even after Final Judgment. The district court[1] patiently entertained his drumbeat of spurious motions and late submissions. Ultimately, Grant was given two extensions before being ordered—six times—to

[1] "Court" or "district court" refers to proceedings in the First Case before the Honorable Kenneth Hoyt. "This Court" refers to the Fifth Circuit Court of Appeals.

respond to Harris County's motion for summary judgment. He failed to do so, and when given the opportunity, failed to clarify any misunderstanding he might have had about his deadline.

The Court granted the essentially unopposed motion for summary judgment 50 days after it was filed. Grant responded with a flurry of post-judgment motions and filed an entirely new case based on the same claims as his First Case. He spends much of his appeal arguing the merits of evidence submitted 28 days after Final Judgment, but he never explains why Rule 59 required the district court to consider this evidence at all.

II.
STATEMENT OF THE FACTS

A. Grant's most important job was to watch children and maintain an Observation Log.

The Harris County Juvenile Probation Department operates a Juvenile Probation Center that is responsible for assuring the safety of 500 children who have been remanded into custody because they pose a threat to themselves or others. (ROA.18-20353.1030.) An at-risk child can commit suicide in a matter of minutes, so Texas law strictly requires the Center to monitor these children at either 10 or 15 minute intervals while they are in their rooms and maintain a detailed Observation Log of their activities by recording: (1) the exact time (using a designated clock), (2) a code indicating what each child was doing at that exact time, and (3) the initials of

the officer observing the child at that time. (ROA.18-20353.1326.) Because children have escaped and committed suicide after JSOs had momentary lapses of attention, a JSO's most important job is to monitor these children and maintain accurate Observation Logs. (ROA.18-20353.1030-1031, 1167, 1326.)

B. Grant repeatedly took off his shoes at work, slept on duty, bullied coworkers, missed shifts without warning, and neglected children.

Otis Grant's supervisors ranked him among the Center's worst employees and repeatedly caught him sleeping on the job and falsifying Observation Logs—two activities that placed children at risk.[2] Grant's co-workers frequently complained about him and avoided working with him. (ROA.18-20353.1272.) In 2008 and 2009, Grant's performance reviews indicated he needed to "pay more attention to detail when filling out observational checklists." (ROA.18-20353.1124-1126.) On April 17, 2010, Supervisor Placido Solis twice caught Grant failing to monitor children in his care. (ROA.18-20353.1127-1128.)

On December 10, 2011, Grant defiantly took off his shoes and propped his bare feet on a table while on duty. He was counseled to keep his shoes on while

[2] ROA.18-20353.1116 ("…several times I have went upstairs and caught Mr. Grant either sleeping or falsifying documents…"); ROA.18-20353.1118 ("And that's why you can't be sleeping…suicides could happen."); ROA.18-20353.1120 ("sleeping on the job…I would walk up on him, touch him on the shoulder to make him wake up."); ROA.18-20353.1305 ("During my time supervising Grant, I frequently caught him sleeping at work…")

watching children.[3] On February 11, 2012, Grant once again put his bare feet on a table. (ROA.18-20353.1131-1133.) The next day, Grant fell behind on his Observation Logs, and Supervisor Anthony Samuel had to complete his logs for him. (ROA.18-20353.1133-1136.) On March 3, 2012, Supervisor Doris Phillips discovered Grant once again failed to supervise children in his care. (ROA.18-20353.1131-1133, 1305-1306.) On April 1 and 2, 2012, Grant stayed home from work without giving notice. (ROA.18-20353.1137-1139.)

C. In 2012, the Center modified its policies to better enforce Observation Log rules.

In 2012, the Center changed its policies to better comply with Texas law and accreditation standards. As part of these changes, the Center began better educating JSOs about maintaining accurate Observation Logs and more robustly monitoring and enforcing rules regarding these logs. Since 2012, every JSO has been required to sign an annual Agreement certifying he understands how to complete his Observation Logs and could be terminated for not doing so. This annual Agreement became a condition of employment. (ROA.18-20353.1036-1038, 1167-1168, 1188 at 131:3-13.)

Grant signed the Agreement on March 23, 2012 and again on July 29, 2013. (ROA.18-20353.1036-1038.) Both in 2012 and 2013, Grant promised that if he made

[3] ROA.18-20353.1129-1130. The March 10, 2012 Counseling Record inadvertently listed the offense on December 10, 2012—instead of 2011.

a mistake on his Observation Logs, he would "draw a line through the mistake" and "not write over the area to correct the mistake." *Id.* He also promised that if he failed to monitor a child's activity on schedule, he would complete an "exception report" explaining why he failed to follow procedures. Finally, Grant promised he would never record a time unless he viewed a child "at that actual moment," and acknowledged that if he recorded an incorrect time, he had "falsified that document." (ROA.18-20353.1036-1038, 1326.)

In both 2012 and 2013, Grant initialed in four places to signify: (1) "I have been notified of the attached listed new/revised procedures," (2) "They have been explained and I fully understand the above listed procedures and have been given the opportunity to ask questions," (3) "I have received a copy of the above listed procedures and I understand that violation of these procedures may lead to additional sanctions and/or including termination," and (4) "I will adhere to the above listed procedures." (ROA.18-20353.1036-1038.)

D. On October 29, 2012, Grant was suspended five days for falsifying Observation Logs and covering it up.

Rather than conform to these policies, Grant blatantly disobeyed them and tried to cover up his actions when caught. As explained, *infra*, Grant claims the Agreement was never binding on him, and he frequently argued with supervisors that he did not have to follow these rules.

On October 23, 2012, Supervisor Anthony Samuel noticed Grant had not completed his Observation Log. Samuel documented the lapse and marked a code "88/2" (indicating Grant's deficiency). After Samuel left, Grant retrieved the form and wrote in false times to make it appear he had watched the children. That was not only insubordination, but also a deliberate falsification of a government record. Grant does not dispute this. Though he could have been terminated and referred for prosecution, he was only suspended for five days and warned he would be fired for another violation. (ROA.18-20353.1031, 1140-1141, 1129-1130.)

E. On February 19, 2013, Grant was issued a Last Warning Letter for walking off the job and abandoning children in his care for 20 minutes.

Less than three months later, on January 13, 2013, Grant walked off the job and abandoned children in his care for nearly 20 minutes. This is an inexcusable offense that merits immediate termination, yet Grant was provided one last opportunity to save his job. He was given a Last Warning Letter which summarized some of his recent transgressions and stated in unequivocal terms: "***Mr. Grant, please note that this memorandum is your FINAL WARNING that any further violation of policy will lead to immediate termination***." (ROA.18-20353.1131-1133.) Grant signed the letter.

F. On October 29, 2013, Grant again falsified his Observation Log and altered a government document to conceal his fraud.

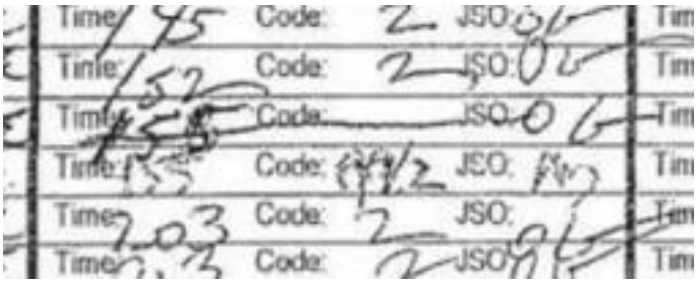
On October 29, 2013, Grant finally went too far. His only job was to sit in a chair, watch a high-risk child through a window, and record what the child was doing every 10 minutes. This is known as Constant Watch, and Grant admits he never had to stand or walk and did not require any type of accommodation. (ROA.18-20353.1089.) This was the most sedentary job available on the most sedentary shift at the Center. (ROA.18-20353.1033-1034.)

Rather than face the window into the child's cell, Grant pushed his chair and table back to evade the camera, then propped his foot on a chair to cover the window and block his view of the child he was supposed to be observing:

At 1:55 a.m., Supervisor Alfred Bryant was conducting his rounds when he noticed Grant's Log showed he had checked on the child at 1:58 a.m.—which was impossible, since that was *three minutes away*. In keeping with policy, Bryant pointed this out, put a line through Grant's entry, and made a new entry below,

showing the correct time of 1:55 and including the code "88/2", which signified an irregularity in Grant's Log. (ROA.18-20353.1143-1145.)

Grant might have still kept his job, except he committed one final act of dishonesty. The next day, Bryant noticed the Log had been altered in two ways. First, Grant changed "**1:58**" to "**1:55**" to conceal his own false entry. Second, Grant changed Bryant's code from "**88/2**" to "**99/2**". A code "99" means there was no error. These alterations can be clearly seen below:[4]



This serious misconduct violated nearly every term of the Agreement Grant signed in 2012 and 2013 and is strikingly similar to the fraud Samuel caught Grant committing a year earlier. Grant could no longer be trusted watching children, and all of his Observation Logs were suspect. (ROA.18-20353.1327.)

Before he was fired, a committee reviewed surveillance footage for any mitigating factors. Instead of exonerating Grant, the footage incriminated him by establishing when he altered the document and revealing that he was secretly using

[4] ROA.18-20353.1143-1145, 1320-1321.

a cell phone on duty and hiding it under a table.[5] The Center prohibits JSOs from using electronic devices within the secure portion of the facility, and JSOs have been terminated for doing so.[6] This was not an isolated incident, and during litigation, Grant produced dozens of audio and video files he surreptitiously recorded of his co-workers while on duty in the secure facility.

Grant provided no reasonable explanation for any of this. He disingenuously claimed an unspecified "*pen malfunction*" made him write the incorrect time,[7] admitted in discovery he frequently used his cell phone at work,[8] and never gave any excuse why Bryant's code was changed from "88" to "99." Grant committed insubordination of the highest order, and the Center had no choice but to fire him.[9]

G. Response to Grant's Statement of the Facts.

Much of Grant's Brief is inaccurate, unsupported, and based on a self-serving affidavit filed after Final Judgment was rendered. (ROA.18-20353.2276-2284.) The affidavit contains new allegations replete with hearsay, statements lacking

[5] ROA.18-20353.1032, 1143-1149, 1153 ("During the investigation, we noticed other discrepancies made by Mr. Grant…Having an electronic device on the floor, which was prohibited at the time."), 1160-1161, 1169-1170, 1328-1329.)

[6] ROA.18-20353.1175-1176, 1180-1185, 1301-1303.

[7] ROA.18-20353.1198-1199. Despite this "*pen malfunction*", Grant continued to use the same pen. On appeal, he claimed it was actually a "*clock malfunction*." (Appellant Brief at 12.)

[8] ROA.18-20353.1203-1204, Response to Request for Admission No. 5.

[9] ROA.18-20353.1030-1035, 1148-1149, 1153-1154, 1166-1174, 1325-1331.

foundation, and Grant's personal medical and legal opinions. While these inaccuracies are addressed in argument, a few are also identified below.

1. Grant misstated his disciplinary record and evaluations.

Grant suggests his disciplinary record consisted only of offenses "*which involved malfunctioning clocks or just human error*."[10] As discussed elsewhere, there is no evidence he was fired because of "malfunctioning" clocks or pens.

2. Grant never had an accommodation "revoked."

Grant has no evidence what his "*co-workers and supervisors began to notice*" about his physical condition prior to 2012. (Appellant Brief at 7.) Grant admitted he did not need or request an accommodation, and there is no evidence he had an ADA accommodation to his work rotation prior to 2012. There is certainly no evidence anyone "*revoked*" any accommodation as Grant claims on seven pages of his Brief. (Appellant Brief at 9, 14, 15, 29, 35, 38, 63.)

While Grant subjectively suggests his assignments were easier prior to 2012, he never quantifies this or explains how they changed or who changed them—except that he had to work a few times on the fourth floor in 2011. As discussed, *infra*, the Center briefly tried to assign him fourth floor rotations after he fell asleep and

[10] Appellant Brief at 12-13. Grant also infers Harris County concealed his 2010-2012 evaluations. (Appellant Brief at 7.) There were no evaluations in 2010-2012. After the Center revised its policies in 2012, evaluations resumed in 2013.

complained about his other assignments. (ROA.18-20353.1272.) When Grant complained about the fourth floor, he was moved from that assignment as well.

3. Grant admits he was never denied breaks.

While Grant suggests he had to wait "several minutes" when he wanted breaks (Appellant Brief at 10), he could only recall this happening once. Otherwise, he testified he was always provided 15-minute breaks when he demanded them. (ROA.18-20353.1054 at 122:23-25.)

4. Grant cannot testify that walking contributed to his diabetes.

Grant is not a medical doctor, but he opines that his "assignment to 4A…would prove detrimental to Grant's health" and walking on cement floors contributed to his chronic diabetes. (Appellant Brief at 11.) Grant has similarly accused the Court's rulings of contributing to his diabetes. (ROA.18-20353.1749 at fn. 2 and 2284 at ¶10.) Even a lay person knows walking does not cause or contribute to diabetes, and Grant has no basis to give these medical opinions.

5. Grant cannot expand his pleadings after Final Judgment.

When compelled to identify all incidents of harassment or retaliation in discovery, Grant could provide only seven examples. (ROA.18-20353.1313-1314.) After Final Judgment, Grant suddenly "remembered" "*twenty-two (22) incidents of harassment or adverse acts*" that he incorporates by reference. (Appellant Brief at 11.) Grant should not be permitted to expand his claim on appeal.

SUMMARY OF THE ARGUMENT

(Response to pages 13-19)

Each of Grant's six issues for review seeks to overturn rulings stemming from either a case deadline that Grant missed or a failed eleventh-hour plot to add new claims or evidence after the close of discovery. Grant's counsel brazenly endorsed these tactics and professed her right to withhold evidence "…***all the way up to trial***…" (ROA.18-20353.715-716. *See also*, ROA.18-20353.119-239, 318-338, 650-723, 871-890.)

Harris County produced 4,327 pages of documents and assisted in scheduling depositions for eight current or former County employees,[11] including apex witness Thomas Brooks, executive director of the Harris County Juvenile Probation Department.[12] These depositions often ended in chaos. For example, while Grant complains that Anthony Samuel was "*very hostile*" during his deposition (Appellant Brief at fn. 2), he neglects to mention that Grant's counsel deposed Samuel well into the night while invoking the judge's name and threatening at least seven times to have this unrepresented man sanctioned. She demanded his banking information,

[11] Grant unilaterally noticed depositions on two days' notice, double-booked depositions, canceled without notice, and scheduled on days he knew Harris County's counsel had hearings. Still, Harris County went to great lengths to accommodate Grant's demands. (ROA.18-20353.341-351, 496-537.)

[12] Harris County was forced to file an emergency motion to quash because Grant would not withdraw his notice while Brooks was hospitalized following emergency brain surgery. (ROA.18-20353.496-537.) Grant accused Brooks of faking and demanded his medical records. When the deposition later occurred, Grant's counsel belittled Brooks' illness and threatened sanctions because Harris County's counsel did not know the clinical details of his condition

accused him of writing "hot checks", attempted to collect a personal debt from him during the deposition, and falsely accused him of physically intimidating her. Samuel was so uncomfortable that he asked to change seats. (ROA.18-20353.1455-1471.)

When Harris County tried to depose Grant, his counsel filibustered by interrupting an astonishing ***617 times*** in seven hours. She coached her client, accused opposing counsel of "***retaliation***" for asking questions, attacked a paralegal for looking in her direction, and testified the entire time. Under his counsel's tutelage, Grant could "***not recall***" answers to ***91*** of the most fundamental questions about his case. (ROA.18-20353.1345-1347.) Not surprisingly, Grant did recall many of these answers in his post-judgment affidavit.

This type of pervasive conduct prompted the discovery disputes that have blossomed into the appellate issues now before this Court. Each ruling being appealed is summarized in chronological order below.

A. The Court properly struck Grant's untimely witnesses.

Only 11 days before the close of discovery, Grant amended his Rule 26 disclosures and added six new trial witnesses without providing the required contact information or explaining who they were, what information they had, or why they

were not timely disclosed.[13] Four of the witnesses were struck, but Grant defied the Court and served a second "First Amended Rule 26 Disclosures" that not only added back the witnesses, but then brazenly added ***two more*** completely new witnesses never mentioned in the case. (Grant ROA.20353.572-575.)

The point is moot, since the case never went to trial. Still, Grant appeals the ruling that he disregarded and accuses the Court of being "*drastic and punitive*." (Appellant Brief at 57.) This is the basis for Grant's fifth issue for review.

B. The Court properly denied Grant's spoliation motion because he had no evidence of spoliation and skipped his appointment to inspect Harris County's computers.

Once discovery was complete, Grant accused Harris County of spoliation and tried to have summary judgment denied outright.[14] After a day of testimony and a forensic computer examination, there was absolutely no evidence of spoliation. Grant was invited to conduct his own investigation of Harris County's computers, but never showed up at the agreed time. (ROA.18.20353.1735-1743.) Grant's fourth issue for review is that he was denied the opportunity to attend an inspection he skipped.

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[13] ROA.18-20353.283-300 (Motion); ROA.18-20353.365-369 (Response); ROA.18-20353.422-428 (Reply); ROA.18-20353.433 (Order).

[14] ROA.18-20353.930-968 (Motion); ROA.18-20353.1333-1476 (Response); ROA.18-20353.1477-1500 (Reply); ROA.18-20353.1586-1621 (Harris County's expert reports); ROA.18.20353.1735-1743 (Filing explaining how Plaintiff's expert failed to appear for the inspection.)

C. The Court properly denied Grant's motion to add an abandoned Title VII claim after the discovery deadline.

On the day his summary judgment response was due, Grant sought leave to file a Fourth Amended Complaint and resurrect an abandoned Title VII claim.[15] This would have reopened discovery and upset all remaining deadlines. The Court denied Grant's motion because it was it too late to amend under Rules 15 and 16 and the statute of limitations had expired on Grant's Title VII claim. This ruling forms the basis for Grant's third issue for review.

D. The Court properly granted Harris County's unopposed motion for summary judgment.

During the hearing on Grant's spoliation motion, the Court ordered Grant to respond to the pending motion for summary judgment by "next weekend" (March 2, 2018) and identified the exact issues it wanted Grant to address. (ROA.18-20353.2626-2627.) Grant ignored this deadline, and the Court waited until 50 days after summary judgment was filed before granting the essentially unopposed motion. Grant incorrectly claims the Court "*refused to permit Grant to respond to the motion for summary judgment*." (Appellant Brief at 17.) This ruling forms the basis for Grant's first issue for review.

[15] ROA.18-20353.1552-1585 (Motion); ROA.18-20353.1644-1650 (Response); ROA.18-20353.1651-1662 (Reply); ROA.18-20353.1667 (Order).

E. The Court properly denied Grant's Motion to Amend Final Judgment.

After Final Judgment, Grant filed an angry Motion to Amend attacking both counsel and the Court. Although Grant's central issue on appeal is that the district court should have considered his late summary judgment evidence and amended the judgment, Grant did not explain how he met his Rule 59 burden of showing manifest error of law or newly discovered evidence that could not have been presented before judgment was signed.[16] The Court denied the Motion to Amend, which forms the basis for Grant's second issue for review.

F. Grant's Second Case was properly dismissed as *res judicata*.

After the Court held Grant waited too long to bring his Title VII claim and denied his motion to file a Fourth Amended Complaint, Grant filed a Second Case in which he alleged he had a right to bring the Title VII claim in 2018 because of a typographical error in his 2016 right-to-sue letter. Although Harris County also pointed out that the Second Case should be dismissed because the statute of limitations expired, the Second Court granted summary judgment under the doctrine of *res judicata*. This forms the basis for Grant's sixth issue for review.

[16] ROA.18-20353.1747-2517 (Motion); ROA.18-20353.2519-2529 (Response); ROA.18-20353.2530 (Order).

ARGUMENT

I.
RESPONSE TO GRANT'S STANDARDS OF REVIEW

Grant correctly states the standards of review, with the following exceptions. Summary judgment is reviewed *de novo*, but only as to evidence before the court when judgment was rendered. Grant presented no evidence opposing summary judgment, despite having been given two extensions and a direct order to respond. Under Rule 56(e), the Court was permitted to consider Harris County's facts undisputed and grant summary judgment, since Grant did not attempt to meet his burden of demonstrating an issue of fact through competent summary judgment proof. *Lindsey v. Sears Roebuck & Co.*, 16 F.3d 616, 618 (5th Cir. 1994).

Grant's summary judgment evidence was attached to a Motion to Amend Final Judgment. The decision to even consider untimely summary judgment evidence is reviewed for abuse of discretion, and the district court's decision and decision-making process need only be reasonable. *Luig v. N. Bay Enterprises, Inc.*, 817 F.3d 901, 905 (5th Cir. 2016).

While Grant asserts his motion for leave to file an amended complaint is analyzed under Rule 15, it must first be analyzed under Rule 16, because it was filed six weeks after the close of discovery and required a showing of good cause to modify the scheduling order. *S&W Enterprises, L.L.C. v. SouthTrust Bank of Alabama, NA*, 315 F.3d 533, 536 (5th Cir. 2003).

II.
THE DISTRICT COURT PROPERLY GRANTED HARRIS COUNTY'S MOTION FOR SUMMARY JUDGMENT AFTER GRANT FAILED TO RESPOND FOR 50 DAYS

Under Federal Rule of Civil Procedure 56(a), "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to material fact and the movant is entitled to judgment as a matter of law."

On January 29, 2018, Harris County filed a detailed Motion for Summary Judgment (ROA.20353.970-1026). Grant was given two extensions, but failed to respond. Under Rule 56(e), if a party does not address another party's assertion of fact, the court may consider the facts undisputed or grant summary judgment. Further, if the movant points to an absence of evidence, the burden shifts to the non-movant to demonstrate an issue of fact through competent summary judgment proof. If the non-movant fails to meet that burden, summary judgment is appropriate. *Lindsey v. Sears Roebuck & Co.*, 16 F.3d 616, 618 (5th Cir. 1994).

On March 20, 2018—50 days after the motion was filed—the district court rendered Final Judgment. Focusing on Grant's own testimony, it provided a well-reasoned analysis of the undisputed evidence and concluded:

(1) Grant failed to respond to the motion for summary judgment.

(2) Grant's retaliation claim was not based on his disability, but on a Title VII national origin charge that Grant allowed to lapse.

(3) Grant failed to establish he was disabled.

(4) Grant failed to request any reasonable accommodation.

(5) Grant was already accommodated with a "light duty" job.

(6) Grant's termination was not "by reason of a disability of impairment" and Harris County's reasons for terminating Grant were valid and non-discriminatory and would support summary judgment—even if Grant had met his burden of establishing a *prima facie* case of discrimination.[17]

On appeal, Grant attacks the merits of this Judgment as if it had been timely briefed. However, Grant may not argue the merits until he establishes the Court abused its discretion by not considering his late submission.

III.
THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY FINDING GRANT WAS NOT ENTITLED TO AMEND FINAL JUDGMENT

On April 17, 2018, Grant filed a Motion to Amend Final Judgment which sought reconsideration of summary judgment. A motion to amend "calls into question the correctness of a judgment." *In re Transtexas Gas Corp.,* 303 F.3d 571, 581 (5th Cir.2002). It is an extraordinary remedy to be used sparingly, and it is not the proper vehicle to rehash evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment. *Simon v. United States,* 891 F.2d 1154, 1159 (5th Cir.1990). Rule 59(e) "serve[s] the narrow purpose of allowing a

[17] ROA.18-20353.1680-1686.

party to correct manifest errors of law or fact or to present newly discovered evidence." *Waltman v. Int'l Paper Co.,* 875 F.2d 468, 473 (5th Cir.1989).

A. The district court was not required to consider Grant's untimely evidence because Grant had no good reason for being in default.

There are two possible standards of review when a district court grants summary judgment and is presented with new evidence in a motion to amend. When the court considers the new evidence and still grants summary judgment, the decision is reviewed *de novo*. However, if it is unclear whether the district court considered the new evidence, this Court reviews for abuse of discretion. *Luig v. N. Bay Enterprises, Inc.*, 817 F.3d 901, 905 (5th Cir. 2016).

There is no indication the district court considered the material attached to Grant's Motion to Amend, and the decision to deny Grant's motion is reviewed for abuse of discretion. Under this standard, the decision need only be reasonable. *Templet v. HydroChem Inc.*, 367 F.3d 473, 477 (5th Cir. 2004).

Courts consider four factors in determining whether to consider summary judgment evidence presented for the first time in a motion to amend: (1) the reason for the moving party's default, (2) the importance of the omitted evidence to the moving party, (3) whether the evidence was available to the non-movant, and (4) the likelihood that the non-moving party will suffer unfair prejudice if the case is reopened. *Id.*

This Court has held "an unexcused failure to present evidence available at the time of summary judgment provides a valid basis for denying a subsequent motion for reconsideration." *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004). In the *Templet* case, plaintiffs argued they missed their response deadline because their attorney abandoned them. This court held that was not good cause. Similarly, courts have found no good cause to miss deadlines due to a malfunction in the Court's electronic case filing system, *Fox v. Am. Airlines, Inc.*, 389 F.3d 1291, 1294 (D.C. Cir. 2004) or failure to calendar deadlines, *Cromartie v. D.C.*, 806 F. Supp. 2d 222, 227 (D.D.C. 2011).

Grant claims he failed to respond to summary judgment because he misunderstood the Court's order to respond and believed he had already prevailed without having to file a response.[18] Grant's selective recitation of facts omits several very important rulings discussed below.

As the dispositive motion deadline approached, Grant expressed concern that Harris County would prevail on summary judgment (ROA.18-20353.1340.) Days before the dispositive motion deadline, Grant filed a Motion for Sanctions for Spoliation in which he demanded that the district court "deny any dispositive motion

[18] Appellant Brief at 17. Actually, Grant makes the less plausible argument that the Court "forgot" it ruled on summary judgment.

filed by Defendant" and order Harris County to pay him $28,000. (ROA.18-20353.934.)

The Court took these allegations seriously, believed Harris County may have manufactured documents to alter the outcome of the case, and was upset with the "fever pitch" of discovery motions. (ROA.20353.2573.) The Court ordered a hearing on the spoliation claim to assure Grant was not denied access to information and explained, "I don't want anyone to leave here feeling that they have been cut off simply by a motion practice and not being able to present their case in chief." (ROA.18-20353.2573.) The Court then announced it would deny summary judgment and "enter a short order on that sometime later on." (ROA.18-20353.2577.)

After conducting the evidentiary hearing, the Court realized Grant was not denied evidence and the case was in a position to move forward. It reserved the right to "[w]ithdraw my order and look at that [summary judgment] more carefully because I haven't looked at it that carefully." (ROA.18-20353.2627.)

The Court reminded Grant's counsel that her summary judgment response was already a day late and gave her a second extension until the following weekend. The Court helped narrow the issues by explaining, "…I'm concerned about whether or not the plaintiff has, by his deposition, supported or destroyed his cause of action." (ROA.18-20353.2622-23.) The Court further clarified:

> THE COURT: Now, as far as the summary judgment is concerned, the part that I was referring to that concerns me, because I have had to read some things, is whether or not Mr. Grant has in his – in the question and answering regarding what we know to be the claim before the Court now, whether or not that cause of action has been invalidated by his testimony. Sometimes people get up and will say the darnedest things.[19]

Grant's counsel promised she would respond by the following weekend and suggested that Grant—who had just been discredited on the stand—would submit an affidavit. The Court, clearly concerned that Grant would submit a sham affidavit prepared by counsel, cautioned:

> THE COURT: I don't need his declaration because I have his sworn testimony, and his declaration cannot be—cannot create a fact issue. You cannot testify to one thing is what I'm saying and then create an affidavit that conflicts with that and expect me to believe either document. That is zero gain there.
>
> MS. PLANTE-NORTHINGTON: I understand that.
>
> THE COURT: So what I'm saying is what you need to respond to in the motion for summary judgment is the question of whether or not the ADA claim is still a viable claim in light of his testimony, because I believe they have attached testimony specifically on that point. Am I correct, Mr. Hopkins?
>
> MR. HOPKINS: Yes, Your Honor.
>
> THE COURT: That's the part of the summary judgment motion that I want you to respond to. That's the only portion.
>
> MS. PLANTE-NORTHINGTON: If the ADA is a viable claim?
>
> THE COURT: The ADA claim is his claim, right?

[19] ROA.18-20353.2624.

> MS. PLANTE-NORTHINGTON: The ADA claim, yes, and the spoliation.
>
> THE COURT: And what?
>
> MS. PLANTE-NORTHINGTON: The ADA claim is his claim...
>
> …
>
> THE COURT: I want your response to what I'm trying to tell you. I want that by the end of next week.[20]

The Court admonished that it did not want any more "delays" and would enforce this deadline. The Court explained once again it may have "overdone it" by denying summary judgment and would read the parties' briefs carefully:

> THE COURT: You know what I'm looking for. He [Harris County] has already filed his motion for summary judgment, and that's the only portion of his summary judgment motion that in the Court's opinion I need to make sure that I have not overdone it by denying it. Because the denial of it is a general denial, but when I look at whatever he says, that Hopkins says—and he is citing to the testimony of Mr. Grant—then I need to make sure there is some evidence that either creates a disputed fact issue or not.[21]

The Court accepted questions from the parties, and again clarified: "I need a response by the end of next week on that [summary judgment] from plaintiff's counsel…" (ROA.18-20353.2626.) Grant's counsel once again confirmed she understood exactly what was expected:

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[20] ROA.18-20353.2624-2626.

[21] ROA.18-20353.2626.

> MS. PLANTE-NORTHINGTON: I just want to understand what I'm supposed to be writing on, the ADA claim and whether it is a viable claim or what?
>
> THE COURT: Whatever he says in his motion for summary judgment about the ADA claim and specifically referring to your client's testimony is what you need to respond to...
>
> MS. PLANTE-NORTHINGTON: Okay.[22]

Twice more, the Court confirmed it wanted to read the parties' briefs and would withdraw the denial of summary judgment if Grant's testimony undermined his ADA claim. Yet again, the Court ordered counsel to file a response by the following weekend:

> THE COURT: ...You have got the depositions. You look at the depositions, and you tell me whether or not his testimony undermines and destroys his ADA claim. That's all I'm asking. Because if he does, then my – if he does, I'm going to withdraw the summary judgment motion and look at that more carefully. That's all I'm saying. Withdraw my order and look at that more carefully because I haven't looked at it that carefully...
>
> MS. PLANTE-NORTHINGTON: So you are saying my client is prohibited from giving a declaration that doesn't even—
>
> THE COURT: You are making this up as you go along. I haven't said your client is prohibited from doing anything. I said I don't need one from him. But if you want to do one, that's fine. But I have just got to have all of that by next weekend. Okay?[23]

[22] ROA.18-20353.2626-2627.

[23] ROA.18-20353.2627.

The Court kept its promise. That evening, it entered a minute entry ordering: "Plaintiff's response to MOTION for Summary Judgment is due by next weekend." (ROA.18-20353.10 at Doc. 86.) The following day, it entered the order denying summary judgment. (ROA.18-20353.10 at Doc. 87, 18-20353.1622.) Grant failed to comply with the Court's directive or clarify any confusion he may have had. Instead, he relied on the conditional order that the Court had just told him was being reviewed and possibly withdrawn.

On March 19, 2018—a month after Grant's original deadline and 17 days after the Court's final extension—Harris County moved for reconsideration of summary judgment. (ROA.18-20353.1669-1679.) Grant's counsel acknowledged receiving the motion, but rather than address it or request additional time, she sent an accusatory email to counsel and the Court. (ROA.18-20353.2521 at fn. 4.) The Court waited one more day before issuing a detailed opinion granting summary judgment based largely on Grant's own testimony. (ROA.18-20353.1680-1687.)

On April 17, 2018, Grant moved to amend Final Judgment with an angry attack on both the Court and opposing counsel, who he identified by name and repeatedly called a "*liar*." (ROA.18-20353.1772, fn. 8, 1777.)

Grant did not even attempt to show manifest error of law or newly discovered evidence and never analyzed the factors required under Rule 59 to reopen a case and amend judgment.

Instead, Grant complained he spent "*too much time and money*" to lose this case. (ROA.18-20353.1749, fn. 2.) His counsel claimed she had personal standing to amend her client's judgment because it was a "*blemish*" on her reputation, and she took "*exception with the way the court made her appear*." (ROA.18-20353.1750.) She further boasted that she never missed a motion deadline in her "*almost 21 years of practice*," although that was false.[24] Grant never even attached a proposed order or explained how he wanted to amend the Judgment.

B. The district court was not required to amend Final Judgment because Grant's late evidence is largely inadmissible and would not overcome summary judgment.

Having established that Grant had no good cause for being in default, the second factor to determine whether to consider untimely summary judgment evidence is the importance of the omitted evidence to the moving party. The lynchpin of Grant's untimely evidence is precisely the kind of self-serving affidavit the Court advised him not to submit.

Grant's affidavit is based largely on hearsay, his personal medical opinions and legal conclusions, allegations he never disclosed in discovery (despite being compelled to do so), and references to people never disclosed in discovery. Grant even suggests the Court exacerbated his diabetes and caused him to go to the hospital

[24] ROA.18-20353.1750. Harris County identified deadlines Grant's counsel missed in this case and pointed out that she often interjected herself into clients' pleadings with false statements about herself to avoid sanctions and adverse rulings. (ROA.18-20353.2522-2523,fn. 7.)

for "swelling, pain, and a very large blister on my foot."[25] Even if this evidence had been considered, it would not have changed the outcome of Grant's case because it fails to create a genuine issue of material fact as to his ADA claims.

C. The omitted evidence could not have supported a discrimination claim. (Response to Pages 22-33 of Appellant's Brief)

The first of Grant's four ADA claims is that he was terminated "because of his diabetes and diabetic manifestations." (Appellant Brief at 22.) To survive summary judgment, Grant had to establish he was qualified to perform the essential functions of a JSO but fired on account of his diabetes. This can be done with direct evidence or through the *McDonnell Douglas* test. *EEOC v. LHC Grp., Inc.*, 773 F.3d 688, 694 (5th Cir.2014), *citing McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

Grant never suggests there was "direct evidence" of discrimination because he does not allege he was subjected to workplace comments (1) related to his disability, (2) in proximate time to his termination, (3) made by an individual with authority over him, and (4) related to his termination. *Rodriguez v. Eli Lilly & Co.*, 820 F.3d 759, 764 (5th Cir. 2016).

Under the *McDonnell Douglas* test, the omitted evidence needed to establish he (1) had a disability, (2) was qualified for the job, and (3) there was a causal

[25] ROA.18-20353.1749 at fn. 2 and 2284 at ¶10. Grant even included a 2018 photo of his foot to prove the Court's rulings caused his injuries.

connection between his termination and his disability. *Rodriguez v. Eli Lilly & Co.*, 820 F.3d 759, 764 (5th Cir. 2016). To prove this causal connection, a plaintiff does not have to show disability was the sole reason for termination, but he must prove it was a "determinative influence on the outcome." *Pinkerton v. Spellings*, 529 F.3d 513, 519 (5th Cir. 2008).

Even if Grant had met this burden, Harris County could rebut the presumption of discrimination by articulating a legitimate business reason for Grant's termination. *E.E.O.C. v. LHC Grp., Inc.*, 773 F.3d 688, 701 (5th Cir. 2014). The burden would have shifted back to Grant to establish every reason was a pretext for discrimination. *Id.* at 702.

1. Disability.

Addressing each of the *McDonnell Douglas* factors in turn, Grant provided no briefing and few facts about his condition prior to Judgment, except to allege his feet hurt once or twice per month. He designated no expert to testify about his subjective, episodic condition, and as discussed, *infra*, rebuked Harris County's attempts to engage in an interactive process to understand his condition.

On December 28, 2018, Disability Rights Texas submitted an *amicus* brief on the narrow issue of the "definition of disability." Harris County does not dispute the *amicus* analysis on this narrow topic and will not make any argument on appeal regarding the first *McDonnell Douglas* factor. On the whole, the *amicus* brief

reinforces Harris County's position. Though the mission of Disability Rights Texas is to advocate for those with disabilities, the organization declined to support any of Grant's other positions and did not recommend reversing summary judgment.

2. Grant could not have shown he was qualified to be a JSO because he disavowed his obligation to maintain accurate Observation Logs and falsified two government documents.

Grant's second burden under *McDonnell Douglas* was to prove he was "otherwise qualified" to perform the essential functions of his job. This Court gives great deference to an employer's judgment of what constitutes an essential job function, and a job description "shall be considered evidence of the essential functions of the job." An employee's assessment of his own job functions are given little to no weight. *Credeur v. Louisiana*, 860 F.3d 785, 792-93 (5th Cir. 2017).

Grant's only basis for claiming he was qualified is that he previously received "satisfactory" performance evaluations. (Appellant Brief at 28.) That overlooks several facts. As noted, Grant was admonished in 2008, 2009, and 2010 for failing to monitor children and maintain Observation Logs (ROA.20353.1124-1126), and between 2010 and 2013, he was disciplined by at least four supervisors for progressively more serious offenses. (ROA.20353.1168-1169.)

As noted, in 2012, the Center adopted new policies for maintaining Observation Logs and required every JSO to sign an annual Agreement promising

to honor these policies. As former Superintendent Aaron Beasley testified, "[s]igning this Agreement was a requirement of Grant's job, since it reflected his promise to comply with the most fundamental responsibilities of his job." (ROA.18-20353.1326.)

On March 23, 2012, Grant refused to sign the Agreement and was fired. He pleaded for his job back, and "[o]ur staff allowed him to belatedly sign this Agreement and gave him his job back." (ROA.18-20353.1168; ROA.18-20353.1043-1045 at 34:24-36:18.) The Center had no obligation to re-hire Grant after he refused to agree to the most basic requirements of his job, and its willingness to take him back eviscerates Grant's claim that anyone was trying to "build a case" to fire him because he had diabetes.

Though Grant signed the Agreement, he openly claimed he had no obligation to comply with the Observation Log policies. He maintains—to this day—they were not binding on him because he signed the Agreement "***under duress***." (ROA.18-20353.1084-1085 at 242:4-243:25.) It is well established that an employee can be fired for refusing to agree to follow workplace policies. *See, Davis v. Ockomon*, 668 F.3d 473, 478 (7th Cir. 2012). As Dr. Shelton explained, "[a]nyone who is not willing to unconditionally sign this Agreement is not qualified to work as a JSO." (ROA.18-20353.1168.)

Grant not only stated his opposition to the Observation Log policy, but actively resisted this policy at a time when the Center was conscientiously trying to improve training and enforcement to better comply with state law. As former Superintendent Beasley explained:

> Grant often claimed he did not understand the process for completing his Observation Logs. Specifically, he could not comprehend that there was a designated clock on each floor, and that, for the Observation Logs to be consistent, every Juvenile Supervision Officer on that unit must use the same clock. Grant wanted to use clocks from other units or his cell phone or watch. I repeatedly explained to Grant which clock to use, but he often argued with me and made it clear that he would not follow this basic rule.[26]

In the last year of his job, Grant graduated from careless offenses, such as failing to observe children, to egregious acts of fraud and insubordination documented by three different supervisors. As discussed, the two most serious offenses occurred on October 23, 2012 and October 29, 2013, when Grant was caught falsifying not only his own Observation Logs, but also the records of his supervisors.[27] Dr. Shelton describes this as "fraud on a level rarely seen at the Detention Center." (ROA.18-20353.1169.)

Former Superintendent Beasley explained that even one incident of fraud makes a JSO unqualified to hold his job because "he cannot be trusted to supervise children." (ROA.18-20353.1327.) Further, JSOs are sometimes called as witnesses,

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[26] ROA.18-20353.1327.

[27] ROA.18-20353.1140-1141, 1327.

and "if there is ever an incident requiring that he testify at trial, his credibility is subject to attack." *Id.* Contrary to Grant's representation, he was not "otherwise qualified" to hold the position of a JSO.

3. Grant claimed he could not meet the essential functions of a JSO.

In 2012, the Center also implemented new job descriptions for all JSOs based on U.S. Department of Labor exemplars. (ROA.18-20353.1167-1168.) A JSO is an "Essential Employee" who must frequently stand, stoop, bend, pull, and walk and be able to "stand/walk throughout the majority of the shift."[28] A JSO is a first-line responder in emergencies and must help fellow officers, restrain violent residents, and safeguard troubled children.

Dr. Shelton explained that unlike most businesses, the Center's staffing requirements are set by law. When JSOs use vacation, sick time, or encounter personal emergencies, traffic, inclement weather, and other unexpected events, other JSOs must work mandatory overtime, cover their positions, and remain flexible to meet emergent staffing needs. (ROA.18-20353.1167.) That is why JSOs rotate throughout the facility.

On September 1, 2012, Grant was presented with the new job description. Even after the debacle of being fired for refusing to sign the Agreement a few months earlier, he refused to sign the job description. Dr. Shelton noted, he "could have been

[28] ROA.18-20353.1283-1287.

terminated at that time." (ROA.18-20353.1168.) After some cajoling, Grant signed—but once again under protest. He wrote that his "*Doctor recommended light duty only*." (ROA.20353.1287.) Dr. Shelton was understandably confused, since three days earlier, Grant's doctor cleared him to work "*without restrictions*." (ROA.18-20353.1054-1055.)

Grant never explained this or produced the "light duty" doctor's note he claimed to have. (ROA.18-20353.1168, 1326.) The Center had no reason to believe Grant was physically unable to perform his job, but Grant claimed he could not meet a JSO's essential functions. *See, Marsh v. Terra Int'l (Oklahoma), Inc.*, 122 F. Supp. 3d 1267 (N.D. Okla. 2015) (employer permitted to terminate employee who claimed his disability prevented him from safely complying with new job standards applied to all employees).

4. Grant could not have shown a causal connection between his disability and termination.

Grant never even argues a causal connection between his disability and termination. Grant would have had to prove diabetes was a "determinative influence" on the Center's decision to fire him. *Pinkerton v. Spellings*, 529 F.3d 513, 519 (5th Cir. 2008).

Grant presented no evidence of this, other than wild speculation that his co-workers conspired with at least four supervisors, Superintendent Beasley, Dr. Shelton, Deputy Director Melissa Watson, and the County's human resources

department for two years to document his transgressions so they could fire him because he has diabetes. That is particularly implausible since Superintendent Beasley has diabetes, bears no animosity toward those with his condition, faces no discrimination, and has "no difficulty managing my condition while at work." (ROA.18-20353.1329.)

5. Even if Grant had stated a *prima facie* case of discrimination, he could never have shown pretext.

Even if Grant had presented timely evidence to meet his burden of proving a *prima facie* case, Harris County would have easily rebutted the presumption of discrimination by articulating the many legitimate business reasons for Grant's termination. *LHC Grp., Inc.*, 773 F.3d at 701. Not only **could** Grant be terminated, but he **had** to be terminated to protect children at the Center.

There is a legitimate business need to fire JSOs who falsify government documents,[29] abandon children, refuse to abide by policy, use cell phones in a secure juvenile facility, disrupt other employees, and engage in the vast scope of Grant's misconduct. Grant's termination letter identified four of the most serious transgressions in the previous year—the October 29, 2012 five-day suspension where Grant admits he falsified an Observation Log, the February 19, 2013 Final

[29] Falsification of a document, alone, is a legitimate reason to terminate an employee. *Rodriguez*, 820 F.3d 759, 766.

Warning for walking off the job and abandoning children, the October 29, 2013 falsification of an Observation Log, and the use of an electronic device at work.[30]

Assuming, *arguendo*, Grant's late evidence had been considered, and assuming, *arguendo*, it had stated a *prima facie* case, the burden would have shifted back to Grant to prove every one of these reasons was pretext for discrimination. *LHC Grp., Inc*., 773 F.3d at 702. "To carry this burden, the plaintiff must rebut each nondiscriminatory...reason articulated by the employer." *Rodriguez*, 820 F.3d at 765-66 (denying pretext where plaintiff did not contest two of the five reasons for termination).

That is a high burden. Grant needed to not only prove he was innocent of each transgression, but that the Center believed he was innocent. Pretext is more than a mistake on the part of the employer; it is a phony excuse. *Debs v. Northeastern Illinois Univ.,* 153 F.3d 390, 395 (7th Cir.1998). A court will not "sit as a super-personnel department that reexamines an entity's business decisions." *Dale v. Chicago Tribune Co.,* 797 F.2d 458, 464 (7th Cir.1986). The court simply determines "whether the employer gave an honest explanation of its behavior." *Id.*

One way to determine whether termination is pretext is to examine whether other employees were fired for similar reasons. Since implementing its new policies, the Center fired more than 300 employees—generally for conduct much less serious

[30] ROA.18-20353.1147-1149.

than Grant's. JSOs have been fired for: sleeping and falsifying an Observation Log (ROA.18-20353.1289-1290), sleeping (ROA.18-20353.1291-1292), tardiness (ROA.18-20353.1293), leaving children unsupervised (ROA.18-20353.1294), refusing to work in an assigned location (ROA.18-20353.1295), failing to report to an assigned location (ROA.18-20353.1296-1297), failing to report an altercation (ROA.18-20353.1298), leaving a post for 21 minutes and attempting to work in an area to which he was not assigned (ROA.18-20353.1299-1300), and using a cell phone at work (ROA.18-20353.1301-1303). In fact, as discussed, *infra*, Grant's own supervisor, Anthony Samuel, was fired after Grant accused him of taking a single picture in violation of the electronic devices policy. Grant was given an "exuberant amount of chances, opportunities…to get things together." (ROA.20353.1173, 1191-1192 at 131:14-132:9.)

Grant never identified other JSOs allowed to engage in such fraud and keep their jobs. Rather than respond to the reasons for his termination, he makes six irrelevant allegations that he claims support pretext. First, Grant alleges his Termination Letter and Last Warning Letter are invalid because Dr. Shelton did not initial them. (Appellant Brief at 30.) To support this, Grant cites a 1998 memo where a former director asked that letters of reprimand be initialed by an "appropriate deputy director" before being filed with Personnel (ROA.18-20353.2473).

Both letters were copied to Grant's personnel file and Deputy Director Melissa Watson (ROA.18-20353.2253, 2401). It is unclear why Grant believed Dr. Shelton needed to initial them, but he testified he approved of Grant's discipline and termination. Further, every other termination letter produced in discovery followed the same procedure. (ROA.18-20353.1089-1303.)

Second, Grant claims that because six months passed since he received his Last Warning Letter, he could not be fired for falsifying government documents. Grant supports this outrageous assertion with the same 1998 policy. That policy does not expunge Grant's disciplinary record or provide him with immunity to commit fraud—it simply prevented Grant from requesting a job transfer while on probation. (ROA.18-20353.2473.)

Third, Grant admitted falsifying his Observation Log in 2012, but he makes the absurd and unexplained claim that he did not falsify his Log on October 29, 2013 because he had a "*pen malfunction*" at 1:55 a.m. that caused him to report he had already completed his 1:58 a.m. observation.[31]

Grant never bothered to come up with an excuse for what happened next. After Supervisor Bryant documented Grant's error, Grant tried to cover it up by altering the Log to make "1:58" appear to be "1:55." He then altered Supervisor Bryant's

[31] Appellant Brief at 31. Grant's brief is not even internally consistent. Sometimes he blames a "*pen malfunction*" and other times, a "*clock malfunction*." Even on appeal, Grant is a moving target. (Compare Appellant Brief at 12 and 31.)

code "88/2" to read "99/2." (ROA.18-20353.1143-1145, 1320-1321.) That is very different from the other JSOs who "had a line or scratch-out and corrections earlier in the day." (Appellant Brief at 32.) Grant also makes no attempt to explain why he was using an unauthorized electronic device at work.

Fourth, Grant suggests that because he received a satisfactory performance evaluation on August 13, 2013, he was permitted to falsify his Observation Log two months later. (Appellant Brief at 32.) Not only is that ridiculous, but Grant's 2013 evaluation actually reinforces how recalcitrant he was. When his supervisors encouraged him to work on his communication skills, he used the "Comments" section to lecture them about their lack of ethics while stating, "I do not have a problem with authority." (ROA.18-20353.2485.)

Fifth, Grant claims a co-worker, Tikidra Batiste, "told an HR representative" [Owens] that Samuel singled him out for being late on his Observation Logs in 2011. (Appellant Brief at 33.) Grant cites a page of notes Owens took while interviewing Batiste about one of Grant's complaints in 2011 (ROA.18-20353.2509). Ironically, Grant moved for sanctions when Harris County produced this, and he took the position that Owens never interviewed Batiste and Harris County "manufactured these unsigned written statements to support its claim." (ROA.18-20353.930-931.)

Even if Owens' 2011 notes were not hearsay and had been timely filed, they are irrelevant, since Grant was not fired for his 2011 transgressions. In fact, there

could never be a causal link between these notes and Grant's termination because Samuel did not even work for the Center when Grant was fired and he had nothing to do with Grant's termination.[32] Further, the most salient part of these notes is the first sentence, which begins: "Ms. Batiste stated that she has not seen or witnessed Mr. Grant being discriminated or retaliated against from Mr. Samuel." (ROA.18-20353.2509).

Finally, Grant claims his termination was pretext because the Center believed he was not qualified to be a JSO due to his disability. As noted, *supra*, it was Grant who signed his job description "under protest" and said he could not meet the job's essential functions. As explained, *infra*, Grant also refused to engage in an interactive process to explain why he did not believe he could meet a JSO's essential functions. Harris County made an alternative argument in summary judgment that if Grant's representations were true, he would not have been qualified to work as a JSO.

None of this pettifogging has any bearing on the legitimate business reasons for Grant's termination. Even if Grant had timely submitted this evidence, he could not have made a *prima facie* case—much less rebutted every reason for termination to show pretext.

[32] Even when Samuel worked at the Center, he was not authorized to recommend termination. (ROA.18-20353.1117.)

D. The omitted evidence could not have supported a failure to accommodate claim.
(Response to Pages 33-36 of Appellant's Brief)

Grant's tardy evidence also could not have overcome summary judgment on his failure to accommodate claim. This Court holds an employee who needs an accommodation must inform his employer. *E.E.O.C. v. Chevron Phillips Chem. Co.,* 570 F.3d 606, 621 (5th Cir.2009). Then the employer and employee should "engage in flexible, interactive discussions to determine the appropriate accommodation." *E.E.O.C. v. Agro Distrib.,* 555 F.3d 462, 471 (5th Cir.2009). *See also, Williamson v. Clarke Cty. Dep't of Human Res.*, 834 F. Supp. 2d 1310, 1316 (S.D. Ala. 2011). (Employee stated he was disabled but was unclear about what accommodation was needed and never submitted a written request). *Patton v. Jacobs Eng'g Grp., Inc.*, 874 F.3d 437, 444-445 (5th Cir. 2017) (Employee must clearly link a specific disability with a specific request).

The plaintiff bears the burden of proving an available position exists that he is qualified for and can perform. He is not entitled to his preferred accommodation or to "choose what job to which he will be assigned." *Bleiweiss v. Panduit Sales Corp.*, No. CIV.A. H-13-0080, 2015 WL 163819, at *9 (S.D. Tex. Jan. 13, 2015).

1. Grant refused to explain his disability, identify the accommodation he wanted, or engage in an interactive discussion.

Grant never clearly explained his limitations and never suggested a reasonable accommodation.[33] He often filed "exception reports" filled with a rambling litany of complaints and excuses for his misconduct. Twice—on December 20, 2011 and March 6, 2012—the reports made vague reference to his feet hurting.

Grant's December 20, 2011 exception report is the first indication he might want an accommodation. In that document, he was gaming for a vacation and stated a "Just and Fair Solution" to his grievance would be to have Friday and Saturday nights off. (ROA.20353.1257.) The Center referred Grant's complaint to Erika Owens, an outside investigator.

On December 27, 2011, Assistant Deputy Director of Administrative Services Bianca Malveaux also followed up and attempted to engage in an interactive process with Grant. She met with him both in person and by phone. During these conversations, Grant admits he told Malveaux he did not want an accommodation.[34] Grant agreed to call Malveaux back if he changed his mind, but he never did.[35] This

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[33] Grant's intermittent FMLA paperwork indicated he had a sporadic foot condition "*one or two times per month*" which made it uncomfortable to stand for a "*prolonged*" period. He was permitted to stay home when that occurred, but never indicated he needed another accommodation. (ROA.20353.1047, 1049-1050 at 102:16-19 & 105:24-106:3.)

[34] ROA.18-20353.1203, Grant's Response to Request for Admission No. 4, where Grant claimed it was "harassment" to engage in an interactive process. *See also*, ROA.18-20353.1275.

[35] ROA.18-20353.1046 at 89:6-8 and ROA.18-20353.1276.

Court holds that when "responsibility for the breakdown of the 'informal, interactive process' is traceable to the employee," an employer "cannot be found to have violated the ADA." *Griffin v. United Parcel Serv., Inc.*, 661 F.3d 216, 224 (5th Cir. 2011).

2. The closest Grant came to requesting an accommodation was to ask for 15-minute breaks, which he admits he was always given.

A few months later, Grant asked his physician to write a note requesting 15-minute breaks to prop up his feet. He admits this is the first time his doctor ever recommended an accommodation.[36] Rather than provide the note to Malveaux, he gave it to an employee who had nothing to do with ADA accommodations. Grant admits the note was superfluous, since he was always allowed 15-minute breaks:

> Q. **But you were getting 15-minute breaks**, weren't you, Mr. Grant, when you needed them?
>
> A. **Yes**.[37]

Grant's own doctor did not advocate any additional accommodation and certainly did not advocate reassigning him to the control booth or any other more sedentary position. In fact, Grant's physician criticized him for not walking enough

[36] ROA.18-20353.1078-1079 at 212:23-213:4. Grant's physician wrote this note because he apparently believed Grant walked continuously all night without breaks.

[37] ROA.18-20353.1054 at 122:23-25. Grant complained only once about his breaks—a single incident on January 5, 2013 when he walked off the job without telling anyone. The Center responded by instructing all supervisors to give Grant priority when he wanted a break. (ROA.18-20353.1173.)

and recommended that he walk more.[38] Grant admits his doctor had a sound medical reason for this decision and "...doesn't want to lose his license, so he's the one who knows if this was needed for me or not." (ROA.18-20353.1080-1082 at 216:20-218:6.)

In 2013, Grant's doctor again mentioned (this time on an FMLA form) that Grant should have 15 minute breaks. Dr. Shelton noticed this and took the initiative to write Grant on July 11, 2013 to make sure he was receiving the breaks he needed and ask if he had any special requirements for when and where he took them.[39] Grant received the letter, but ignored it.[40]

While the Center could have considered this matter closed, Dr. Shelton pressed further and scheduled a meeting with Grant on August 6, 2013 to again try to discuss what accommodations Grant might need. Grant secretly recorded the meeting, but deleted parts harmful to his case.

In his haste to destroy evidence, Grant forgot to erase a portion of the tape where Dr. Shelton asked about his feet and suggested that they talk about an accommodation.[41] Grant's tape revealed that instead of engaging in an interactive

[38] ROA.20353.1210, Grant's Response to Request for Admission No. 44.

[39] ROA.20353.1171, 1277-1278.

[40] ROA.20353.1051-1056 at 111:18-24, 112:9-18, 119:6-8, 123:24-124:4.

[41] ROA.18-20353.1058 at 135:2-14, ROA.18-20353.1171.

process, Grant avoided it by changing topics to discuss his friends in the entertainment industry and how he wanted to write a school rap song.[42]

When Grant learned during his deposition that he inadvertently produced that part of the recording, he incredulously demanded that the clip be replayed three times. He broke down and admitted he had every opportunity to ask for an accommodation, but failed to do so.[43]

On November 3, 2017, the Court compelled Grant to answer Interrogatory 6 and identify "the exact accommodations that you requested." Other than mentioning FMLA (which is not part of this lawsuit) Grant did not identify a single accommodation request. (ROA.18-20353.1312-1313.) Grant resolved any doubt when he admitted he does not recall ever asking for an accommodation.[44]

3. Walking is an essential function of a JSO's job.

Grant was already working the easiest shift, and JSOs with short-term impairments requested his shift when they needed accommodations.[45] Unless there was an emergency or staffing shortage, Grant could be as sedentary as sitting in a chair and as active as walking down a hall every 15 minutes to check on children.

[42] ROA.18-20353.1065-1067 at 145:22-147:1; 1171.

[43] ROA.18-20353.1060, 1110 at 140:3-12 & 342:13-15.

[44] ROA.18-20353.1064 at 89:6-8; 1186 at 129:5-7.

[45] ROA.18-20353.1172. Grant acknowledged his shift was easy because the children he supervised were generally asleep. (ROA.18-20353.1075-1077 at 184:1-186:1)

He rarely walked more than a few minutes and took breaks as needed. (ROA.18-20353.1171-1172.)

After filing suit, Grant implied he wanted a job with no walking at all. Walking is an essential function of a JSO's job, and JSOs rotate between: (1) walking the floor every 15 minutes, (2) working the control booth, and (3) watching a particular child on a rotation known as Constant Watch. There are very few control booth rotations, and Constant Watch is only available when a child is suicidal or needs particular care. (ROA.18-20353.1172.) When a JSO has a short-term impairment, the Center tries to find these temporary rotations, but they are in short supply, and there are no permanent sedentary JSO jobs.[46]

As explained, the Center is mandated by law to maintain minimal staffing levels and often scrambles to find personnel to fill each position, particularly during emergencies and when JSOs are absent. This sometimes requires JSOs work as long as 16 hours per day and help each other. The fluid nature of staffing requires that each be prepared to fill emergent needs on a moment's notice.[47]

The ADA does not require the Center to change this arrangement, eliminate essential functions of a job, reassign existing employees, or "create a new job type" for Grant. *Toronka v. Cont'l Airlines, Inc.*, 411 F. App'x 719, 725 (5th Cir. 2011).

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[46] ROA.18-20353.1172, 1189 at 128:2-5. ("No, there's no JSO position that doesn't require walking.")

[47] ROA.18-20353.1031.

The ADA also does not require the Center to jeopardize resident or staff safety by lowering standards, causing other employees to work harder or longer, or assigning Grant a lighter load, because that would fundamentally alter the nature of the job.[48]

Grant has no basis to opine on what accommodations were available because he has no idea how JSOs were scheduled, what staffing challenges the Center had, what positions were available, or whether other JSOs were restricted to particular assignments. (ROA.1070-1073 at 164:11-167:21.)

4. Grant never had an accommodation "revoked."

Grant vaguely asserts that an unknown person gave him an unwritten, unspecified accommodation to work in an unknown location for an unknown reason, and that this was "revoked" by an unknown person around August, 2011. (Appellant Brief at 35.) There is no evidence of that. Grant's evaluations prior to 2012 establish he rotated like other JSOs and "worked in various capacities (supervising youth, laundry room, inventory, and central control)."[49] If Grant believed an informal accommodation was "revoked" by his co-workers, he had an obligation to clarify this with management. Dr. Shelton and Bianca Malveaux tried to understand what Grant wanted, but he refused to communicate with them.

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[48] *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1124-25 (10th Cir. 1995). The interpretive guidance to 29 C.F.R. §1630.2 does not allow courts to "second guess an employer's business judgment with regard to production standards…or require employers to lower such standards." Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. §1630.2(n).

[49] ROA.18-20353.1125-1126.

E. The omitted evidence could not have supported a claim for harassment. (Response to Pages 36-40 of Appellant's Brief)

Grant's untimely evidence would also have been insufficient to overcome summary judgment on his harassment claim. Grant would have needed to prove: (1) he belongs to a protected group, (2) he was subjected to unwelcome harassment, (3) the harassment was based on his disability, (4) the harassment affected a term, condition, or privilege of employment, and (5) the employer knew or should have known of the harassment and failed to take prompt, remedial action. *Patton v. Jacobs Eng'g Grp., Inc.*, 874 F.3d 437, 445 (5th Cir. 2017).

Grant also had to prove the harassment was so pervasive and severe that it altered the conditions of employment and created an abusive working environment. This is shown by the frequency of discriminatory conduct, its severity, whether it was physically threatening, or merely offensive, and whether it unreasonably interfered with the employee's performance. *Credeur*, 860 F.3d at 796.

An example of harassment is an employer intercepting an employee's phone calls and subjecting her to frequent humiliating, offensive, and vulgar sexual comments based on her HIV status. *Flowers v. S. Reg'l Physician Servs. Inc.*, 247 F.3d 229, 236-237 (5th Cir. 2001).

Conversely, it is not harassment to order an employee to attend meetings and sign job descriptions or agreements, criticize an employee's performance, provide a "Last Chance" letter, or threaten to terminate an employee. *Credeur*, 860 F.3d at 796.

Further, "petty slights, minor annoyances, and simple lack of good manners" are not actionable. *Stewart v. Mississippi Transp. Comm.,* 586 F.3d 321, 332 (5th Cir. 2009). Teasing, offhand comments, or isolated incidents rarely rise to the level of harassment, and an employee's "subjective physical and emotional reactions" to his employer's conduct "do not establish that the work environment would have been perceived as hostile or abusive by a reasonable employee." *Kumar v. Shinseki*, 495 F. App'x 541, 543 (5th Cir. 2012).

On November 3, 2017, Grant was compelled to answer Interrogatory 7 and "identify ***every*** instance" of harassment or retaliation by Harris County. Grant listed seven incidents, which were addressed in summary judgment.[50] On appeal, Grant identifies five of these incidents. First, he complains that in 2011, he was assigned to work on the fourth floor, which he perceived to be a difficult assignment. (Appellant Brief at 37-38.)

Supervisors rotated Grant throughout the facility, but he either complained about every assignment or was unable to do his job. For example, when Grant was assigned to work in the control booth, he offended his peers by taking off his shoes, propping up his feet, and sleeping. (ROA.18-20353.1272.)

Briefly in 2011, the Center tried to offer Grant rotations in Unit 4A, where he would not have to walk as much because it was smaller than other units and had only

[50] ROA.18-20353.1313-1314.

12 children. This also permitted Grant to work alone, where he was less likely to provoke his peers. *Id.* When Grant complained about this assignment, the Center continued to experiment with rotations to satisfy him. That is not harassment, had nothing to do with Grant's disability, did not affect a condition of his employment, and the Center tried to resolve his complaint.

Grant next complains Samuel "mocked" his disability on Facebook. Grant never disclosed this in discovery, but Harris County addressed it in summary judgment anyway. Grant accused Samuel of briefly posting (then deleting) a picture of an unidentified person's feet propped up to suggest he was sleeping at work. This unaltered image could only be seen by Samuel's friends on his private Facebook account. (ROA.18-20353.1173.)

Grant—who often slept at work with his feet propped up[51]—assumed he was the person in the image and filed a grievance against Samuel in July, 2013. Samuel's Facebook post appears to have been motivated by the fact that he repeatedly caught Grant sleeping on the job—not because Grant was supposedly disabled.[52]

Though he denied posting the picture, the Center immediately fired Samuel for suspicion of using an unauthorized electronic device at work. (ROA.18-20353.1035, 1173.) Grant sees no irony in being responsible for his supervisor's

[51] As noted, Samuel, Phillips, and Beasley repeatedly caught Grant sleeping at work.

[52] Samuel testified he did not even know Grant had a foot condition. (ROA.18-20353.1120 at 222:24-25.) ("I didn't know nothing about his personal issues or his health.")

termination for taking a single photo, when Grant unapologetically spent years secretly photographing and recording his coworkers.[53]

Harris County did not condone Samuel's action, and this photo of Grant sleeping at work did not affect a condition of Grant's employment. As soon as the Center learned of Grant's allegation, it took swift, strong action on Grant's behalf. That is not harassment.

Grant next claims he was harassed over an incident where Samuel "ordered Batiste to deny Grant access to the control booth." (Appellant Brief at 39.) On August 17, 2011, Grant abandoned his post and tried to force his way into a control booth where he admits he was not assigned to work and had no right to be.[54] Samuel, aware of Grant's propensity to force his way into the booth and concerned that he was bothering the female officer assigned to the booth that night, instructed that Grant was to remain at his post. (ROA.20353.1172-1173.)

It is not harassment to ask Grant to work where he is assigned and stay out of places he is forbidden, and Samuel's instructions had nothing to do with Grant's disability and did not affect a condition of Grant's employment.

[53] Grant defended making unauthorized recordings within a secure facility by claiming he had the right to do so because Texas is a "one-party state...and I can do that." (ROA.20353.1057 at 128:3-17.)

[54] ROA.20353.1069-1073 at 163:18-167:22.

Without elaboration, Grant claims it was also harassment to ask him to sign his job description and provide a few minutes' notice when he wanted to go to the bathroom so someone could relieve him. (Appellant Brief at 39.) Neither allegation satisfies the five elements required for harassment.

F. The omitted evidence could not have supported a claim for retaliation. (Response to Appellant's Brief at 40-44)

Grant's tardy evidence would also have failed to state a claim for retaliation for the same reasons it failed to state a claim for harassment. To prove a *prima facie* case of retaliation, Grant had to show (1) he engaged in activity protected by the ADA, (2) an adverse employment action occurred, and (3) a causal connection existed between the protected act and the adverse action. *Credeur*, 860 F.3d at 797.

Protected activity. It is unclear what "protected activity" Grant believes prompted his termination, since he refused to request an accommodation and has no apparent complaint about his FMLA. If Grant suggests he was fired in 2013 for complaining that Samuel discriminated against another employee in 2011, that also fails, because Grant abandoned his Title VII claim and Samuel could not have been responsible for Grant's termination in 2013, since he was not even working at the Center (after Grant got him fired).

Adverse employment action. It is also unclear what adverse employment action Grant is referring to. Employee warnings, write-ups, and notices of performance deficiencies are not adverse employment actions. *Credeur*, 860 F.3d

785, 798 (5th Cir. 2017). Grant references only two actual employment actions—his five-day suspension in 2012 for falsifying a government document and his 2013 termination. Grant conceded his 2012 suspension was justified, so any alleged harassment must be directly connected to his termination.

Causal connection. Because Grant never identified a protected act, he could not have shown causation. He vaguely implies that whatever protected activity he engaged in took place years before he was terminated, and suggests his own arguments are attenuated. (Appellant Brief at 42-43.)

Even if Grant's untimely evidence could have established a *prima facie* case of retaliation, Harris County would have defeated it by showing the many legitimate, non-retaliatory reasons for his termination discussed, *supra*. The burden would have shifted back to Grant to demonstrate pretext by defeating each of them and showing the adverse action would not have occurred "but for" the fact that the Center wanted to retaliate against him because he had diabetes. *Feist v. Louisiana, Dep't of Justice*, 730 F.3d 450, 454 (5th Cir. 2013). Grant's late submission contains absolutely no evidence of that.

G. Grant concealed most of this evidence.

Having addressed the first *Templet* factors by showing Grant had no good cause for his default and the omitted evidence was not important because it could

not have changed the outcome of the case, Harris County next points out that Grant deliberately concealed much of this evidence until after Final Judgment.

As noted, Grant's seven alleged incidents of harassment and retaliation ballooned to 22 incidents after Final Judgment, and his affidavit opined on legal and medical matters that were never disclosed. Grant's decision to withhold evidence strengthens Harris County's argument that it would suffer prejudice if the evidence were now considered.

H. Harris County would suffer prejudice if this litigation dragged on.

Grant has litigated every imagined slight since 2011. He received thousands of pages of confidential documents, deposed nine officials, threatened to rummage through the County's computers, and tied up 15 professional-level County employees for a spoliation hearing on a bogus claim. This consumed exponentially more of the County's time and resources than Grant's.

It is impossible to defend a case when the other side's evidence is in constant flux. Reopening this case would not only impose prejudice because of the cost, but also because Harris County would be essentially litigating against a phantom whose evidence shifts with the wind, and whose claims have no beginning and no end.

IV.
THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING LEAVE TO FILE A FOURTH AMENDED COMPLAINT TO ASSERT A PRESCRIBED CAUSE OF ACTION SIX WEEKS AFTER THE CLOSE OF DISCOVERY

Grant next claims the district court abused its discretion by not allowing him to file a Fourth Amended Complaint to add a Title VII claim six weeks after discovery closed.

A. Grant abandoned his Title VII claims.

As noted, in 2011, Grant claimed Samuel, an African American supervisor, was discourteous to an African-born employee. Grant is not African-born, and although the other employee filed no apparent grievance, Grant felt compelled to file a national origin charge on the man's behalf.

On February 17, 2016, Grant received his 90-day right-to-sue letter for his ADA and Title VII claims. (ROA.18-20353.1657.) On May 23, 2016, he filed suit only on the ADA claim. He amended on July 11, 2016 and November 18, 2016, but still pleaded only an ADA claim. The parties conducted extensive discovery on the ADA claim, but no discovery was propounded, no witnesses deposed, and no evidence acquired on the abandoned Title VII claim.

As discovery ended, Grant filed a Third Amended Complaint which expanded his ADA allegations. However, he promised he would add "no new causes of action in the amended complaint" and acknowledged that new claims would cause

"prejudice or unfair surprise which would require additional discovery." (ROA.18-20353.539-540.)

B. Grant changed his story to justify resurrecting the Title VII claim.

Grant waited until his response to summary judgment was due, then sought leave to file a Fourth Amended Complaint to assert (for the first time) the long-abandoned 2011 Title VII claim that he had just promised not to bring. Grant's excuse was:

> During the process of responding to Defendant's Motion for Summary Judgment, Counsel for Grant, Victoria Plante-Northington, discovered on February 19, 2018, that she had not pled a Title VII violation for retaliation and harassment…This inadvertent oversight of Plante-Northington in not typing the Title VII statute in the amended complaint should not be held against Grant.[55]

The same lawyer represented Grant before the EEOC, and it was disingenuous to feign surprise that his Title VII claim was "inadvertently" overlooked.

Even that story soon changed, and on February 26, 2018, Grant started telling the Court that he **never received** a right-to-sue letter for his Title VII claim and that counsel had been waiting two years for the letter.[56] Grant does not dispute that he received the February 17, 2016 letter, but he claims it is invalid because it misspelled

[55] ROA.18-20353.1552-1554.

[56] ROA.18-20353.1651 ("The U.S. Department of Justice (DOJ) did not issue a Title VII claim right to sue…")

"Title VII" as "Title V." Thus, according to Grant, the federal government held his Title VII claim in suspense for two years.

Grant demanded that the Justice Department re-issue the 2016 right-to-sue letter in 2018, which is why he claims on appeal he "*had until June 1, 2018*" to file suit on his 2013 Title VII claim. (Appellant Brief at 50.)

C. The statute of limitations expired for Grant's Title VII claim.

Notwithstanding these antics, Grant had 90 days from February 17, 2016 to bring his Title VII claim. A party must file suit within 90 days of receiving a right-to-sue letter, and this period is strictly construed and akin to a statute of limitations. The clock begins even if a claimant orally learns the charge is being dismissed. *Hunter-Reed v. City of Houston*, 244 F. Supp. 2d 733, 739, 741 (S.D. Tex. 2003). This is because 42 U.S.C. § 2000e-5(f)(1) requires only that the EEOC "notify the person aggrieved" of the dismissal of the charge—it does not require notice in any specific manner. *Garrison v. Town of Bethany Beach*, 131 F. Supp. 2d 585, 589 (D. Del. 2001).

When a claimant requests a second right-to-sue letter to correct a technical defect in the first letter, the date of the first letter controls, and the second letter does not toll the limitations period unless issued pursuant to a reconsideration on the merits under 29 C.F.R. § 1602.21. "As a matter of law, receipt of a second EEOC Notice does not constitute grounds for equitable tolling where a party has actual

notice of the first Notice." *Santini v. Cleveland Clinic Fla.*, 232 F.3d 823, 825 (11th Cir. 2000).

D. The Court was not required to upset the Scheduling Order to permit Grant to amend.

Even if the statute of limitations had not run on Grant's Title VII claim, he still waited too late to amend. By filing a new claim the day his summary judgment response was due, Grant attempted to disrupt the Scheduling Order and force discovery to be reopened and deadlines moved. When an amendment would upset a scheduling order, Rule 16(b) requires the movant to show "good cause to modify the scheduling order" before the court may apply the more liberal standard of Rule 15. *S&W Enterprises, L.L.C. v. SouthTrust Bank of Alabama, NA*, 315 F.3d 533, 536 (5th Cir. 2003).

Good cause requires proof that "the deadlines cannot reasonably be met despite the diligence of the party needing the extension." *Id.* Grant never attempted to show good cause. Clearly, with even minimal diligence, Grant could have brought all the claims stemming from his 2013 termination in one lawsuit.

Even under Rule 15, a court may deny an amendment when there is undue delay, bad faith, dilatory motive, repeated failures to cure deficiencies, or undue prejudice to the opposing party. *Mayeaux v. La. Health Serv. & Idem. Co.*, 376 F.3d 420, 427 (5th Cir. 2004). All of those factors apply to this case.

V.
THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING GRANT'S MOTION FOR SANCTIONS

As discussed, in early 2012, Erika Owens interviewed several witnesses to investigate one of Grant's workplace complaints. Owens jotted some notes, transcribed them, and incorporated them into a report. Owens produced the report and typed notes, but she no longer had the handwritten version, which is what Grant refers to as "destroyed documents." (Appellant Brief at 53.)

Though these notes were redundant and of little relevance, Grant accused Owens of manufacturing, backdating, and altering her report and fabricating all of the transcribed witness notes. The County hired an independent forensic computer expert who examined Owens' computer while she was away and concluded the files were authentic. (ROA.18.20353.1586-1621.)

Grant was still unsatisfied and demanded a hearing in which 15 witnesses were subpoenaed to testify, including county attorneys and high-level human resources staff. As the hearing wore on, Grant's own witnesses contradicted his claim,[57] and Grant's counsel's arguments became so spurious that the Court concluded, "You are making this up as you go along." (ROA.18-20353.2627.)

[57] For example, Tikidra Batiste remembered giving an interview "about mostly everything that's on here [the statement Grant alleged was fabricated]." (ROA.18-20353.2687).

Still, to make certain Owens had not fabricated evidence, the Court permitted Grant's unlicensed computer expert to examine Harris County's computers and servers. (ROA.18-20353.2700.) Harris County did not object and offered Grant an inspection date of his choice.

During the February 21, 2018 hearing, the Court reminded the parties they were on an accelerated timeline because trial was in less than six weeks. Despite these instructions, Grant waited three weeks to schedule the inspection. At the designated time, March 13, 2018 at 2 p.m., two of Harris County's attorneys and Harris County's computer expert met at Owens' office. They waited 38 minutes, but neither Grant's counsel, nor his expert showed up. Grant's counsel never told Harris County of her change of plans, and this act of discourtesy disrupted the schedules of two attorneys, an expert, and the Harris County Human Resources Department. (ROA.18.20353.1735-1743.)

For Grant to claim the district court "*clearly abused its discretion by not providing Grant a right to obtain additional evidence*"[58] is patently false. Grant cannot claim he was denied an inspection that he skipped, and even on appeal, he has no idea what evidence he wanted from that inspection—especially after his own witnesses vouched for the accuracy of Owens' notes, and he relied on those notes on appeal.

[58] Appellant Brief at 55.

VI.
THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY PREVENTING GRANT FROM NAMING "SURPRISE" WITNESSES

Grant next claims the district court "granted the County's Motion to Strike a *vast number* of Grant's fact witnesses, because he did not include the addresses of the witnesses in this [sic] Initial Disclosures." (Appellant Brief at 56.)

Grant's disclosures were due February 10, 2017, and at one point, discovery ended September 30, 2017. Eleven days before the discovery deadline, Grant served new disclosures adding six new witnesses, but gave little indication of who they were, how to contact them, or why they were being added. As Harris County tried to unravel these disclosures, Grant tied up the remaining few days of discovery with six deposition notices and refused to agree to a discovery extension.

The Court struck four of the witnesses, but Grant defied the order and served a second "First Amended Rule 26 Disclosures" that not only added them back, but then brazenly added ***two more*** witnesses never mentioned in the case. (ROA.20353.572-575.) Had Grant simply explained who these people were, the prejudice may have been cured. (ROA.18-20353.433.) However, even after discovery was extended, Grant refused to provide additional information. Instead, he appealed a ruling that he ignored—regarding witnesses for a trial that never occurred—and accuses the Court of being "*drastic and punitive*" (Appellant Brief at 57.)

On appeal, Grant blamed his late disclosure on Hurricane Harvey (which formed seven months after disclosures were due). (Appellant Brief at 56.) A court's decision to strike witnesses is reviewed for abuse of discretion based on: (1) the explanation for the failure to identify the witness, (2) the importance of the testimony, (3) potential prejudice in allowing the testimony, and (4) availability of a continuance to cure the prejudice. *Geiserman v. MacDonald*, 893 F.2d 787, 791 (5th Cir. 1990). Grant never even attempted to apply these factors.

VII.
THE SECOND COURT DID NOT ABUSE ITS DISCRETION BY DISMISSING GRANT'S SECOND CASE BASED ON *RES JUDICATA*

After the Honorable Kenneth Hoyt denied Grant's attempt to add an untimely Title VII claim six weeks after the close of discovery, Grant simply filed a new lawsuit, which was assigned to the Honorable Gray Miller.

Judge Miller dismissed Grant's claim under the doctrine of *res judicata.* In doing so, he concluded Grant's cases involved identical parties and that Judge Hoyt had jurisdiction over Grant's Title VII claim because Grant pleaded it in his proposed Fourth Amended Complaint and it arose from the same EEOC charge as his ADA case. Judge Miller also held that Judge Hoyt rendered final judgment that Grant's Title VII claim was time-barred. (ROA.18-20592.221-222.)

Grant claims Judge Miller improperly dismissed his case based on *res judicata* because Harris County did not raise the argument as an affirmative defense.

(Appellant Brief at 59-60.) However, Grant concedes *res judicata* can also be raised "at summary judgment." (Appellant Brief at 59.) Harris County's motion to dismiss alternatively requested "that the Court treat this as a motion for summary judgment" (ROA.18-20592.45) and Judge Miller obliged: "The court treats Harris County's motion as a motion for summary judgment." (ROA.18.20592.220 at fn.1.)

Putting aside the fact that Grant's Title VII claim had already been adjudicated, the statute of limitations had also expired. Grant claims he had no choice but to file the Second Case because he was still waiting for a right-to-sue letter from his 2014 EEOC charge, but Grant received that letter February 17, 2016 (ROA.18-20353.1657) and his counsel admits she made an "inadvertent oversight" in not bringing the case within 90-days. (ROA.18-20353.1552-1554.)

As explained, the 90-day clock is strictly construed and the statute of limitations had long foreclosed Grant's Title VII claim. Regardless of whether there was a typographical error, Grant knew the EEOC's investigation ended two years earlier. If Grant wanted to take "affirmative steps to have his Title VII claim heard before the first court," (Appellant Brief at 61), he should have pleaded it two years earlier.

CONCLUSION

Plaintiff-Appellant Otis Grant was fired after engaging in extraordinary acts of fraud. Rather than acknowledge this, he filed two lawsuits in which he kept his witnesses, evidence, and claims in a constant state of deceptive flux. The district courts patiently considered his drumbeat of spurious motions, allowed him to respond on his own time, and even tolerated outbursts directed at both counsel and the Court. However, Grant's motions were eventually denied and his cases dismissed. The district courts' rulings were correct and should be upheld.

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CERTIFICATE OF SERVICE

I certify that on February 21, 2019, 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 emailed an electronic copy of this brief to the counsel of record below:

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