
United States Court of Appeals
for the
Fifth Circuit

Case No. 17-30879

JASON HACKER,

Plaintiff-Appellant,

– v. –

N. BURL CAIN, Warden, Louisiana State Penitentiary at Angola, in His Official and Individual Capacities; LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS; LOUISIANA STATE PENITENTIARY AT ANGOLA; JAMES M. LEBLANC, SECRETARY, DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, in His Official and Individual Capacities,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA, BATON ROUGE

BRIEF FOR PLAINTIFF-APPELLANT

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JASON HACKER,
Plaintiff, Appellant

v.

No. 17-30879

N. BURL CAIN, *et al.*,
Defendants-Appellees.

CERTIFICATE OF INTERESTED PERSONS

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

1. Jason Hacker, Plaintiff
2. Samuel Weiss, Lawyers' Committee for Civil Rights Under Law
3. Jon Greenbaum, Lawyers' Committee for Civil Rights Under Law
4. John Adcock, Law Offices of John N. Adcock
5. William Most, Law Offices of William Most
6. State of Louisiana
7. Louisiana Department of Public Safety and Corrections
8. Louisiana State Penitentiary at Angola
9. Bobby Jindal, Governor, *retired*
State of Louisiana
10. James LeBlanc, Secretary
Louisiana Department of Public Safety and Corrections
11. N. Burl Cain, Warden
Louisiana State Penitentiary at Angola, Louisiana

12. Dr. Rahm Sing, Medical Director
Louisiana Department of Public Safety and Corrections
13. Stephanie Lamartiniere, Assistant Warden
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14. Jason Collins, M.D.
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15. Andrew Blanchfield, Keogh Cox

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

This case meets the standards in Federal Rule of Appellate Procedure 34(a)(2) for oral argument. The appeal is not frivolous: the district court under review found the legal issue “close” in denying Appellant’s motion for a new trial, ROA.5994, and also found that his appeal was not frivolous in granting him a trial transcript at no cost under 28 U.S.C. § 753(f). ROA.5853. The dispositive issues in this appeal have not been recently and authoritatively decided. Lastly, oral argument would significantly aid the decisional process, as Appellant presents several distinct legal issues and there is a lengthy and complex record.

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JURISDICTIONAL STATEMENT

A. District Court’s Jurisdiction

The district court had subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, which grants the district courts “original jurisdiction of all civil actions arising under the . . . laws . . . of the United States.” Jason Hacker’s complaint and amended complaint were brought under 42 U.S.C. § 1983 and alleged violations of 42 U.S.C. § 12131; 42 U.S.C. § 12132; 28 C.F.R. § 35.130; 29 U.S.C. § 794; 28 C.F.R. § 45.503; and the Eighth Amendment to the United States Constitution. ROA.41–65; ROA.258–271.

B. Court of Appeals’ Jurisdiction

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 because the judgment below is a final judgment of the United States District Court.

C. Timeliness of Appeal

On June 6, 2016, the district court denied the parties’ dueling motions for summary judgment. ROA.3373–3418. Following the close of evidence, Hacker moved for a directed verdict, which was denied. ROA.6565–67. The district court entered final judgment on February 7, 2017. ROA.5824–25. Thereafter, Hacker filed a motion for a new trial and renewed judgment as a matter of law, which the district court denied on October 30, 2017. ROA.5977–99. Hacker filed the Notice of Appeal on November 3, 2017. ROA.6000–01.

STANDARD OF REVIEW

This Court reviews a motion for a new trial for abuse of discretion. *See Hollybrook Cottonseed Processing, L.L.C. v. Am. Guarantee & Liab. Ins. Co.*, 772 F.3d 1031, 1034 (5th Cir. 2014); *see also Smith v. Transworld Drilling Co.*, 773 F.2d 610, 613 (5th Cir. 1985). This Court reviews a motion for judgment as a matter of law de novo. *SEC v. Life Partners Holdings, Inc.*, 854 F.3d 765, 777 (5th Cir. 2017).

STATEMENT OF THE ISSUES

- I. Whether the district court erred in holding that Plaintiff's overwhelming evidence that he was substantially impaired in several major life activities and that he had a record of such impairment failed to establish as a matter of law that he was disabled under the ADA.
- II. Whether the district court erred in holding that Plaintiff's overwhelming evidence failed to establish that he had not received reasonable accommodation for his disability.
- III. Whether the district court erred in holding that Plaintiff had not exhausted his claims as a matter of law even though there were no facts in dispute and Defendants presented neither evidence nor argument at trial that Hacker had failed to exhaust.
- IV. Whether the district court erred in failing to grant a new trial due to Defendants' repeated violations of orders in limine on the basis that they had not sufficiently prejudiced Hacker.

STATEMENT OF THE CASE

Over the course of three years, starting in October 2011, Plaintiff Jason Hacker's untreated cataracts worsened until he lost the ability to see. Despite this impairment, Defendants continued to assign him to field work and other dangerous work duties, resulting in serious injuries, and failed to make other accommodations while he waited to receive medically necessary surgery. Following trial on Hacker's claim under the Americans with Disabilities Act ("ADA") the district court denied a motion for judgment as a matter of law, finding disputed issues of fact as to whether Hacker qualified as disabled under the ADA and whether he had exhausted his administrative remedies. This Court should reverse the district court's denial of judgment as a matter of law on Hacker's ADA claim on the issues of disability and exhaustion. This Court should also grant a directed verdict on the remaining elements of his ADA claim which the district court did not reach, or, at minimum, remand for a new trial on those elements. In the alternative, this Court should reverse the district court's failure to grant a new trial to remedy the prejudice caused by Defendants' repeated violations of limine rulings.

A. Hacker Endured Progressively Serious Visual Impairment for Three Years While Incarcerated

Jason Hacker is incarcerated in Angola, the Louisiana State Penitentiary. In October 2011, he began having serious vision problems. ROA.7969. In June 2012, an outside hospital diagnosed him with cataracts and recommended surgery.

ROA.7970. By July 2013, doctors working for Angola and outside hospitals considered him “legally blind.” ROA.7970. Only after filing this lawsuit and obtaining counsel in 2014 would he receive surgery, more than two years after his first referral.

Hacker was forced to live in a maximum security prison with impaired vision for several years. He received no accommodation for his disability. Instead, he was assigned to dangerous work in Angola’s fields and machine shop. Hacker was no anomaly—Angola deemed cataract surgery “elective” and had a practice of refusing to accommodate people with disabilities like Hacker’s. ROA.2064, ROA.6170.

The LSU Hospital recommended cataract surgery for Hacker in June 2012. ROA.7970. That same month, Angola’s personnel noted that he was having difficulty seeing out of his right eye even with glasses. Dr. Coullard assessed that Hacker “needed surgery” for cataracts by October 2012. *Id.* Angola’s medical records in 2013 call him “legally blind” and refer to his vision as “20/400.” *Id.* When Hacker filed his grievance (referred to as an “ARP”) because of his poor vision, the Assistant Warden for Health Services found after “careful review” of his medical records that he had been labeled as “legally blind” since May 2013 and that in April 2013 another outside hospital had recommended cataract surgery “when approved.” ROA.7086. Nevertheless, Hacker’s requests were denied and by

March 2014, his vision in his left eye had degraded to 20/400 and his right eye to counting fingers. ROA.7971. Dr. Edward Bell, the Director of the Professional Development and Research Institute on Blindness at Louisiana Tech University, testified as an expert that Hacker's complaints were consistent with his medical records. ROA.6365–66.

One inmate who knew Hacker, Scott Meyer, testified that Hacker had severe trouble seeing, often bumped into things, and received no help from the prison because “that wasn't really the policy” at Angola. ROA.6047. Another inmate, Jackie Wafer, testified that Hacker's visual impairment prevented him from recognizing people he knew and made him agitated. ROA.6235–36, ROA.6238. Finally, Hacker himself testified that because of his cataracts he was substantially limited in the major life activities of seeing, walking, reading, writing, exercising, working, and playing music. ROA.6401–09.

Testifying as a representative of the Department of Corrections, Deputy Warden Richard Peabody agreed that under the ADA, reasonable accommodations should be made for inmates who cannot see very well and whose eyesight interferes with their ability to see, read, write, play music, or exercise. ROA.6065. He testified that although the Department's regulations say that staff who have reason to believe that an inmate has a disability are required to advise the ADA coordinator, they fail to do so. ROA.6068. Instead, blind prisoners at Angola are

often led around informally by other “assistant” prisoners. ROA.6073; *see also* ROA.6188 (another witness, Miranda Tait, testifying to same).

Warden Peabody conceded at trial that an inmate with the limitations that Hacker suffered is disabled. ROA.6115–16. Angola staff placed Hacker in dangerous work environments, including Angola’s fields where he tore a pectoral muscle off of the bone because he could not see a heavy bale of hay and Angola’s machine shop, where he lost a piece of his finger. While working in the fields after Angola declared him legally blind, Hacker used sharp equipment in locations where armed guards are instructed to shoot any inmates who cross a certain line. ROA.6408–09, ROA.6416. In addition to failing to provide Hacker with reasonable accommodations in his work assignments, Angola also failed to accommodate Hacker’s disability in access to exercise services, music programs, and hobbycraft programs at Angola.

B. The District Court Failed to Resolve Key Issues as a Matter of Law Throughout the Procedural History of This Litigation

In the absence of any accommodation for his well-documented disability, Hacker submitted an ARP on August 21, 2013. ROA.7080–82. He detailed the history of his eye problems and explained that “[a]s a result of severe cataracts, [he was] unable to perform daily living activities.” *Id.* He noted that he was working in the field “like the rest of the workers – as if nothing were wrong with [his] sight.” ROA.7080. He explained that he had an “inability to perform [his] work detail as

would someone without a disability.” ROA.7081. He requested surgery and any other equitable relief that he was entitled to under law. ROA.7082. The Assistant Warden denied his ARP on October 3, 2013. ROA.7083. Hacker then unsuccessfully appealed to the second and final step of Angola’s grievance process. ROA.7084; ROA.7079.

In January 2014, Hacker filed suit pro se, alleging that his Eighth Amendment rights were violated when he was denied necessary surgery and forced to work in dangerous conditions. ROA.41–64. Outside counsel undertook representation of Hacker in June 2014 and, 34 days later, Hacker finally received cataract surgery on his right eye on July 7, 2014. ROA.2097. He received surgery on his other eye on September 15, 2014. *Id.* By the time he received surgery on both eyes, 813 days had passed since Angola first referred him for cataract surgery and 481 days since Angola first declared him legally blind.

Hacker amended his complaint to include a claim under the ADA. ROA.258–70. The parties cross-moved for summary judgment. ROA.3373. Hacker argued that he had exhausted his administrative remedies; that his Eighth Amendment rights were violated by the delay in surgery and by being forced to work in dangerous conditions; and that he qualified as disabled under the ADA and was not provided reasonable accommodation.

The district court denied the cross-motions. On exhaustion, the district court denied Defendants' motion for summary judgment, noting that exhaustion "requires no more than such holistic and general notice, one which Plaintiff's [grievance] sufficiently provided." ROA.3412. It failed, however, to resolve exhaustion as a matter of law on behalf of Hacker, instead leaving the issue as a jury question without explaining what questions of fact remained. On the ADA, the district court asked, was "no fair dispute as to this fact even remotely possible?" ROA.3375. Even reading the facts in the light most favorable to the Defendants, the district court acknowledged, "[t]rue, Plaintiff's cataracts made him increasingly and eventually totally blind." ROA.3415; *see also* ROA.3416 ("True, Plaintiff's cataracts rendered him legally blind and realistically disabled, and the latter fact could be found to have been obvious."). It nonetheless found a question of fact on whether Hacker was disabled, writing that "multiple courts have refused to consider either cataracts or legal blindness as an automatic disability under the [Rehabilitation Act or the] ADA." ROA.3415. The district court also held that Angola's treatment of Hacker did not necessarily result in a denial of reasonable accommodation. ROA.3415–16.

In December 2016, the United States Department of Justice filed a Statement of Interest on behalf of Hacker in response to arguments Defendants had been making. ROA.4958–74. It put forth three positions of the United States: "(1) a

State must ensure that the prisoners in its custody receive constitutionally adequate medical treatment, regardless of whether it contracts with private providers to deliver that treatment; (2) where prisoners have objectively serious medical needs that require attention, a State cannot consciously disregard the consistent medical judgments and recommendations of the physicians with whom it contracts; and (3) a State may not escape its duty to provide constitutionally necessary medical care by labeling that care ‘elective,’ if in fact treatment is necessary to address an objectively serious medical need.” ROA 4958–59.

The district court entered several orders in limine before trial. The district court excluded evidence in Defendants’ expert report that Hacker could see well after his surgery because it was irrelevant. ROA.5175. The district court held that Hacker’s motion to exclude his disciplinary record at Angola was moot because Defendants represented to the court that they “will not introduce any evidence at trial regarding Plaintiff’s disciplinary record at Angola.” ROA.5168. The district court entered an order that Defendants “will not attempt to offer evidence or refer to the specific crimes for which Plaintiff was convicted or the conduct which led to his conviction.” ROA.5167. Lastly, the district court granted an order in limine that “evidence of medical problems and treatment unrelated to Plaintiff’s cataract condition will not be allowed except as it may bear on the issues related to Plaintiff’s cataracts.” ROA.5168.

C. The Defenses at Trial Violated Orders In Limine and Did Not Undermine the Overwhelming Evidence Supporting Hacker's ADA Claim

Defendants put on only two witnesses in defense, one of whom had testified in Hacker's case. Dr. Randy Lavespere was recalled to testify as to the medical treatment that Hacker received in 2011 and 2012 when Hacker's eyesight problem was still being diagnosed. ROA.6476, ROA.6486, ROA.6494. Defendants' expert, Dr. Peter Kastl, briefly testified that Hacker was not legally blind according to a visual acuity measurement taken in March 2014 while ignoring evidence from the same records indicating that Hacker had a limited field of vision. ROA.6545, ROA.6559.

Through their two witnesses, opening argument, cross-examination, and closing argument, Defendants advanced miscellaneous defenses. None were probative of the key issues on the merits of Hacker's ADA claim:

Jason Hacker was a bad man. The opening substantive words of the Defendants' opening statement were, "What's this case about? Well, Jason Hacker is serving a life sentence." ROA.6028. Later in the opening statement, Defendants told the jury "you're going to hear the testimony and the evidence is going to be Jason Hacker broke all the rules." ROA.6038.

Hacker received lots of treatment in 2011–2012 when Angola was attempting to determine the source of his eye problem. Much of Defendants'

opening statement focused on Angola’s process of diagnosing the cataracts with counsel’s refrain linking it back to the Eighth Amendment legal standard.

ROA.6030–36 (repeating the exact phrase “Refuse to treat him? Ignores complaints? I don’t think so” twice). Much of Defendants’ case involved asking Dr. Lavespere to testify as to Hacker’s medical treatment from 2011–12 before he was diagnosed with cataracts. They returned to the theme in closing argument: “You heard the whole story, beginning in 2011. There were issues going on. The doctors at Angola, including Dr. Levespere, looked at it, tried to find out what was going on.” ROA.6591.

Hacker was not legally blind. Although the ADA does not use “legal blindness” as a requirement for visual disability, Defendants argued in their opening statement that Hacker “was never legally blind. You’re going to hear testimony about what is legally blind? . . . His vision was never that bad. You’re going to hear testimony really from the only qualified individual here, the eye specialist, the ophthalmologist, the medical doctor, that he was never legally blind.” ROA.6041. The only admissible portion of Dr. Kastl’s expert report was that Hacker was not legally blind. ROA.5175. The opening words of Defendants’ closing statement were, “Jason Hacker hasn’t spent one day of his life legally blind, not one day.” ROA.6590.

Hacker's condition was temporary. Although the ADA expressly applies to temporary disabilities, early in their opening statement, Defendants argued that “these cataracts” were “a temporary condition.” ROA.6028. Warden Peabody testified that the ADA requires disabilities to be “permanent or longstanding,” without being able to “remember the exact wording.” ROA.6146. A disability cannot, he testified, be “episodic.” ROA.6147. At closing argument, Defendants’ entire argument on whether Hacker was disabled was: “[a] cloud on the back of your lens of your eye that you get surgically removed and vision is perfectly restored after it’s discovered, is that—is that a disability? No.” ROA.6593.

Hacker could see perfectly well after receiving surgery. Defendants argued in the first sentences of their opening argument that Hacker was “left with perfect vision. His vision, in his own words, is 100 percent. He sees really, really clear.” ROA.6028. In Defendants’ description of the ADA, they explained regarding cataracts, “we don’t think it’s a disability and it was fixed.” ROA.6042. Dr. Lavespere was asked how Hacker sees after the surgery and testified that his “understanding is that he sees quite well.” ROA.6520. Defendants asked Hacker four questions about his “really, really clear” post-surgery vision on cross-examination. ROA.6435–36. In the opening paragraph of Defendants’ closing argument, counsel argued, “I saw him read from the monitor. I wish I could read like that.” ROA.6590.

D. The Verdict Ignored the Overwhelming Evidence of Disability

The jury returned a verdict for Defendants. ROA.5818. They found: 1) Hacker was not disabled; 2) the delay of cataract surgery did not violate the Eighth Amendment; and 3) Defendants were not deliberately indifferent to Hacker performing dangerous work. ROA.5818–21. Because the jury did not find Hacker disabled, it did not reach the issues of exhaustion of administrative remedies or reasonable accommodations for Hacker’s disability. *Id.* The district court denied Hacker’s motion for a judgment as a matter of law or a new trial. ROA.5977–99. Hacker timely appealed. ROA.6000.

SUMMARY OF THE ARGUMENT

The district court erred in failing to grant Hacker’s motion for judgment as a matter of law because the overwhelming weight of the evidence established that Defendants violated the ADA. First, Hacker was clearly disabled under the ADA. He presented witness testimony, expert testimony, and significant medical record evidence from Defendants that he was substantially limited in several major life activities, including most obviously “seeing.” Defendants did not address whether Hacker was substantially limited in major life activities but instead raised red herrings such as the “temporary” nature of Hacker’s disability and his vision after surgery. Although Defendants presented no evidence that Hacker’s medical

records were misdiagnoses, even if they were, Hacker would still have had a “record of impairment” and therefore been disabled under the ADA.

Defendants did not reasonably accommodate Hacker’s impaired vision. Defendants did not dispute that the only work “accommodation” they offered Hacker was temporary and more dangerous: after he ripped a muscle off the bone trying to catch a bale of hay in Angola’s fields, they moved him to a machine shop, which Defendants concede was even more dangerous, and where he lost part of a finger.

Hacker clearly exhausted his claims under the Prison Litigation Reform Act. The district court erred when it failed to grant Hacker summary judgment when there were no facts in dispute and again when it failed to direct a verdict at trial even when Defendants offered no evidence as to the affirmative defense.

Even were the weight of the evidence not so overwhelming as to demand judgment as a matter of law, this Court should grant a new trial because of Defendants’ repeated violations of the district court’s orders in limine. These were particularly prejudicial given Defendants’ lack of evidence and the district court’s failure to properly instruct the jury to disregard the prejudicial evidence.

ARGUMENT

The district court erred in upholding the jury verdict that Hacker did not have a claim under the ADA. Title II of the ADA forbids public entities from

denying the benefits of services, programs, or activities for which the public entity is responsible or otherwise discriminating against individuals on the basis of their disabilities. *See Hale v. King*, 642 F.3d 492, 499 (5th Cir. 2011). State prisons are public entities for purposes of the ADA. *Id.* Hacker proved the elements of his ADA claim: that he suffered from a qualified disability and that he was denied reasonable accommodations or access to services, programs, or activities.

ROA.5818–19. At trial, the jury returned a verdict that Hacker had not proven that he had a disability and did not reach the remaining issues. ROA.5818. Hacker, however, had presented overwhelming evidence in support of his claim that Defendants failed to rebut. As an affirmative defense, Defendants asserted that Hacker failed to exhaust his administrative remedies, but the overwhelming evidence was to the contrary, and the court erred multiple times in not ruling for Hacker on this issue, which the governing case law has held is properly decided by the court, not a jury.

I. The District Court Erred in Finding That a Reasonable Jury Could Have Found That Jason Hacker Was Not Disabled

The ADA defines three ways to qualify as disabled: 1) “a physical or mental impairment that substantially limits one or more major life activities of [the] individual”; 2) a “record of such an impairment”; or 3) “being regarded as having such an impairment.” 42 U.S.C. § 12102(1). Hacker was disabled in two

respects—he had both a physical impairment that substantially limited major life activities and a “record of” such impairment.

A. The Overwhelming Evidence at Trial Showed That Hacker Had a Qualified Disability Under the ADA Because His Visual Impairment Substantially Limited Multiple Major Life Activities

Hacker met the first prong of the ADA’s test for disability because he experienced a substantial limitation of numerous major life activities. Unrebutted testimony demonstrated that Hacker progressively lost the ability to see, read and write, read and play music, walk without bumping into objects or other inmates, and work safely. These limitations all affect activities expressly listed as examples of major life activities in the ADA. *See* 42 U.S.C. § 12102(2)(A) (listing, *inter alia*, “seeing,” “walking,” “reading,” and “working”). Additionally, the ADA’s implementing regulations¹ explain that “major life activities” is to be read in favor of individuals alleging an impairment: 1) “In determining whether an impairment substantially limits a major life activity, the term major shall not be interpreted strictly to create a demanding standard;” and 2) “Whether an activity is a major life activity is not determined by reference to whether it is of central importance to daily life.” 28 C.F.R. § 35.108(c)(2). As explained below, the district court

¹ *See* 42 U.S.C. § 12134 (instructing the United States Attorney General to promulgate implementing regulations of title II of the ADA). “Because the Department [of Justice] is the agency directed by Congress to issue regulations implementing Title II, its views warrant respect.” *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597–98 (1999).

erroneously denied Hacker’s post-trial motion based on purely hypothetical credibility issues that, at most, would have affected only part of the evidence establishing Hacker’s disability.

1. The District Court’s Denial of Judgment as a Matter of Law on Disability Was Contrary to the Overwhelming Evidence at Trial

The district court found the issue “close” but ultimately ruled that a reasonable jury could have found that Hacker was not disabled. ROA.5994. This conclusion ignored the overwhelming evidence.

Hacker’s medical records show progressive visual impairment. Medical records authored by multiple doctors over several years consistently demonstrate that Hacker passed the point of legal blindness, with one eye at 20/400 and the other only able to count fingers. *See* ROA.7970–71. As early as October 17, 2012, Angola’s Dr. Coullard assessed that Hacker “needed” cataract surgery. ROA.7970. A doctor at LSU recommended that Hacker receive cataract surgery in 2013. *Id.* In May 2013, an Angola doctor declared Hacker “legally blind” and recommended that he be relieved from work duty. ROA.6095–96. Dr. Edward Bell, the Director of the Professional Development and Research Institute on Blindness at Louisiana Tech University, testified as an expert that Hacker’s complaints were consistent with his medical records. ROA.6365–66.

The district court's holding that the jury verdict was justified by a couple of hypothetical credibility disputes cannot withstand scrutiny. The district court noted that 1) "much of" the evidence of his eyesight problems was "based primarily on his own reports"; 2) one of Defendants' witnesses, Dr. Kastl, testified that "Plaintiff's medical records just prior to his surgery showed that his visual acuity was significantly better than prison records suggested"; and 3) the jury could have "considered testimony that the hospital with the ability to correct Plaintiff's cataracts kept 'sending [him] back' without surgery." ROA.5994-95. Each of these rationales was contrary to the great weight of the evidence.

There is no specific basis in the record for the hypothetical credibility issues with the underlying statements by Hacker reflected in the medical records. Angola's own medical staff repeatedly examined Hacker, tested him, and found him legally blind. There was no evidence presented at trial that he had somehow tricked numerous doctors into making countless incorrect diagnoses. Dr. Bell testified without contradiction that it would be nearly impossible for an inmate to fake a visual impairment consistently for several years, much less fake the progression from bad to worse. ROA.6581. Finally, it is indisputable that Hacker eventually had cataract surgery and that surgery in fact removed his cataracts.

The district court appears to have relied on Defendants' representative's characterization of the testing procedure at Angola as "subjective." *See* ROA.5984.

But diagnosis of illness may largely rely on individuals' own perception, as with certain mental illnesses, chronic pain, and countless others. As the Department of Justice's Statement of Interest observed, prisons have an obligation to follow their own doctors' medical advice. There is no exception to this requirement for when the doctors' medical advice turns on "self-reports."² Further, the district court ignored that doctors at Angola and outside hospitals also had purely objective medical evidence and never suggested any incompatibility with Hacker's visual acuity tests. Defendants' witness testified, for example, that Hacker had a "corneal topography," which is a "specialized eye test." ROA.6501; *see also* ROA.6498 (testimony from defense witness that "when Dr. Coullard looked in [Hacker's] eyes" in June 2012, "he saw something he didn't really like"). The objective medical evidence was consistent with the many diagnoses of severe visual acuity problems, up to and including legal blindness.

Dr. Kastl's testimony did not create an issue of fact regarding whether Hacker's vision substantially limited his ability to see or to conduct other major

² One of Defendants' other main defenses was that they provided Hacker with extensive medical treatment in diagnosing the source of his serious eye problems that were intertwined with a series of other troubling symptoms in 2011–2012. *See supra* pp. 11–12. The eye problems that prompted such serious responses in 2011 and 2012 were instead of getting progressively worse, according to Defendants, by 2013 and 2014 a conspiracy by Hacker to repeatedly fool Angola's doctors into thinking he had substantially impaired vision and providing him cataract surgery. *See* ROA.6592 ("[Hacker] declared himself in emergency because he didn't want to be outside"). This interpretation is not credible.

life activities. Kastl reviewed one medical record on the stand: a March 12, 2014 record stating that Hacker had visual acuity of 20/100 in one eye and could identify three of five letters on the 20/60 line with his other eye. ROA.6559. That same medical record, however, reported that Hacker “[l]ooks ‘over his cataract’ right eye in order to see eye chart.” ROA.8440. As Dr. Kastl testified on cross-examination, visual acuity cannot alone tell you whether someone is legally blind because visual field loss must also be considered. ROA.6561; *see also* ROA.6562–63 (answering “yes” to the question, “to determine whether someone is legally blind, you need to see both how well they can see *and* how much they can see; is that correct?” (emphasis added)). After this issue was raised on cross-examination, Defendants asked on redirect examination whether there was “any information in the records [he] reviewed about visual field?” ROA.6563. Dr. Kastl answered no, *id.*, ignoring the note that Hacker looked around his cataract. Naturally, an individual who can only see by looking around a cataract would experience substantial limitations on his life activities and nothing in Dr. Kastl’s testimony is to the contrary.

Finally, the district court’s reference to the testimony that one hospital sent Hacker back to Angola without scheduling surgery is unconnected to the substance of an ADA claim. *See* ROA.5995. Whether a hospital considered cataract surgery to be an emergency is not probative of whether the visual impairment substantially limited Hacker’s life activities. Defendants also constantly undermined this

possible line of argument by repeatedly arguing that Angola cannot require private hospitals to perform surgeries even if they are medically necessary. *See, e.g.*, ROA.6037 (“Earl K. Long Charity Hospital closed. It was Angola’s go-to hospital. Angola could send a prisoner over there and say evaluate a prisoner and do what you’ve got to do and Earl K. Long had to take and had to do what they had to do. In April of 2013 that stopped. We no longer had it. And you’re going to see records about the problems that that created for Angola.”); *see also* ROA.6689 (statewide medical director testifying that the department was “truly in a crisis” when “LSU was privatized overnight”). The fact that prisoners in Angola were denied medically necessary treatment due to budgetary constraints and administrative difficulties does not give rise to a permissible inference that such procedures were unnecessary.

Extensive and un rebutted testimony at trial established that Hacker experienced limitations on many major life activities. At trial, Hacker offered extensive evidence that he was substantially limited in major life activities, including seeing, writing, working, and playing music. Hacker himself testified that while he had cataracts, he could not engage in the major life activities of seeing, walking, or reading. ROA.6401–09. One inmate, Scott Meyers, testified that Hacker had severe trouble seeing, often bumped into things, and received no help from the prison because “that wasn’t really the policy” at Angola. ROA.6047.

Another inmate, Jackie Wafer, testified that Hacker’s visual impairment prevented him from recognizing people he knew and made him agitated. ROA.6235–38.

Warden Peabody, the ADA coordinator at Angola, conceded that Hacker—or alternatively, a hypothetical inmate with the same impairment as Hacker—was disabled. ROA.6115–16.

Hacker was incarcerated in Defendants’ prison throughout the relevant time period, so they were undoubtedly aware of numerous employees and inmates who witnessed Hacker engage in daily life activities. They nonetheless presented no evidence regarding Hacker’s daily activities and cross-examination of Hacker’s witnesses was minimal. *See, e.g.*, ROA.605355. This Court has stated that “a court may draw a negative inference from a party’s failure to produce a witness whose testimony would elucidate the” factual issues of the case. *Streber v. C.I.R.*, 138 F.3d 216, 221 (5th Cir. 1998) (quotations omitted). In *United States v. Wilson*, “[t]he Government failed to call a single witness with actual personal knowledge of the” crucial issue in the case. 322 F.3d 353, 364 (5th Cir. 2003). This Court reversed the district court for clear error in its factual findings, noting that “the Government’s failure to call its own employees as witnesses when they had crucial information about th[e] dispositive issue of fact gives rise to a ‘particularly strong’ adverse inference against it.” *Id.* The dispositive issue of fact here was whether Hacker was substantially limited in his daily activities. Defendants, uniquely in

possession of the information of hundreds of people who had crucial information on this question, decided to call none of them, including their own employees, giving rise to a particularly strong inference that Hacker was substantially limited in major life activities.

The district court's only rationale for the jury's wholesale rejection of the extensive and consistent testimony concerning the limitations on Hacker's life activities was a generic credibility issue. *See* ROA.5994–95 (“[M]ost of the evidence about how Plaintiff's impairment actually affected his daily life came from the testimony of Plaintiff and other inmates. The jury could have rejected this testimony.”). While the jury is entitled to reject the inmates' testimony in favor of other, contradictory evidence, here there is no perceivable basis in the record for that rejection. The verdict was therefore against the great weight of the evidence.

2. Defendants' Arguments at Trial Failed to Rebut the Evidence of Disability

The district court relied on hypothetical credibility disputes because all of Defendants' primary defenses to Hacker being disabled were either incorrect or irrelevant. The district court did not even attempt to rely on Defendants' primary defenses in attempting to justify the verdict.

The ADA applies to temporary disabilities as a matter of law. Defendants repeatedly—and incorrectly—argued that Hacker's condition was not a disability

because it was temporary.³ The ADA explicitly covers temporary conditions. 42 U.S.C. § 12102(4)(d) (“An impairment that is episodic . . . is a disability if it would substantially limit a major life activity when active.”); 29 C.F.R. § 1630.2(j)(1)(ix) (“The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.”). Due to Warden Peabody’s incorrect testimony about a legal issue central to Hacker’s case, the district court had to issue a jury instruction stating that impairments can be disabilities even though they are temporary.⁴

Hacker’s health following the surgery is irrelevant. Defendants also argued that Hacker was not disabled because he could see well *after* he received his surgery. Defendants argued in the first sentences of their opening argument that Hacker is “left with perfect vision. His vision, in his own words, is 100 percent. He

³ At closing argument, Defendants’ entire argument on whether Hacker was disabled was, “[a] cloud on the back of your lens of your eye that you get surgically removed and vision is perfectly restored after it’s discovered, is that—is that a disability? No.” ROA.6593; *see also, e.g.*, ROA.6028 (arguing in opening statement that “these cataracts” were “a temporary condition”) ROA.6146–47 (Warden Peabody testifying that the ADA requires disabilities to be “permanent or longstanding,” though he could not “remember the exact wording”).

⁴ In its post-trial order, the district court found that Warden Peabody’s testimony was not willfully false. ROA.5997. Hacker accepts that the confident testimony as to the incorrect black letter definition of a disability under the ADA by Peabody—Angola’s deputy warden, the ADA coordinator for Angola’s 6,500 inmates, and Defendants’ Rule 30(b)(6) representative for this case—was the product of ignorance and not perjury.

sees really, really clear.” ROA.6028. Referencing the ADA in their opening statement, Defendants described cataracts by saying, “we don’t think it’s a disability and it was fixed.” ROA.6042. The Angola Medical Director was asked how Hacker sees after the surgery and testified that his “understanding is that he sees quite well.” ROA.6520. Defendants asked Hacker four questions about his “really, really clear” post-surgery vision on cross-examination. ROA.6435–36. In the opening paragraph of Defendants’ closing argument, they argued, “I saw him read from the monitor. I wish I could read like that.” ROA.6590. Whether Hacker could see comfortably after his surgery was entirely irrelevant to whether he was disabled before he had his surgery. Hacker conceded that he could see after his surgery. When Dr. Kastl included this fact in his expert report, the district court excluded the evidence in an order in limine because it was legally irrelevant. ROA.5175.

Hacker was not required to prove that he was legally blind. Lastly, Defendants argued that Hacker was not legally blind. In their opening statement, Defendants suggested that Hacker “was never legally blind. You’re going to hear testimony about what is legally blind? . . . His vision was never that bad. You’re going to hear testimony from really the only qualified individual here, the eye specialist, the ophthalmologist, the medical doctor, that he was never legally blind.” ROA.6041. The opening words of Defendants’ closing statement were,

“Jason Hacker hasn’t spent one day of his life legally blind, not one day.”

ROA.6590. Defendants’ only evidence that Hacker was not legally blind came from the testimony of Dr. Kastl, and even this was undermined by his ignoring visual field issues. *See* ROA.6559. Although diagnoses of legal blindness are relevant to determining the existence of a visual disability, there is a huge gulf between the formality of “legal blindness” and the amended ADA’s permissive definition of “disability.”

* * *

Hacker was clearly and unequivocally disabled under the ADA’s permissive definition. By presenting evidence that Hacker was not legally blind, Defendants were arguing with their own records rather than suggesting that Hacker failed to meet the legal standard for a disability under the ADA. The overwhelming and un rebutted evidence established that Hacker could not see or conduct other major life activities as well as most of the general population due to his cataracts. The district court erred in failing to hold as a matter of law that Hacker was disabled.

B. Hacker Also Had a “Record of Impairment”

Ultimately, the district court’s conjectures concerning credibility were unnecessary because Hacker also demonstrated that he had a “record of impairment” as a matter of law under the ADA. Individuals with a “record of [an] impairment” that substantially limits one or major life activities are defined as

disabled under the ADA, even if the record is the product of a misdiagnosis. 28 C.F.R. § 35.108(e)(1); *Sherrod v. Am. Airlines, Inc.*, 132 F.3d 1112, 1120–21 (5th Cir. 1998). The implementing regulations of the statute mandate a “broad construction,” as this provision “shall be construed broadly to the maximum extent permitted by the ADA and should not demand extensive analysis.” 28 C.F.R. § 35.108(e)(2). “An individual will be considered to fall within this prong of the definition of ‘disability’ if the individual has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population, or was misclassified as having had such an impairment.” *Id.* “There are many types of records that could potentially contain this information, including . . . medical . . . records,” although “past history of an impairment need not be reflected in a specific document.” 28 C.F.R. Pt. 35, App. C.

As described above, Hacker clearly demonstrated a “record of impairment” at trial, including but not limited to:

- Several medical records detailing that Hacker passed the point of legal blindness in visual acuity, progressing to the point that one of his eyes was 20/400 and the other could only count fingers.
- On May 22, 2013, an Angola doctor declared Hacker legally blind.
- On July 2, 2013, Angola personnel observed that Hacker was “legally blind.”

- The prison’s ARP response, which—while defending Angola’s response—explained after a “careful review” of Hacker’s medical records that “examination notes indicated that [Hacker] is legally blind, secondary to keratoconus and cataracts can count fingers with your right eye [sic].”

ROA.7970, ROA.6217, ROA.7083. Even if all of these medical records were misdiagnoses—which, as described above, is implausible—they would nonetheless be records of impairment. Defendants offered no evidence contesting Hacker’s “record of impairment.” Nor could they have—the numerous records detailing Hacker’s legal blindness were authentic.

Hacker raised this issue at length in his post-trial motion. ROA.5906–07. Defendants’ only response in its post-trial briefing was that for Hacker “to prove the record of impairment prong, plaintiff still must prove that the impairment substantially limits a major life activity.” ROA.5888. This misreads the statute and would make the “record of impairment” entirely duplicative of the definition of disability right above it in 42 U.S.C. § 12102(2)(A). As explained above, even individuals who are misdiagnosed with an impairment have a “record of impairment” if the misdiagnosed impairment would have substantially limited a major life activity.

The district court upheld the jury’s conclusion that Hacker was disabled in its post-trial order but failed to even mention the “record of impairment” provision of the ADA. This was legal error. No reasonable jury could have found that Hacker did not have a record of impairment.

C. The District Court Erred by Applying Superseded Law to Hacker’s Motion for Summary Judgment

Finally, the trial on the issue of disability was unnecessary because the issue should have been resolved on summary judgment.

When Hacker moved for summary judgment that he had a qualified disability under the ADA, ROA.3373, Defendants did not contest it—and even appeared to concede it. ROA.3187 (“Plaintiff cannot show that the alleged delay in receiving cataract surgery was attributable to his disability.”). In denying Hacker’s motion for summary judgment, the district court, reading the facts in the light most favorable to the Defendants, wrote, “True, Plaintiff’s cataracts made him increasingly and eventually totally blind.” ROA.3415; *see also* ROA.3416 (“True, Plaintiff’s cataracts rendered him legally blind and realistically disabled, and the latter fact could be found to have been obvious”). Summary judgment on the issue of disability should have issued upon that finding. Instead, the district court erroneously held that a question of fact existed based on case law that has been superseded by statute. *See* ROA.3415 (“[M]ultiple courts have refused to consider either cataracts or legal blindness as an automatic disability under the [Rehabilitation Act or the] ADA.”).

As this Court has recognized, Congress amended the ADA in 2008 “to broaden the definition and coverage of the term ‘disability.’” *Neely v. PSEG Texas, Ltd. P’ship*, 735 F.3d 242, 245 (5th Cir. 2013). Congress modified the definition of

“disability” in the ADA in 2008 in response to two Supreme Court decisions. In 1999, the Supreme Court held in *Sutton v. United Air Lines, Inc.* that two plaintiffs who had severe myopia without corrective measures but perfect vision with them were not disabled under the ADA. 527 U.S. 471, 481 (1999). The Court held that failing to take into account corrective measures would betray the intention of the ADA that “whether a person has a disability under the ADA is an individualized inquiry.” *Id.* at 483. In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the Court held that to qualify as a disability under the ADA, an impairment must be “permanent or long term.” 534 U.S. 184, 198 (2002). Congress passed the ADA Amendments Act of 2008 with the express intent of overruling *Sutton* and *Williams* and expanding the definition of “disability.” See Pub. L. No. 110–325 § 2(a)(3)–(4), 122 Stat. 3553 (2008) (criticizing the Supreme Court for “narrow[ing] the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect”).

Despite this clear change in the governing law, the district court cited two pre-2008 cases for its conclusion that legal blindness is not necessarily a disability under the ADA. ROA.3398, ROA.3415 (citing *MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437, 1445 (10th Cir. 1996), and *Heilweil v. Mount Sinai Hospital*, 32

F.3d 718, 723 (2d Cir. 1994)).⁵ The district court’s conclusion was clearly incorrect. Even under the old ADA, individuals who could see poorly in one eye and well in the other would “ordinarily” meet the definition of disabled.

Albertson’s, Inc. v. Kirkingburg, 527 U.S. 555, 566 (1999). Under the new ADA, “seeing” is *expressly* defined in the statute as a major life activity.⁶ “Substantially limits” means merely that an individual cannot see well “compared to most people in the general population,” and does not require the impairment to “prevent, or

⁵ Even if they were good law, these cases are both distinguishable on numerous grounds. The court in *MacDonald* only examined the limitations on plaintiff’s ability to work, as that was the only alleged substantially limited major life activity; furthermore, the case involved title I of the ADA, not title II, and relied on title I’s implementation regulations; and finally, the plaintiff was not even blind, he had just “failed [an] eye exam.” *Id.* *Heilwel* had nothing to do with vision or eyesight at all and also only involved employment discrimination, so the court focused only on whether the plaintiff was substantially impaired in his ability to work. *Cf. Ray v. Weit*, 708 F. App’x 719, 721 (2d Cir. 2017) (“the district court erred in finding that the major life activity that was limited by Appellant’s 99% loss of vision in one eye was either working or commuting . . . Rather, the major life activity limited by Appellant’s vision loss was ‘seeing.’”).

⁶ Indeed, numerous courts have held that cataracts are “serious medical needs” under the Eighth Amendment, even though the Eighth Amendment standard is higher than the permissive definition of disability under the ADA. *See, e.g. Colwell v. Bannister*, 763 F.3d 1060, 1067–68 (9th Cir. 2014); *Cobbs v. Pramstaller*, 475 F. App’x 575, 580 (6th Cir. 2012). In *Bannister*, for example, the Ninth Circuit held that a cataract in a single eye qualified as a “serious medical need” under the Eighth Amendment; the dissent criticized the majority for even referencing the ADA in its opinion because “the ADA serves a very different purpose from the Eighth Amendment” as a “broad law” that “seeks to improve quality of life for disabled individuals,” while the “Eighth Amendment is not an aspiration toward an ideal environment for long-term confinement.” 763 F.3d at 1079 n.6 (internal quotation marks omitted).

significantly or severely restrict” the ability to see. 28 C.F.R. § 35.108(d). The ADA’s express mandate is to be interpreted as expansively as possible, so much so that “the threshold issue of whether an impairment substantially limits a major life activity should not demand extensive analysis.” *Id.* Under the ADA as properly understood, the district court’s conclusion that an individual who is “totally blind” is not necessarily substantially limited in their ability to see was plain legal error. The issue of whether Hacker was disabled should have been decided on summary judgment; it was not only because the court fundamentally misconstrued what constituted a disability under the amended ADA.

II. The District Court Erred in Refusing to Direct a Verdict or Grant a New Trial Because Overwhelming Evidence Supported the Conclusion That Hacker’s Disability Was Not Reasonably Accommodated

Hacker suffered discrimination on the basis of his disability because Defendants failed to make reasonable accommodations by providing him with a safer work environment and other modifications to enable him to participate in prison activities. As a result of the erroneous conclusion that Hacker did not have a disability, the jury did not reach the issue of reasonable accommodations. On Hacker’s post-trial motion, the district court similarly held that it did not need to make findings on this issue, but also noted that “because the evidence of the precise extent and nature of Plaintiff’s disability was mixed, it would not have been error . . . to determine that Plaintiff had not shown discrimination or a denial

of access to services or programs sufficient to give rise to a claim under the ADA or RA.” ROA.5996. As explained above, *see supra* Sections I.A.1, I.B, Hacker’s disability was clear at all relevant times. Further, this ruling ignores the overwhelming evidence at trial—including testimony from Defendants’ own representative—that Defendants should have and failed to assist Hacker while his vision was severely impaired. Even Defendants barely attempted to justify their accommodations—their only commentary in opening or closing argument on this element at trial was the statement: “did Angola discriminate against Jason Hacker for a disability? No.” ROA.6594.

Under the ADA, Defendants had an obligation to “make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless [they] can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” 28 C.F.R. § 35.130(b)(7)(i); *see also Garrett v. Thaler*, 560 F. App’x 375, 382 (5th Cir. 2014). Although the ADA “does not require prisons to provide new services or programs for disabled prisoners,” it does impose “an affirmative obligation to make reasonable modifications . . . so that a disabled prisoner can have meaningful access to existing public services or programs.” *Borum v. Swisher County*, No. 2:14-cv-127-J, 2015 WL 327508, at *9 (N.D. Tex. Jan 26, 2015) (emphasis omitted). This duty arises when a disabled

inmate makes a request for an accommodation or where the need for an accommodation is otherwise obvious to the prison.

A. Defendants Should Have Made Reasonable Accommodations for Hacker's Disability

Defendants had clear and repeated notice of Hacker's visual impairment. Defendants knew of Hacker's disability both because he raised the issue with prison officials and because his medical records clearly indicated his diminished eyesight. Hacker's medical records documented a continuing decline in ability to see from 2011 to 2013. Hacker began making requests for accommodations beginning in May of 2013. Defendants' representative, Warden Peabody, agreed that the Defendants would be deemed to have knowledge of a disability under these circumstances. *See* ROA.6068–70.

Unrebutted evidence at trial showed that Hacker's ability to carry out daily activities, much less participate in prison programs, was severely curtailed by his visual impairment. Hacker started bumping into people and objects, stopped exercising, and was unable to read or play music. ROA.6047–48; ROA.6405–06. Defendants' Rule 30(b)(6) witness, Warden Peabody, unequivocally testified that a prison should provide accommodations to someone with these handicaps:

Q. Now, as your job as ADA coordinator, you agree that the prisons should apply – should provide accommodations to people who can't see very well, correct?

A. I would say yes.

Q. You should provide accommodations to people whose bad eyesight interferes with their ability to walk?

A. Yes.

Q. You should provide accommodations to someone whose bad eyesight interferes with their ability to read and write?

A. Yes.

Q. You should provide accommodations to someone with bad eyesight where that prevents them from reading and playing music?

A. Yes.

Q. Similarly if it prevents them from writing music?

A. Yes.

* * * *

Q. And when . . . glasses don't help that prisoner with bad eyesight you think the prison should give them a different accommodation for their eyesight, correct?

A. Depending upon what is causing the problem with the eyesight, yes.

ROA.6064–66. According to Warden Peabody and Defendants' policies, the appropriate course of action would have been to engage in an interactive process with Hacker to find a solution to his disability. ROA.6089. Instead, Defendants repeatedly failed in their duty to help Hacker participate in daily life at the prison.

B. Defendants' Failures to Accommodate Hacker's Disability Are Shown by the Great Weight of Evidence at Trial

The evidence at trial demonstrated that Hacker's deteriorating vision manifested as early as 2011 and was not cured until 2014. Upon his diagnosis in 2012, Defendants could have eliminated his disability immediately with surgery. Instead, Hacker waited more than two years, and Defendants in the interim had numerous opportunities to help Hacker participate in prison programs and activities, but failed to do so.

First, Defendants repeatedly failed to provide Hacker with work assignments reasonably suited to his disability. Defendants' representative testified that providing an appropriate work assignment could be a reasonable accommodation:

Q. And part of those accommodations is you can say, this Job A is too dangerous for this prisoner given his disability, correct?

A. I could, yes.

Q. And so, therefore, he should be working in Job B instead, correct?

A. Possibly, yes.

Q. So instead of working in the fields, he could go be a dorm orderly for instance?

A. Possibly, yes.

Q. A dorm orderly would be less dangerous than working in the fields?

A. I don't know that it would be, but yeah.

Q. Dorm orderly would be less dangerous than working in a license tag plant, correct?

A. Yes.

ROA.6099-6100. Dr. Bell agreed that "job assignments that were . . . safer, that didn't put [Hacker] in terms of using sharp objects or heavy machinery" could have been a reasonable accommodation. ROA.6367. Instead, Defendants assigned Hacker to work in the fields and a machine shop in 2013.

Work in the fields posed unique dangers for someone who can barely see his own hands. Hacker worked on "a guard line," which is where "they put one guard with a shotgun on one side and then across the street, they'll have another guard with a shotgun." ROA.6408. The inmates work in between the guards. If they cross over the line, the guards "will shoot the gun. They don't shoot it at you, but they will shoot it in the air. And then you have to pay for that round as well."

ROA.6409. If a prisoner crosses the line a second time, “[t]hey’re going to shoot you.” *Id.* Hacker was constantly worried about the risk that he would accidentally cross the line and did so once, but the guard happened to know of his poor eyesight. ROA.6410. Hacker’s work also included cutting grass with a large metal blade. ROA.6416.

Unsurprisingly, on May 16, 2013, Hacker suffered an injury while working in the fields. On that day, he was part of a group baling and stacking hay. Hacker’s task required him to catch and toss bales of hay as they were passed up a line. ROA.6414. Due to his poor eyesight, Hacker mishandled a bale and ripped his pectoral muscle off the bone.

Even after Hacker was removed from work in the fields, however, he was not reassigned to a safer work environment. Instead, he was placed in a shop manufacturing license plates with dangerous machinery, which even Defendants’ representative agreed is “not a place for someone with low vision.” ROA.6132–33.

Modifications to Hacker’s duty status during this time were only temporary despite the long-term nature of his diagnosis. His request on May 6, 2013 noted that he was suffering from cataracts, but his duty status was only changed for two days before he was placed back in the field. The prison continued to require Hacker to work in the fields well into the summer of 2013. Dr. Bell explained that it was unreasonable to require a person with a severe visual impairment to continue

to work in the fields or with heavy machinery, ROA.6364–65, and that “[a] lot of the work that [Hacker] was assigned to do, I think, would be very, very dangerous for somebody with that degree of limited vision.” ROA.6364. In contrast, there is no evidence that it was reasonable to require Hacker to be exposed to the risks of a person with extreme visual impairment working with sharp blades or heavy machinery or that it would have been unreasonable to provide him with a different work assignment.

C. Defendants Failed to Accommodate Hacker’s Disability in Prison Activities

In addition to the unsuitable working conditions, Hacker also experienced numerous adverse effects on his daily life due to the lack of accommodations for his disability. Warden Peabody identified numerous accommodations the prison can provide to inmates suffering from visual impairments. *See* ROA.6071-74 (discussing modifications to inmate’s housing, provision of walking sticks, and assistance from other prisoners). Dr. Bell explained without contradiction why these accommodations are critical to assisting someone suffering a visual impairment:

[A] white cane is an obvious [accommodation] because, as he reported, not being able to – the white cane does two things: Number one, is it identifies him as a person with a visual impairment to the inmates and also to the guards so that they would understand that he may or may not be able to see them from a distance. Or if somebody shouts to him and is giving him hand signals like come here or move over or something and he’s not obeying those, is he just being

obstinate or does he not see them? So I think the white cane helps to identify that this is a person who is blind or visually impaired.

And then secondly, practically speaking, it would have given him more ability to move about within his environment without fear of tripping over objects or stumbling in holes and the like. Other types of accommodations, you know, a magnifier as well as we were just discussing a minute ago, his field of vision was pretty severely restricted.

ROA.6366-67. Defendants presented no evidence that these accommodations would have been unreasonable for Hacker.

III. The District Court Erred in Failing to Direct a Verdict for Hacker on Defendants' Affirmative Defense of Failure to Exhaust Administrative Remedies

Judgment as a matter of law on the affirmative defense of exhaustion is warranted because the only evidence in the record shows that Hacker exhausted his remedies. The Prison Litigation Reform Act's exhaustion provision states, "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Failure to exhaust is an affirmative defense. *Jones v. Bock*, 549 U.S. 199, 212 (2007). Defendants have the burden of persuasion in demonstrating that a plaintiff failed to exhaust. *Dillon v. Rogers*, 596 F.3d 260, 266 (5th Cir. 2010). "[A] prisoner, who is of course typically uncounselled, need not present legal theories in his grievances," but instead only enough facts to put the prison administrators on notice of his complaint. *Johnson v.*

Johnson, 385 F.3d 503, 517 (5th Cir. 2004). The district court could have resolved this issue on summary judgment or on Hacker’s motion for a directed verdict, but failed to do so at either point.

A. The District Court Erred in Denying Summary Judgment on the Affirmative Defense of Exhaustion Because There Were No Disputed Issues of Fact

On August 22, 2013, Hacker submitted an ARP. ROA.7080–82. He detailed the history of his eye problems and explained that “[a]s a result of severe cataracts, [he] is unable to perform daily living activities.” *Id.* He pointed out that he was working in the field “like the rest of the workers – as if nothing were wrong with my sight.” *Id.* He had an “inability to perform [his] work detail as would someone without a disability.” *Id.* He requested surgery and any other equitable relief that he was entitled to under law. ROA.7082. The assistant warden denied his ARP. ROA.7083. Hacker appealed his ARP to “Step Two;” his appeal was also denied. ROA.7084; ROA.7079. Hacker had no further recourse in Angola’s grievance system—his claims were exhausted.

Hacker’s ARP was plainly sufficient to put the facility on “general notice” that he had a qualified disability and required accommodation. *See Johnson*, 385 F.3d at 517. He stated that he had a disability and was substantially impaired in the performance of daily living activities. Warden Peabody testified at trial that Hacker’s ARP used a term of art taken from the ADA: “daily living activities.”

ROA.6119. Defendants opposed summary judgment on the basis that Hacker’s ARP invoked the Eighth Amendment and not the ADA. ROA.3184–85. Under *Johnson*, however, this distinction is irrelevant, as Hacker’s obligation was to present the facts of his complaint, not the legal theories.

The district court denied Defendants’ motion for summary judgment, noting that the “PLRA requires no more than such holistic and general notice, one which Plaintiff’s ARP sufficiently provided.” ROA.3412. It failed, however, to resolve exhaustion as a matter of law on behalf of Hacker, instead leaving the issue as a jury question without suggesting what questions of fact remained.⁷

The district court erred in doing so—there were no facts in dispute. The only issue was whether Hacker’s ARP was sufficient to satisfy the PLRA’s exhaustion requirement, a purely legal—and obvious—question. Hacker’s discussion of his blindness and inability to see or work put Defendants on notice that he required accommodation due to his disability.

Even had there been facts in dispute, the district court should have decided the question of exhaustion instead of submitting it to the jury. *See Dillon*, 596 F.3d at 272 (“[E]xhaustion is a threshold issue that courts must address to determine

⁷ Courts typically deal with exhaustion on summary judgment as it usually turns on pure questions of law as it did here—the sort of actual materially contested fact that could preclude summary judgment is, for example, when a prisoner testifies that he filed an ARP and a prison denies he ever did. *See, e.g., Paladino v. Newsome*, 885 F.3d 203, 210 (3d Cir. 2018).

whether litigation is being conducted in the right forum at the right time.’’). District courts across the Fifth Circuit have interpreted *Dillon* to forbid them from sending the question of exhaustion to a jury. *See, e.g., Rogers v. Brown*, No. 3:12-CV-2458-M, 2014 WL 572384, at *6 (N.D. Tex. Feb. 13, 2014); *Shakouri v. Raines*, No. PE:11-CV-00126-RAJ, 2012 WL 12872418, at *1 (W.D. Tex. Dec. 19, 2012); *Garner v. Richland Par. Det. Ctr.*, No. CIV.A. 09-0670, 2010 WL 2804313, at *5 (W.D. La. Apr. 20, 2010); *White v. Lewis*, No. 3:12CV285LRA, 2013 WL 5437367, at *2 (S.D. Miss. Sept. 27, 2013).⁸

B. The District Court Erred in Failing to Direct a Verdict for Hacker

The district court erred again on the issue of exhaustion at the close of trial. Hacker affirmatively put forth evidence to establish that he had exhausted. The parties stipulated that Hacker filed an ARP “relative to this incident” which was denied at the first and second steps, and the stipulation was read to the jury. ROA.6016. Hacker’s counsel asked Warden Peabody, the ADA Coordinator at Angola, to review the ARP, and Peabody agreed that the ARP used a “term of art” taken from the ADA to explain that Hacker was unable to perform “daily living

⁸ Other circuit courts to examine this question have also held that exhaustion must be resolved before the case is presented to the jury, some relying on *Dillon* as authority in doing so. *See Lee v. Willey*, 789 F.3d 673, 678 (6th Cir. 2015) (quoting and citing *Dillon*). *Albino v. Baca*, 747 F.3d 1162, 1170–71 (9th Cir. 2014) (citing *Dillon*); *Small v. Camden Cty.*, 728 F.3d 265, 269 (3d Cir. 2013); *Messa v. Goord*, 652 F.3d 305, 309 (2d Cir. 2011) (citing *Dillon*); *Pavey v. Conley*, 544 F.3d 739, 742 (7th Cir. 2008); *Bryant v. Rich*, 530 F.3d 1368, 1376 (11th Cir. 2008).

activities.” ROA.6119. Peabody also agreed that the ARP stated multiple times that Hacker had a disability and that it was “interfering with his ability to do major life activities like work.” ROA.6121. Hacker’s acquaintance, Scott Meyers, testified about helping Hacker fill out the ARPs. ROA.6048–50. Hacker testified that he had little legal knowledge and that no one at the prison had told him that any sort of request for ADA accommodation other than an ARP was necessary. ROA.6428–50.

Defendants put on zero evidence related to exhaustion. They did not mention exhaustion in their opening or closing arguments, and did not cross-examine Peabody or Hacker on their characterization of Hacker’s ARP. Defendants did nothing to meet their burden of persuasion on this affirmative defense.

Hacker moved for a directed verdict on exhaustion at the close of evidence. ROA.6565. He argued that “it’s the Defendants’ burden to prove that [Hacker] failed to exhaust his administrative remedies” and “there’s been no evidence to suggest anything other than he exhausted his administrative remedies.” *Id.* Defendants’ response on exhaustion was, in its entirety, “they have to exhaust through the ARP. That’s the law on the PLRA.” ROA.6566. The district court rejected the motion for a directed verdict, saying “this case is replete with questions of fact for the jury. There is nothing in my view that is appropriate for a

directed verdict.” ROA.6567. The district court did not articulate what questions of fact existed as to exhaustion.

There were no questions of fact to be resolved and no evidence to weigh. Setting aside that no jury should have been allowed to determine exhaustion under *Dillon*, no reasonable jury could have found that Hacker failed to exhaust. Defendants had the burden to demonstrate failure to exhaust, but offered no evidence. The jury had only the stipulation that Hacker had gone through the process and the explanation from Warden Peabody that Hacker’s ARP explicitly referenced disability and the ADA. Under *Johnson*, this was more than sufficient. The district court erred in failing to direct a verdict otherwise.⁹

⁹ The district court, in ways large and small, repeatedly stacked the standards of proof against Hacker. On summary judgment, the district court acknowledged that Hacker’s case was much stronger than Defendants, but asked “has Plaintiff provided incontrovertible proof compelling a favorable judgment on his Eighth Amendment claim, proof that no jury could reject and which no doubt infects?” ROA.3375. As to his ADA claim, the district court asked if “judgment in his favor must now be ordered by this Court, no fair dispute as to this fact even remotely possible.” *Id.* This is simply not the summary judgment standard, which asks whether a *reasonable* jury could return a verdict for the non-movant, not “no jury.” *Rogers v. Bromac Title Servs., L.L.C.*, 755 F.3d 347, 353 (5th Cir. 2014).

When Hacker moved for a directed verdict at the close of evidence, arguing that overwhelming evidence supported the conclusion, the district court ruled, “overwhelming or not, there’s evidence going on both sides of every issue you mentioned.” ROA.6567. But whether the evidence was overwhelming was exactly the dispositive question. *See Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 218–19 (5th Cir. 2001); *Commodores Entm’t Corp. v. McClary*, 879 F.3d 1114, 1130 (11th Cir. 2018); *Radtke v. Lifecare Mgmt. Partners*, 795 F.3d 159, 165–66 (D.C. Cir. 2015).

IV. The District Court Abused Its Discretion by Not Granting a New Trial Due to Repeated Violations of the District Court’s Rulings in Limine

A new trial is warranted on all claims because the trial was affected by Defendants’ repeated references to subjects that the district court had excluded through rulings in limine. When a district court rules on a motion for new trial based on prejudicial information in violation of orders in limine, “the district court must decide whether the error is harmless by assessing whether the error did not influence the jury, or had but very slight effect.” *Hollybrook Cottonseed Processing, L.L.C. v. Am. Guarantee & Liab. Ins. Co.*, 772 F.3d 1031, 1034 (5th Cir. 2014) (internal quotation marks omitted). “[I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.” *O’Rear v. Fruehauf Corp.*, 554 F.2d 1304, 1308 (5th Cir. 1977). Improper testimony can be prejudicial even if it “was brief and did not permeate the trial.” *See Hollybrook*, 772 F.3d at 1034; *see also McWhorter v. City of Birmingham*, 906 F.2d 674, 677 (11th Cir. 1990) (affirming the grant of a new trial after the plaintiff’s counsel violated an order in limine once in his closing argument).

Three of the district court’s orders on Plaintiffs’ motions in limine are relevant to this appeal. Defendants were precluded from referencing 1) medical care unrelated to Hacker’s cataracts; 2) Hacker’s disciplinary records; and 3) the

severity of Hacker’s sentence. Violations of all these orders began in Defendants’ opening statement and continued throughout the trial.

A. Defendants Presented Extensive Evidence of Irrelevant Medical Treatment Despite the District Court’s Clear Ruling that They Could Present Evidence of Treatment Only as Related to Hacker’s Cataracts

Defendants violated the district court’s order that “evidence of medical problems and treatment unrelated to Plaintiff’s cataract condition will not be allowed except as it may bear on the issues related to Plaintiff’s cataracts.” *See* ROA.5168.¹⁰ Hacker had not claimed that the medical treatment in the months leading up to his cataract diagnosis was improper, so the district court had entered an order in limine disallowing its use. Defendants’ opening statement was nonetheless largely a list of medical treatments Hacker received in 2011 and 2012. ROA.6030–35. This litany prejudiced Hacker because it obfuscated the issues of medical treatment relating to his specific disability.

The sole reason that medical records from 2011 and 2012 were relevant was that they put Defendants on notice of a possible disability and a possible serious medical need. ROA.6032–33. After an objection, the district court reiterated the scope of its order: other medical evidence would only be allowed if “the condition

¹⁰ Hacker cited the Department of Justice’s briefing from its litigation against Angola, which similarly fought against Defendants’ use of what it called “the big file theory.” ROA.4283–84 (citing *Williams et al. v. Bruce Lynn et al.*, M.D. La. 92-cv-01, Sept. 9, 1994 Pretrial Order at 1).

[was] potentially connected to the cataract [and] which would explain in some way [sic] why he was or was not treated in the way he was.” ROA.6033. Moments later, however, Defendants explicitly argued that their treatment of Hacker in diagnosing Hacker demonstrated their lack of liability: “Refuse to treat him? Ignores complaints? I don’t think so.” ROA.6035.

The improper testimony on Hacker’s medical treatment from 2011–2012 later took up a large portion of the direct examination of Dr. Lavespere, one of Defendants’ two witnesses, and the only one to testify at length. ROA.6483–6503. Defendants hit the theme again in closing argument: “You heard the whole story, beginning in 2011. There were issues going on. The doctors at Angola, including Dr. Levespere, looked at it, tried to find out what was going on.” ROA.6591.

The district court’s ruling in its post-trial order that Defendants’ repeated references to the 2011–2012 medical files could have been “a genuine misunderstanding about whether plaintiff’s complaints and medical testing regarding facially ‘unrelated’ conditions were nevertheless related for purposes of describing the differential diagnosis procedure that Defendants undertook,” was incorrect. ROA.5991–92. Even the differential diagnosis was entirely irrelevant to this case and outside the scope of the order in limine. Hacker’s counsel explained to the court and to Defendants that Hacker’s 2011 complaint was only relevant to

notice, and that treatment only became relevant once he had actually been diagnosed with cataracts. ROA.6032–33.

B. Defendants’ References to Hacker’s Disciplinary Record Prejudiced Hacker

The district court held that Hacker’s motion seeking to exclude his disciplinary record at Angola was moot because Defendants represented to the court that they “will not introduce any evidence at trial regarding Plaintiff’s disciplinary record at Angola.” ROA.5168. However, Defendants told the jury in their opening argument, “the testimony and the evidence is going to be Jason Hacker broke all the rules.” ROA.6038. In sustaining an objection, the district court responded, “This is a violation of my order, [counselor], and frankly, it’s the second time you’ve done it. They didn’t even object to the first one and I’m getting really, really upset with you. I’m getting very upset with you. So I’m going to tell you do not violate my order in any way again. If you do you’re going to be in serious trouble.” ROA.6040. The district court sustained the objection in a bench conference and failed to admonish the jury to disregard the statement, so nothing cured the prejudice caused by the aspersions on Hacker’s character. *Id.*

C. Defendants’ References to Hacker’s Life Sentence Prejudiced Hacker

Lastly, Defendants violated the order that stated that they would “not attempt to offer evidence or refer to the specific crimes for which Plaintiff was

convicted or the conduct which led to his conviction.” ROA.5167. The district court would not allow such evidence even for impeachment under Federal Rule of Evidence 609, despite it normally being allowed, because of its substantial prejudicial effect. ROA.5167; *see* Fed. R. Evid. 403. Defendants nevertheless began their opening statement with, “What’s this case about? Well, Jason Hacker is serving a life sentence.” ROA.6028. This clearly communicated to the jury that Hacker had committed a severe offense. The district court ruled that this sentence violated its order in limine but did so out of the presence of the jury and did not admonish them to disregard the evidence. ROA.6056.

In denying a new trial, the district court held that the jury, hearing that Hacker was serving “a life sentence,” would not be able to understand that this implied Hacker had committed a serious crime without “inferential steps and some knowledge about Louisiana sentencing law.” ROA.5991. This is an untenable conclusion. It is widely understood that people serving life sentences are in prison for serious crimes. *Cf.* Julia O’Donoghue, *17 former prison lifers have been released since Louisiana criminal justice overhaul*, *The Times-Picayune*, Feb. 28, 2018 (explaining that the two categories of “lifers” now eligible for parole are two different categories of murderers).

D. Prejudice Resulting from Violations of Limine Orders

The cumulative prejudice from the violations of the rulings in limine requires a new trial. Prejudice has to be considered in light of the evidence presented to the jury as a whole. *Matherne v. Alexandria Mar., Inc.*, No. CIV. A. 88-2261, 1991 WL 162128, at *2 (E.D. La. Aug. 8, 1991), *aff'd sub nom. Matherne v. Alexandria Mar.*, 974 F.2d 172 (5th Cir. 1992). The district court erred in finding that these violations of the orders in limine failed to prejudice Hacker for several reasons.

First, the district court found “more significant” that Hacker “made no specific showing of prejudice from defense counsel’s violations.” ROA.5992. In this circumstance, however, the jury could have communicated such prejudice in only one way: by ruling against Hacker on every interrogatory on the verdict form, even on questions where a resolution in favor of Hacker should have been a foregone conclusion (such as if he had a “record of impairment”). They had no other way to communicate their dislike for Hacker because of his crime or disciplinary history or to communicate their approval for the prison in providing Hacker with medical care unrelated to his claims.

Second, the district court characterized the violations as “oblique and isolated” when all three motions were violated in Defendants’ opening statement, including one in the statement’s opening words, preceded by “What’s this case all

about?” as well as making up a large portion of their primary witness’s testimony and reappearing in closing argument. This Court held in *Hollybrook* that even prejudicial statements that were “brief and did not permeate the trial” may still leave “no fair assurance the jury was not influenced” by them, 772 F.3d at 1034, but here the prejudicial statements did permeate the trial.

Third, the district court held that “it does not appear that defense counsel introduced any evidence on either of these issues, and the jury was instructed to base their verdict on the evidence in the case and not any arguments by counsel.” ROA.5992. The same instruction, however, was given to the jury in *O’Rear*, 554 F.2d at 1308, and this Court nonetheless held that trial counsel’s prejudicial remarks required reversing the district court for failing to grant a mistrial. *Id.* at 1310. The orders in limine themselves imagined just this possibility. *See* ROA.5167 (“Defendants will not attempt to offer evidence *or refer . . .*” (emphasis added)). This ruling is also erroneous because Defendants introduced significant evidence of unrelated medical treatment through the testimony of Dr. Lavespere.¹¹

¹¹ Even if the jury had access to files in which they theoretically could have found Hacker’s crime and his disciplinary history during deliberations, Hacker was nonetheless prejudiced by counsel describing them during their opening argument, both because this knowledge about Hacker’s past could have inappropriately colored their interpretation of trial testimony and because Defendants’ counsel linked Hacker’s past conduct to how Hacker was treated at Angola. ROA.6038.

E. The District Court Failed to Instruct the Jury to Disregard Objectionable Testimony

The district court also repeatedly failed to give curative instructions regarding prejudicial comments. “[T]he trial judge must make rulings upon objectionable remarks by counsel and give appropriate cautionary instructions to the jury to disregard all prejudicial matter.” *O’Rear*, 554 F.2d at 1308. These cautionary instructions may cure the prejudicial errors, *see Lacaze v. Olendorff*, 526 F.2d 1213, 1222 (5th Cir. 1976) (holding that prejudicial errors in jury argument were cured by a prompt instruction by the district court to disregard the objectionable matter), but “cautionary instructions are effective only up to a certain point” and “after repeated exposure of a jury to prejudicial information . . . a motion for a mistrial should be granted.” *O’Rear*, 554 F.2d at 1309. Here, the district court repeatedly failed to provide such instructions. It sustained Hacker’s objection when Defendants referred to Hacker’s disciplinary history but only in a bench conference and did not admonish the jury to disregard the statement or otherwise instruct them. ROA.6040. The court also sustained Hacker’s objection when Defendants referenced his life sentence outside the presence of the jury and never instructed them otherwise. ROA.6056.

The district court similarly failed to instruct the jury when Dr. Lavespere inserted irrelevant and inflammatory racial comments into the proceeding. Dr. Lavespere, without personal knowledge about Hacker, testified that he believes

that “to be sent to the field is the ultimate slap in the face for any offender [at Angola]. You know, some of them view it as slavery. Some of the black ones in particular view it as slavery.” ROA.6508. There was no foundation for Dr. Lavespere’s knowledge of whether prisoners at Angola view working in the fields as slavery or the racial disparities in such beliefs, and the testimony was extremely inflammatory. *Cf. United States v. Sanchez*, 482 F.2d 5, 8 (5th Cir. 1973) (reversing a conviction when the prosecutor made comments “with racial and political undertones”). The district court once again sustained an objection in a bench conference and deliberately chose to not instruct the jury to ignore the statement. ROA.6510.

CONCLUSION

This Court should reverse the district court's denial of Hacker's motion for judgment as a matter of law on his claim for an ADA violations and remand for further proceedings. In the alternative, this Court should reverse the district court's denial of Hacker's motion for a new trial and remand for further proceedings.

Respectfully submitted,

Dated: April 30, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2018, a true and correct copy of the foregoing Brief for Plaintiff-Appellant was served via electronic filing with the Clerk of Court and all registered ECF users.

Dated: April 30, 2018

/s/ SAMUEL WEISS

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that:

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,892 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Microsoft Office Word 2013 using 14-point Times New Roman font.

Dated: April 30, 2018

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