UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

ASHLEY DIAMOND,

Plaintiff,

v.

TIMOTHY WARD, *et al.*,

Defendants.

No. 5:20-cv-00453-MTT

POST-HEARING REPLY BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Contrary to *Farmer v. Brennan*, 511 U.S. 825 (1994), and in callous disregard for Ms. Diamond's health and safety, Defendants contend that prison officials can, and this Court should, ignore a victim of serial sexual assaults and pervasive sexual harassment who is at a substantial risk of continued sexual abuse because she has not documented physical injuries, because she has discipline violations, and because of filing "delay[s]." ECF 130 ("Opp'n") at 5-12. Their arguments are unsupported in law. *Farmer*, 511 U.S. at 841-43, 845 (asking whether plaintiffs stand a "substantial risk of harm," not whether they have physical injuries and a clean discipline record). Because Ms. Diamond "need not wait until she is raped again to seek relief from the Court," *Tay v. Dennison*, 457 F. Supp. 3d 657, 690 (S.D. Ill. 2020), she respectfully requests that her motion for preliminary injunctive relief be granted.

ARGUMENT

Ms. Diamond has satisfied the requirements for preliminary injunctive relief and of the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626(a)(1)(A), because she has shown: (1) a substantial likelihood of prevailing on the merits; (2) she will continue to suffer a "substantial threat" of irreparable harm absent an injunction; (3) the balance of equities favors relief; and (4) the public interest will not be disserved if the Court intercedes to prevent her suffering further assaults. *Levi Strauss & Co. v. Sunrise Int'l Trading Inc.*, 51 F.3d 982, 985 (11th Cir. 1995) (quoting *Church v. City of Huntsville*, 30 F.3d 1332, 1342 (11th Cir. 1994)) (recognizing proof of certain victory is not required).

I. Ms. Diamond Has Demonstrated Her Likelihood of Success on the Merits.

Defendants' blanket denials do not overcome the record evidence showing Defendants had subjective knowledge of Ms. Diamond's substantial risk of sexual assault but responded "in an objectively unreasonable manner." *Rodriguez v. Sec'y for Dep't of Corrs.*, 508 F.3d 611, 620 (11th

Cir. 2007) (quoting *Cottone v. Jenne*, 326 F.3d 1352, 1358 (11th Cir. 2003)).

A. Prior Reported Assaults or Physical Injury Are Not Required Under *Farmer.*

Reports of sexual abuse, substantiated or otherwise, are not a prerequisite to satisfy deliberate indifference because "a prisoner seeking a remedy for unsafe conditions [need not] await a tragic event such as an actual assault before obtaining relief." *Farmer*, 511 U.S. at 845 (quoting *Helling v. McKinney*, 509 U.S. 25, 33-34 (1993)) (cleaned up); *accord Diamond v. Owens* ("*Diamond I*"), 131 F. Supp. 3d 1346, 1377 (M.D. Ga. 2015) (Treadwell, J.) ("The Supreme Court in *Farmer* held that circumstantial evidence and the obviousness of the substantial risk of harm, not just actual notification, may be used to establish subjective awareness."). Here, however, the record shows Defendants' receipt of grievances, verbal and written PREA reports, mental health records, declarations, testimony, and witness statements detailing Ms. Diamond's suffering sexual abuse. *See* ECF 50-1 at 3-6, 10-16; ECF 122 at 3, 5, 17-31 (collecting record cites); Mancil Decl. ¶¶ 18-21; *see also Farmer*, 511 U.S. at 842-43 (asking whether officials "had been exposed to information concerning the risk" or "the risk was obvious").

Defendants nonetheless assert that Ms. Diamond is unworthy of Court protection because she has only reported one sexual assault since the hearing. Opp'n 2, 5. This assertion is not only irrelevant to the legal analysis, but it also is contrary to the evidence. Ms. Diamond reported several new sexual assaults and numerous instances of groping and touching, despite broken reporting equipment, threats from incarcerated people who perceive her to be a snitch, and growing despair about GDC's PREA investigation process.[1] ECF 122-22; ECF 121 ¶¶ 2-21, 39. Indeed, as recently

[1] PREA interview recordings and Ms. Diamond's mental health notes also corroborate Ms. Diamond's reports. ECF 121 ¶¶ 19, 24-26. However, Defendants have failed to produce these records despite the Court's instruction and their legal obligation to supplement discovery. *See* Oct. 29, 2021 Status Conference Tr. 13:9-13; ECF 120 ¶¶ 10-12, 16-17; Fed. R. Civ. P. 26(e)(1).

as January 2022, Ms. Diamond requested assistance from Defendants' counsel to safely report new incidents of sexual abuse by making "arrangements for Ms. Diamond to make her report and be interviewed discreetly, outside of her dormitory." Pl.'s Ex. 280 at 3. Instead, she was put in harm's way when "approached by GDC staff about giving a PREA interview . . . in full view of everyone in her dormitory." *Id.* at 1. Defendants also have not produced additional documentation of her PREA reports and attempted reports. ECF 121 ¶¶ 24-25; Mancil Decl. ¶¶ 18-21. Nor have Defendants opened an investigation into ongoing PREA violations Ms. Diamond reported, under oath, describing the pervasive sexual harassment and sexual abuse she endures at Coastal State Prison ("CSP"), including frequent groping. Hr'g Tr. 42:15-44:9, 60:21-61:22, 62:22-26, 73:11-15 (Diamond). Finally, Defendants' arguments contradict their health care providers and PREA personnel who determined that Ms. Diamond's abuse allegations were credible and justified her transfer away from CSP for "safety/victimization" reasons. ECF 122 at 18, 34-35 (collecting record citations).

Next, Defendants sidestep their Eighth Amendment obligations by advancing the chilling argument—contrary to law—that Ms. Diamond's recurrent sexual assaults can be disregarded until she can show physical injuries rather than the resulting exhaustively documented suicidality, PTSD, and emotional scars. Opp'n 5-6; *see also* ECF 122 at 12-13, 33-35 (collecting record citations); *Farmer*, 511 U.S. at 845 (holding past harm is not a prerequisite for an injunction); *Helling*, 509 U.S. at 33-34 (same). Defendants' suggestion that the Court follow their example and disregard Ms. Diamond's requests for safekeeping until *even more harm materializes to her* is especially disturbing because it comes on the heels of Defendants settling the lawsuit of another incarcerated transgender woman who died by suicide. Elisha Fieldstadt, *$2.2 million settlement for family of transgender woman who died in Georgia men's prison*, NBC NEWS (Dec. 7, 2021),

https://www.nbcnews.com/news/us-news/22-million-settlement-family-transgender-woman-died-georgia-mens-priso-rcna7867.

Defendants do not dispute that they have failed to take a *single action* to address Ms. Diamond's safety concerns at CSP since the May 2021 hearing. Indeed, as the record shows:

- Defendants continue to house Ms. Diamond in an all-male dormitory alongside numerous gang members and sex offenders. ECF 121 ¶ 4; Mancil Decl. ¶¶ 4, 8, 13; Horne Decl. ¶ 9.
- Defendants closed *and refused to reopen* investigations that Ms. Diamond believed were merely "pending" until interviews with her counsel present could be arranged, even though Defendant Holt testified that PREA allegations have "no expiration date" and that Defendants could "look into" her prior claims. Hr'g Tr. 567:19-24 (Holt); ECF 122 at 24 (acknowledging right to counsel and outside advocates); Pl.'s Ex. 259 at DEF005318 (confirming representations about interview status and Ms. Diamond's reliance); Cantera Dep. Tr. 47:2-5 (same).
- Defendants abruptly terminated the security escorts Ms. Diamond relied on for safety after the hearing. ECF 122 at 32.
- Defendants continue to deny Ms. Diamond the ability to shower apart from male prisoners as required by PREA regulation, resulting in increased sexual harassment. 28 C.F.R. § 115.42(f); ECF 52 ¶¶ 33-34, 113.
- Defendants jeopardized Ms. Diamond's safety by ignoring her request to discretely report a PREA violation, deepening the perception that she is a snitch. Pl.'s Ex. 280 at 1-3.

These actions, coupled with those outlined in earlier submissions, ECF 122 at 22-23, and described below, show that Defendants acted in an objectively unreasonable manner by disregarding "alternative means that would have brought [Ms. Diamond's assault] risk to within constitutional norms." *LaMarca v. Turner*, 995 F.2d 1526, 1536 (11th Cir. 1993); *accord Diamond I*, 131 F. Supp. 3d at 1379 (holding Ms. Diamond stated a deliberate indifference claim where her "substantial risk of harm remained unabated, and [she] suffered further sexual assaults" due to Defendants' inaction).

B. Defendants' Cursory Investigations and Destruction of Video Evidence Demonstrate Deliberate Indifference.

Defendants argue that they have protected Ms. Diamond by placing her in a dormitory

surveilled by "upgraded" cameras, ECF 77-2 ¶ 7; Hr'g Tr. 565:24-566:1, and fault her for offering "no evidence" of her assaults, Opp'n 5-6, yet they hypocritically do not explain their failure to properly investigate Ms. Diamond's PREA allegations, including their failure to review or preserve relevant security camera footage that could have corroborated (or disproven) her allegations on at least seven occasions, *see* ECF 122 at 2-11, 20-26; Hr'g Tr. 565:24-566:11; ECF 77-2 ¶ 7, despite their litigation obligations. Fed. R. Civ. P. 37; ECF 120 ¶¶ 2-17. Defendants also do not explain the reason that they summarily dismissed nearly all of Ms. Diamond's PREA allegations as *disproven* without pointing to a shred of contradictory evidence. ECF 122 at 6-10. Finally, Defendants offer no justification for closing investigations before speaking to third parties with relevant information—contrary to their own PREA policies. *See* ECF 122 at 23 (collecting record citations). Indeed, Defendants admit they dismissed another recent PREA report as unfounded *before* referring it for investigation. Opp'n 5 (citing ECF 120-48 to -49); *see Goebert v. Lee Cnty*., 510 F.3d 1312, 1328 (11th Cir. 2007) ("Choosing to deliberately disregard, without any investigation or inquiry, everything any inmate says amounts to willful blindness."); *De Veloz v. Miami-Dade Cnty*., 756 F. App'x 869, 878 (11th Cir. 2018) (same). Defendants' post-hearing conduct makes clear that whether or not Ms. Diamond provides additional details in PREA interviews, they have resolved to keep her exclusively in men's prisons without regard to her safety.

C. Defendants' Invidious Character Attacks and Attempts to Misconstrue the Law Also Demonstrate Deliberate Indifference.

In callous disregard for Ms. Diamond's health and safety, Defendants devote the remainder of their brief to Ms. Diamond's alleged disciplinary violations, which Ms. Diamond denies, which Defendants fail to support beyond a statement from an officer without personal knowledge, and most importantly, which are wholly irrelevant. Defendants' constitutional duty to protect does not

extend only to incarcerated people without disciplinary citations. *See, e.g.*, *Rodriguez*, 508 F.3d at 620 (holding reasonable juror could find defendant subjectively knew of substantial risk of harm to plaintiff from gang members, even though plaintiff admitted to being former gang member). Nor does the Eighth Amendment import a "contributory negligence" standard such that prison rape is excused where an inmate allegedly "demonstrates a decided lack of concern for her own safety," as Defendants suggest. Opp'n 9; *see, e.g.*, *Rodriguez*, 508 F.3d at 620; *Braggs v. Dunn*, 257 F. Supp. 3d 1171, 1191-93 (M.D. Ala. 2017) (holding prison officials liable for inmate suicides without faulting the inmates for being suicidal), *clarifying order*, No. 2:14cv601, 2018 WL 5410915 (Oct. 29, 2018).

The notion that the Court should disregard Ms. Diamond's sexual abuse allegations and risks due to her institutional record is more astounding given that Defendants were caught red-handed falsely designating Ms. Diamond as a PREA Aggressor; charging and convicting her of a major rule violation without reliable evidence, Hr'g Tr. 415:10-418:6; and citing the unfounded charge as their basis to deny her a female facility transfer, ECF 77 at 13. Defendants' reliance on alleged discipline violations to absolve themselves of the duty to protect is especially galling since Defendants have *refused to withdraw* this specious Discipline Report ("DR") despite its medical impossibility and the contradictory and unreliable testimony Defendants submitted to the Court. Hr'g Tr. 254:3-12, 255:18-25 (Court acknowledging "irreconcilable" testimony of alleged eyewitness and absence at DR hearing); ECF 90-3 ¶ 7; Ezie Decl. ¶ 2. Defendant Benton also admitted that numerous DRs leveled at Ms. Diamond were plagued by fatal defects, further undermining the credibility and reliability of the GDC disciplinary process or its alleged relevance to Ms. Diamond's requests for protection from assault. Hr'g Tr. 415:10-418:6.

II. An Injunction Is Necessary and Will Advance the Public Interest.

Ms. Diamond has also shown that an injunction is warranted because she will continue to

suffer irreparable harm without Court intervention. ECF 122 at 5, 13-14, 18 (collecting citations showing past and ongoing assaults, abuse, and harassment). An injury is irreparable "if it cannot be undone through monetary remedies." *Ferrero v. Associated Materials Inc.*, 923 F.2d 1441, 1449 (11th Cir. 1991) (quoting *Cate v. Oldham*, 707 F.2d 1176, 1189 (11th Cir. 1983)). Sexual abuse resulting in suicidality, emotional distress, and worsening PTSD meets this definition. *See Tay*, 457 F. Supp. 3d at 687 (holding transgender plaintiff "forced to endure constant sexual abuse and harassment at various men's facilities" satisfied irreparable harm requirement); *Hampton v. Baldwin*, No. 3:18-cv-550, 2018 WL 5830730, at *15 (S.D. Ill. Nov. 7, 2018) (same); *Edmo v. Corizon, Inc.*, 935 F.3d 757, 797-98 (9th Cir. 2019) (holding emotional distress, suicidality, and a self-harm risk constituted irreparable harm), *cert. denied sub nom. Idaho Dep't of Corr. v. Edmo*, 141 S. Ct. 610 (2020). Defendants' post-hearing conduct also makes clear that Defendants will not take affirmative steps to abate Ms. Diamond's heightened risk of sexual assault at CSP without a Court directive. *Farmer*, 511 U.S. at 845 (analyzing "attitudes and conduct at the time suit is brought and persisting thereafter").

Defendants claim "inaction" as an additional basis to deny relief, while also complaining that Ms. Diamond has "engaged in extensive and intensive document discovery," Opp'n 10, ignoring countervailing authority and their role in any "delay." A delay in seeking a preliminary injunction is not determinative, it "is but one factor in the irreparable harm analysis." *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1211 (10th Cir. 2009); *see also Ideal Indus., Inc. v. Gardner Bender, Inc.*, 612 F.2d 1018, 1025 (7th Cir. 1979) (explaining there is no "general rule that irreparable injury cannot exist if the plaintiff delays in filing its motion for a preliminary injunction"). As a court in the Eleventh Circuit recently noted, "each case hinges on the reason for the delay. Some cases have held a two-year delay excusable." *Dream Defs. v. DeSantis*, No.

4:21cv191, 2021 WL 4099437, at *30 (N.D. Fla. Sept. 9, 2021) (citations omitted), *appeal filed sub nom. Dream Defs. v. Governor of Fla.*, No. 21-13489 (11th Cir. Oct. 13, 2021). Moreover, "delay is less probative in the context of continuing injuries—especially constitutional injuries." *Id*. (citation omitted). The procedural history of this case also has no bearing on the questions central to *Farmer*, which approved of injunctions to prevent ongoing "disregard [of inmate safety needs] during the remainder of the litigation and into the future." 511 U.S at 846.

Ironically, the procedural "delay[s]" Defendants fault Ms. Diamond for are largely "delay[s]" of their own creation. These include the period when Ms. Diamond attempted to resolve her health and safety concerns without Court involvement, only to be met by Defendants' refusal. ECF 57 ¶¶ 12-14; ECF 120 ¶¶ 2-5; ECF 120-2 to -4, 120-28 to -29, 120-50 (showing *nine* notices seeking an out of court resolution). Then, Defendants and their staff informed Ms. Diamond that her release from GDC was imminent, which mooted her plan to file a preliminary injunction motion with her complaint. ECF 57 ¶¶ 27-30. When Ms. Diamond's release date was postponed indefinitely due in part to DRs Defendant Benton issued that were later proven false, Ms. Diamond expeditiously moved to file the instant motion. *Id.* ¶ 30.

Defendants also fail to acknowledge they delayed production of documents responsive to Ms. Diamond's April 2020 discovery requests, which would trigger the parties' post-hearing briefing deadlines, for nearly seven months, until the Court set a firm deadline. *See* ECF 108; Oct. 29, 2021 Status Conference Tr. 22:13-23:23, 38:9-39:13 (ordering Defendants to complete productions within 30 days). Defendants' gamesmanship should not be used to prejudice Ms. Diamond.

The balance of equities and the public interest—factors which merge where the government is the opposing party—also support the entry of an injunction here. *Nken v. Holder*,

556 U.S. 418, 434-35 (2009) (reciting standard). The harms to Ms. Diamond are the unspeakable horror of continued sexual abuse and assault as a woman in a men's prison and her resulting suicidal ideation and PTSD. ECF 122 at 5, 13, 33-34 (collecting record citations). Juxtaposed are purely conclusory and speculative harms that Defendants are unable to identify with any particularity. Opp'n 13; *Gonzalez v. Governor of Ga.*, 978 F.3d 1266, 1271-72 (11th Cir. 2020) (ordering injunctive relief where state did not show preventing "chaos and uncertainty" would ensue if granted). Indeed, Defendants fail to identify *any* harm from following their own policy of housing transgender people in facilities that align with their gender identities for safety reasons, instead arguing that they should be able to develop the record to articulate why following their policy here would "alter[] the operation of the state prison system." Opp'n 15. Although Ms. Diamond carries the burden of persuasion, she does not have a duty to disprove the existence of vague or hypothetical harms not contained in the record. *Gonzalez*, 978 F.3d at 1272; *accord Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320, 1348-51 (N.D. Ga. 2016).

Finally, preliminary injunctive relief is appropriate here because "the public interest always is served when citizens' constitutional rights are protected, including . . . offenders." *Reed v. Long*, 420 F. Supp. 3d 1365, 1379 (M.D. Ga. 2019) (Treadwell, J.) (citation omitted), *appeal dismissed sub nom. McClendon v. Long*, 842 F. App'x 537 (Mem) (11th Cir. 2021); *accord Tay*, 457 F. Supp. 3d at 689 ("[I]t is in the public interest to ensure that [a transgender] Plaintiff's constitutional rights are not violated by correctional officers.").

III. Ms. Diamond's Request for Injunctive Relief Comports with the PLRA.

Defendants' argument that Ms. Diamond is seeking an extraordinary form of relief by requesting a transfer to a women's facility for safety is inaccurate. The requested relief is already sanctioned by GDC's written policies, ECF 120-25 at 9-13, and federal law, ECF 65 at 5-9; ECF 120-25 at 1; 28 C.F.R. § 115.42. It is also appropriately tailored injunctive relief under 18 U.S.C.

§ 3626 based on the factual record because safety transfers are a well-established PLRA remedy and Defendants have repeatedly failed to protect Ms. Diamond at CSP. *Plata v. Brown*, 427 F. Supp. 3d 1211, 1223 (N.D. Cal. 2013) (transfers are an available PLRA remedy).

Defendants' own health care providers and PREA personnel admit that CSP is unable to meet Ms. Diamond's health and safety needs, such that a facility change is required, and that Ms. Diamond's risk of sexual victimization would sharply decrease if she were transferred to a female GDC facility. *See, e.g.*, ECF 122 at 18, 34-35 (collecting citations); ECF 78-1 at 2-3, 11; *see* ECF 58 ¶ 117 ("It is now medically necessary that she be transferred to a female correctional facility, where she will not be in danger of violent sexual assault by men"). Particularly given Defendants' admission no other male facilities are considered safe for Ms. Diamond, ECF 84-1 ¶ 4, this request is narrowly tailored to address her harm. *See Armstrong v. Newsom*, 475 F. Supp. 3d 1038, 1062 (N.D. Cal. 2020) (ordering PLRA transfer where "Defendants have not advanced any viable alternative means to protect [plaintiff's] rights").

Finally, although transfer to a female facility will best advance Ms. Diamond's health and safety needs, the Court may fashion other injunctive relief in its discretion such as an order instructing Defendants to develop an individualized plan that safeguards Ms. Diamond for the remainder of her incarceration. *See Tay*, 457 F. Supp. 3d at 688.

CONCLUSION

Because "[b]eing violently assaulted in prison is simply not part of the penalty" that incarcerated people should bear, *Farmer*, 511 U.S. at 834 (citation omitted), and because all prerequisites for injunctive relief have been met, Ms. Diamond's motion for preliminary injunctive relief should be granted and the Court should order Defendants to develop an individualized plan for addressing Ms. Diamond's health and safety needs, up to and including a facility transfer.

Respectfully submitted.

/s/ A. Chinyere Ezie

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, the foregoing document and all attachments were served on all counsel of record through the Court's CM/ECF system.

Dated: February 22, 2022

/s/ A. Chinyere Ezie
A. Chinyere Ezie

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