

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

_____)	
MICHELLE LYNNE KOSILEK,)	
)	
Plaintiff,)	
v.)	C.A. No. 00-12455-MLW
)	
HAROLD W. CLARKE and)	(LEAVE TO FILE GRANTED ON
DOES 1 through 100)	DEC. 21, 2009, ECF DOC. 505)¹
)	
Defendant.)	
_____)	

SECOND AMENDED COMPLAINT

Plaintiff Michelle Lynne Kosilek alleges as follows.

NATURE OF THIS ACTION

1. This is a civil rights action under 42 U.S.C. § 1983 arising out of the deliberately indifferent denial of adequate medical treatment to Plaintiff Michelle Lynne Kosilek ("Kosilek") by Defendants. Kosilek is in the custody of the Massachusetts Department of Correction ("DOC") under the control of defendant Harold W. Clarke ("Clarke").

2. Plaintiff has been diagnosed with Gender Identity Disorder ("GID"), a

¹ Plaintiff's counsel regrets that this Second Amended Complaint is being filed several months after leave to file was granted. The Plaintiff submitted this Second Amended Complaint on December 4, 2009 as an exhibit to her motion for leave to file. See ECF Doc. 492. When leave to file was granted on December 21, 2009, Plaintiff's counsel mistakenly believed that no further action was necessary. It should be noted that the amendments to the complaint are few and relate solely to issues addressed at length in this litigation. Therefore, the late submission of this Second Amended Complaint should not prejudice the Defendant or inconvenience the Court.

condition which in her case has created a serious need for medical treatment. As this Court held in Kosilek v. Malone^y, 221 F. Supp. 2d 156, 158 (D. Mass. 2002):

Plaintiff Michelle Kosilek is serving a life sentence, with the possibility of parole, for murdering [her] wife. Kosilek is also suffering from a severe form of a rare, medically recognized major mental illness — gender identity disorder ("GID"). Kosilek is a transsexual. Since at least age three, Kosilek has believed that [s]he is actually a female who has been cruelly trapped in a male's body. [footnote omitted]. This belief has caused Kosilek to suffer constant mental anguish and, at times, abuse. While incarcerated, it has also caused Kosilek to attempt twice to kill [her]self, and to try to castrate [her]self as well.

3. In Kosilek v. Maloney, this Court found that Kosilek has a serious medical need for treatment and that she had not been adequately treated.

4. Since this Court's 2002 decision, the defendants have provided Kosilek with some limited treatment for her condition. Nonetheless, for reasons that have nothing to do with her medical treatment or any other legitimate purpose, the defendants have refused to provide the full course of treatment — including but not limited to Sexual Reassignment Surgery ("SRS") and electrolysis — specifically recommended by David Seil, M.D. in his February 23, 2003 report (the "Seil Report"), Kevin Kapila, M.D., and Randy Kaufman, Psy.D., in their February 24, 2005 report (the "Fenway Report"), and other experts retained by the DOC itself as being medically necessary. The recommended treatment is in accord with the generally accepted standards of medical treatment.

5. The denial of treatment, including but not limited to SRS and electrolysis, has been in willful disregard of the rights of Kosilek and the Eighth Amendment to the United States Constitution.

6. Ms. Kosilek seeks an order compelling the DOC to provide the full course of treatment as recommended by the Seil Report and as further specified in the Fenway

Report.

PARTIES

7. Plaintiff Michelle Lynne Kosilek is a citizen of the United States and is currently housed at the Massachusetts Corrections Institute at Norfolk ("MCI-Norfolk"), a prison operated by the DOC.

8. Defendant Harold W. Clarke is an individual who is believed to be a resident of Massachusetts and who as of November 26, 2007, is Commissioner of the DOC.

9. Defendant Does 1-100 are unnamed agents or employees of the DOC who have participated in the decision to deny medical care to Kosilek.

JURISDICTION AND VENUE

10. This court has jurisdiction over the claims presented herein pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3).

11. Venue is appropriate in this judicial district pursuant to 28 U.S.C. § 1391 because this is the district in which Plaintiff's claims arose.

STATEMENT OF FACTS

11. Kosilek is incarcerated in the custody of the DOC under the supervision of the defendants at MCI Norfolk.

12. Kosilek previously sued former DOC Commissioner Michael T. Maloney seeking treatment for her GID. That lawsuit culminated in a decision which put Commissioner Maloney on notice that Kosilek has a serious medical need which is not

being properly treated. Therefore he has a need to respond reasonably to it. The Court expects that he will." Kosilek v. Maloney, at 162. Defendant Clarke is also on notice of the decision in Kosilek v. Maloney.

13. The Court stated that "[i]f hormone or sex reassignment surgery are recommended, Maloney may properly consider whether security issues make it impossible to provide adequate medical care in prison for Kosilek's serious medical need." Id.

14. The Court further found that:

If Maloney, in good faith, reasonably decides that there is truly no way that he can discharge both his duty to protect safety and his duty to provide Kosilek with adequate medical care, and concludes that security concerns must trump the recommendations of qualified medical professionals, a court will have to decide whether the Eighth Amendment has been violated. ...If, however, concerns about cost or controversy prompt Maloney to deny Kosilek adequate care for his serious medical need, Kosilek will then likely be entitled to his injunction that he has unsuccessfully sought in this case.

Id. at 162.

15. Kosilek has a serious medical need based on her diagnosis of GID. GID is defined as a major mental illness by the *Diagnostic and Statistical Manual*, Fourth Edition Text Revision ("DSM-IV-TR"). A transsexual, as the Supreme Court has described it, suffers from:

"[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex," and who typically seeks medical treatment, including hormone therapy and surgery, to bring about a permanent sex change."

Farmer v. Brennan, 511 U.S. 825, 829 (1970), quoted in Kosilek v. Maloney at 163.

16. Kosilek has had GID since her earliest memories. Substantial long-term history supports Kosilek's diagnosis with DOC.

17. The agents and employees of the DOC, including the defendants and medical professionals under contract to the DOC, have acknowledged her diagnosis. Nonetheless, the defendants have persistently denied Kosilek treatment.

18. Kosilek persistently feels like a woman trapped in a man's body. The failure to provide medical treatment to her will lead to serious bodily harm, untreated mental illness, depression, self-mutilation and suicide.

19. The appropriate, generally accepted treatment for Kosilek includes treatment pursuant to "Standards of Care" published by the Harry Benjamin International Gender Dysphoria Association, Inc. ("Harry Benjamin"). The Standards of Care establish a "triadic treatment sequence" for treatment. This triadic sequence is comprised of: (1) hormone therapy; (2) a real-life experience of living as a member of the opposite sex; and (3) sex reassignment surgery. Id. at 3.

20. The Standards of Care state that cross-sex hormones are "often medically necessary" "for properly selected adults with gender identity disorders." Id. at 13. "They improve the quality of life and limit the psychiatric comorbidity, which often accompanies lack of treatment." Id. The administration of hormones to a transsexual typically diminishes co-existing serious psychological problems such as depression and suicidality. As the Standards of Care explain:

Hormone therapy can provide significant comfort to gender patients who do not wish to cross live or undergo surgery, or who are unable to do so. In some patients, hormone therapy alone may provide sufficient symptomatic relief to obviate the need for cross living or surgery.

Id. at 14 (emphasis added).

21. Pursuant to the Standards of Care, after at least one year of a real life

experience, including hormones, SRS is medically indicated in some individuals. *Id.* at 20.

The Standards of Care state that:

Sex Reassignment is Effective and Medically Indicated in Severe GID. In persons diagnosed with transsexualism or profound GID, sex reassignment surgery, along with hormone therapy and real-life experience, is a treatment that has proven to be effective. Such a therapeutic regimen, when prescribed or recommended by qualified practitioners, is medically indicated and medically necessary. Sex reassignment is not "experimental," "investigational," "elective," "cosmetic," or optional in any meaningful sense. It constitutes very effective and appropriate treatment for transsexualism or profound GID.

Id. at 18.

22. Mental health services are provided to the DOC under contract with the Psychiatry Department of the University of Massachusetts Medical School.

23. On February 23, 2003, after evaluating Ms. Kosilek upon the referral by the Department of Corrections medical and/or mental health providers, Dr. Seil issued his report that specifically provided seven recommendations regarding Ms. Kosilek's GID treatment, the first five of which were substantive changes to her treatment.

24. The Seil Report's first recommendation was "Estrogen therapy," which was described as the "first line of internal relief." The second recommendation was "Electrolysis Treatment." Dr. Seil recommended that: "Facial hair is a major signifier of male gender. . . . In combination with estrogen, electrolysis is very effective." The third recommendation was "Access to gender appropriate personal items." The fourth recommendation was "Facial and other feminizing procedures." The fifth recommendation was "Sexual reassignment surgery." Dr. Seil recommended that: "A future assessment needs to be made by an experienced gender specialist with Ms. Kosilek after treatment with hormones for a year as to whether this step definitely need be taken."

25. Kenneth Appelbaum, M.D., and Arthur Brewer, M.D., the mental health and medical program directors respectively for the University of Massachusetts Correctional Health program, the medical and mental health provider for the DOC, both approved of Dr. Seil's recommendations for hormone therapy, electrolysis, and access to gender appropriate items.

26. On June 1, 2006, Dr. Appelbaum testified that he and Dr. Brewer approved of these recommendations in Dr. Seil's treatment plan.

Q. And when you received this report, your obligation under the contract was to review it, and if you approved it, to forward it to the health program Director and the Commissioner of -- excuse me, to the Department of Corrections for review by the Health Services Division and the Commissioner of Correction. Isn't that right?

A. Yes, that is essentially the process.

Q. And did you forward it to the Department of Corrections for approval?

A. Yes, we did provide the Department of Corrections with the report.

Q. And that indicated that you and Dr. Brewer agreed with the implementation of the recommendations of this report, at least with respect to Items 1, 2 and 3?

A. Correct.

June 1, 2006 Tr. at 47:7-48:3.

27. Nearly one year after the first decision of this Court, the DOC commenced treating Kosilek for GID in the summer of 2003. At that time, Kosilek was informed by MCI-Norfolk medical staff that SRS had been approved. On August 21, 2003, Kosilek began treatment with hormones, commencing the one year "Real Life Test" required by the Standards of Care. Kosilek thus has been receiving hormones for nearly two years. She has been dressing and living as a woman to the full extent permitted by MCI-Norfolk.

She has developed breasts as a result of the hormone treatment. In addition, laser treatment has removed her facial hair.

28. Under the Standards of Care, Kosilek should have been evaluated for SRS after a one year Real Life Test. At the conclusion of one year on hormones, nothing occurred. Kosilek's mental health professional at MCI Norfolk, Mark Burrowes, was unable to give Kosilek any information regarding her treatment plan.

29. Under pressure of repeated requests from Kosilek and her counsel, in the winter of 2004, the DOC finally sought an evaluation concerning readiness for SRS. A report by GID specialists, selected by the DOC, was provided to the DOC on February 24, 2005. The Fenway Report is signed by Drs. Kapila and Kaufman, two experts selected by the University of Massachusetts medical staff, at the request of the DOC.

26. The Fenway Report states that Kosilek, although happier since put on hormones, "continues to feel incomplete without lower surgery." Report at 4. The Report notes:

- "She continues to have a strong, persistent, cross-sex identification, and her desire to continue transitioning through surgery is clear". Id. at 4.
- "Her ability to live full-time as a female in a male prison, as well as her record of good behavior and absence of conflict with others, suggests intense motivation, as well as real adaptability to her environment, despite obvious stressors." Id.
- "Her joy around being feminized through hormone therapy, facial and body hair removal, and her ability to have access, and to dress in, feminine attire and makeup is palpable. Id.
- "These responses further suggest that being able to express herself as female has been helpful in alleviating her gender dysphoria." Id.

27. Notwithstanding these substantial improvements, the Report notes that "Michelle continues to feel quite distressed, both with having male genitalia, as well as

not having female genitalia." Id.

28. The Report unequivocally recommends sexual reassignment surgery as medically necessary: "It appears likely that this surgery would allow Michelle to have full relief from the symptoms of gender dysphoria she has experienced over the course of her life and may well increase her chance of survival". Id. at 6.

29. The report has been reviewed by University of Massachusetts medical staff who have informed the DOC that they are presently unaware of any known medical or mental health contraindication to providing sexual reassignment surgery.

30. Although the report was transmitted to the DOC on February 24, 2005, it was not presented to plaintiff or her counsel until March 5, 2005, after an order of this Court issued on March 2, 2005 requiring the DOC to do so.

31. Not satisfied with the recommendations made by the experts procured by the DOC, Defendant secured the services of Cynthia S. Osborne, M.S.W., to "review" the Fenway Report. Ms. Osborne has never had any contact with Kosilek.

32. The current stance by the Department of Correction creates an inevitable sense of *deja vu*. The retention of a second expert in circumstances where the DOC does not like the recommendation of its own selected expert is all too familiar and replicates the prior conduct of the DOC regarding the opinion of Dr. Forstein. As this Court found:

In June, 2000, Dr. Forstein was asked by representatives of the DOC whether his recommendations for treating Kosilek in prison would differ from those in his March 15, 2000 report which addressed what he would prescribe if Kosilek were in the community rather than incarcerated. *When Dr. Forstein stated that his recommendations regarding what was required to treat Kosilek adequately were not altered by the fact that Kosilek was incarcerated, the DOC terminated its relationship with him.*

Kosilek v. Maloney at 173 (emphasis added).

33. The DOC then retained Dr. Robert Dickey, a gender specialist in Canada, who is the author of an article recommending that inmates not receive sexual reassign hormones or surgery while in prison. As this Court found, Dr. Dickey and his colleagues at the Clark Institute do not use the Standards of Care, which are regularly relied upon by experts in the United States and elsewhere for treating gender identity disorders. *Id.* Dr. Dickey's approach, as this Court found "would almost always preclude initiating hormones for an inmate for whom they had not been prescribed prior to incarceration." Moreover, the Court found that the DOC had prepared a treatment plan for Kosilek without the participation of her regular mental health professional. *Id.* at 174-175. Ms. Osborne has never examined Kosilek. She was selected, like Dr. Dickey, in result-oriented fashion because she was known to the defendants and to their agents and employees as a medical expert who testifies on behalf of prisons, and against inmates who seek treatment for GID. Notwithstanding the lack of an examination of Kosilek, she did not hesitate to express a view that treatment should be denied. Her report stated:

- Kosilek was inappropriate for sexual reassignment surgery because Ms. Osborne did not have sufficient knowledge of Kosilek's history.
- Incarcerated individuals "are usually individuals who cannot make adequate psychosocial adjustment in the real world and who would rarely if ever succeed in a real life experience in the real world."
- "With the Harry Benjamin Standard as they are, how it can [sic] be justified that criminals in the real world don't qualify for hormones or surgery but incarcerated criminals do, or that non-incarcerated individuals must so often face and adjust to losses associated with their inability to access, for any number of reasons, desired feminizing options but incarcerated individuals must not, is, in my opinion, beyond reason."
- "in my view, providing surgery, or even hormones, to incarcerated individuals, is an undesirable lowering of the [Harry Benjamin] Standards,

and an explicit violation of the criteria regarding sociopathy and suicidality."

Osborne Report at 5.

35. Osborne, in addition to not having examined Kosilek, expresses views that are contrary to the medical opinions expressed by Drs. Kapila and Kaufman, the University of Massachusetts retained experts who did examine Kosilek. Moreover, her views are contrary to generally accepted medical opinion and make unwarranted assumptions about what is constitutionally required.

36. On May 27, 2005, former Commissioner and defendant Kathleen Dennehy signed a report regarding "Anticipated Safety and Security Concerns Arising From the Allowance of Inmate Michele [sic] Kosilek's Request For Sex Reassignment Surgery". One week prior to that report, Dennehy had announced her views to a television "Spotlight Team" in conjunction with a report on the cost of treatment for GID.

37. That report, which focuses largely on security issues involved in arranging for sexual reassignment surgery, does not raise any security concerns sufficient to overcome the Eighth Amendment obligation to provide adequate medical treatment.

38. The so-called security concerns set forth in the Security Report are wholly pretextual. Conclusions reflected in the Security Report did not arise from legitimate or *bona fide* security concerns, but rather from a distaste for sexual reassignment surgery.

39. On May 7, 2008, Defendant Clarke filed his Statement of Commissioner Harold W. Clarke Regarding Inmate Michelle Kosilek's Request for Sex Reassignment Surgery. The Statement largely followed the Security Report filed by former defendant Dennehy in 2005, and concluded that safety and security concerns prevented him from

allowing Ms. Kosilek to receive SRS.

40. On May 12 and 13, 2008, Defendant Clarke testified in this matter and reiterated that he had made the official decision to deny Ms. Kosilek SRS.

41. The defendants, by failing to provide adequate medical treatment for Kosilek have disregarded her serious medical need and placed her at a substantial risk of serious medical harm. Kosilek has been diagnosed by physicians retained by the DOC as having a serious medical need. She has been denied adequate medical care — the very care recommended by the DOC retained experts — for her serious medical need.

42. The defendants, who are the officials responsible for making the relevant decisions regarding Kosilek's care, are aware based on information they have received from University of Massachusetts, and from the recommended experts, that a serious risk of harm exists and the defendants have drawn the inference that such a risk exists. Nonetheless, the defendants have behaved wantonly by failing to provide adequate medical care.

43. The defendants are acting in bad faith and do not perceive any genuine conflict between providing adequate medical treatment and "security" concerns.

44. The defendants' treatment decisions regarding Kosilek were not based on her unique circumstances, or an individualized medical evaluation of Kosilek, but were rather based on a choice made for political, not medical reasons. The defendants' reasons for denying medical treatment are not rooted in legitimate penological concerns.

43. The defendants have knowingly and unreasonably disregarded an intolerable risk of harm to Kosilek and will continue to do so unless injunctive relief is

entered.

COUNT I

Denial of Adequate Medical Treatment with Deliberate Indifference to a Serious Medical Need in Violation of the Eighth Amendment

44. The plaintiff repeats and realleges the allegations of paragraphs 1 through 43 as if fully set forth herein.

45. Kosilek has a serious medical need for full treatment in accordance with the discretion of her treating physicians and medical personnel including the recommendations of consulting physicians experienced in the treatment of GID, including but not limited to the recommendations set forth in the Seil Report and the Fenway Report.

46. Kosilek's serious medical need has not been treated and she has been denied full treatment, including SRS.

47. Defendants have been deliberately indifferent to Kosilek's serious medical needs and have denied her treatment for reasons that are unrelated to her medical needs or to legitimate security concerns. Defendants know that medical experts consider Kosilek to be at risk for serious medical harm and have knowingly disregarded that risk.

48. Defendants' denial of medically necessary care for Kosilek is deliberately indifferent to her serious medical need and constitutes cruel and unusual punishment in violation of Kosilek's rights under 42 U.S.C. § 1983 and the Eighth Amendment to the United States Constitution.

49. Kosilek faces a substantial and imminent risk of serious medical harm.

PRAYERS FOR RELIEF

WHEREFORE, Plaintiff requests that this Court enter relief as follows:

1. Enter injunctive relief against the defendants enjoining them from interfering with the discretion of the mental health and other medical professionals involved in her care;
2. Enter injunctive relief against the defendants enjoining them to provide adequate medical care to Kosilek consistent with the treatment recommendations as set forth in the Seil Report and the Fenway Report, including but not limited to SRS and an independent medical evaluation by a GID specialist for electrolysis;
3. Award reasonable attorneys fees and costs to plaintiff's counsel under 42 U.S.C. § 1988; and
4. Award such other relief as shall be required in the interests of justice.

/s/ Joseph L. Sulman
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Date: April 16, 2010

CERTIFICATE OF SERVICE

I, Joseph L. Sulman, hereby certify that a true copy of the above document was served upon the attorney of record for each other party by ECF on this 16th day of April, 2010.

/s/ Joseph L. Sulman

Joseph L. Sulman