

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHELLE L. KOSILEK,)	
Plaintiff,)	
)	
v.)	C.A. No. 00-12455-MLW
)	
THOMAS E. DICKHAUT, in his)	
official capacity as Acting)	
Commissioner of the)	
Massachusetts Department of)	
Correction,)	
Defendant.)	

MEMORANDUM AND ORDER

WOLF, D.J.

June 4, 2015

On September 4, 2012 this court issued a Memorandum and Order on Eighth Amendment Claim finding sex reassignment surgery ("SRS") was the only adequate treatment for plaintiff Michelle Kosilek's serious medical need and, therefore, ordered defendant Commissioner of the Department of Corrections ("DOC"), then Luis Spencer, to provide it. See Kosilek v. Spencer, 889 F. Supp. 2d 190 (D. Mass. 2012).

On September 4, 2012, the court also issued a Memorandum and Order Concerning Electrolysis (Docket No. 556). The DOC had previously ceased providing Kosilek electrolysis to remove his facial hair. Kosilek alleged in his Second Amended Complaint that electrolysis was medically necessary and, therefore, required by the Eighth Amendment.

Despite the fact that the defendant had not responded properly to the Orders concerning Kosilek's motion for electrolysis, the court did not decide Kosilek's Eighth Amendment claim concerning it. It explained that:

[T]he court did not consider or rely upon any of the evidence relating to the dispute regarding electrolysis in reaching its decision concerning sex reassignment surgery because it had not heard any testimony regarding that dispute. Nor is the court now issuing an order concerning electrolysis, in part because the sex reassignment surgery that has been ordered will be a material change in circumstances regarding any arguable serious medical need Kosilek may have for electrolysis.

Mem. & Order Concerning Electrolysis (Docket No. 556) at 2-3.

Therefore, the court ordered that "[t]o the extent that Count 1 of the Second Amended Complaint requests a medical evaluation by an independent gender identity disorder specialist to determine whether electrolysis is medically necessary, the request is DENIED without prejudice." Id., ¶3 (emphasis added).

The decision ordering sex reassignment surgery was initially affirmed on appeal. See Kosilek v. Spencer, 740 F.3d 733 (1st Cir. 2014). However, after being reheard en banc, it was reversed and this court was instructed to dismiss this case. See Kosilek v. Spencer, 774 F.3d 63, 96 (1st Cir. 2014) (en banc). In its decision, the majority repeatedly expressed the understanding that Kosilek was being provided electrolysis. See id. at 86 (emphasis added) ("[T]he DOC argues that its

alternative course of treatment - which provides Kosilek such alleviative measures as psychotherapy, hormones, electrolysis, and the provision of female garb and accessories - is sufficient to treat Kosilek's [gender identity disorder]); id. at 89 (emphasis added) ("Beginning in 2003, [the DOC] has provided hormones, electrolysis, feminine clothing and accessories, and mental health services aimed at alleviating [Kosilek's] distress"); id. at 90 (emphasis added) ("Kosilek is provided hormones, facial hair removal, feminine clothing and access to regular mental health treatment.").

In a May 23, 2014 letter to this court, Kosilek complained that counsel for the DOC had falsely informed the First Circuit that Kosilek "'continues to receive electrolysis'" and "'regular permanent hair removal.'" See June 2, 2014 Order (Docket No. 673). An exhibit to that letter indicates that in a footnote to his en banc reply brief, Kosilek's counsel stated:

[T]he DOC has incorrectly asserted throughout this appeal that Kosilek is continuing to receive hormone therapy and hair removal. She is not. RA 57-59. The DOC stopped providing hair removal after concluding that further removal is not medically necessary for Kosilek. The district court denied without prejudice Kosilek's request in her second amended complaint for an independent evaluation regarding electrolysis. RA 59. While the subject of hair removal is not at issue in this appeal, the DOC should not be credited for treatment that it no longer provides.

Id., Ex. A. In his letter, Kosilek suggested that he might file a new case seeking electrolysis. Id. In the June 2, 2014 Order, this court "reminded [Kosilek] that as he is represented by counsel only counsel may communicate with the court on his behalf."

On January 7, 2015, mandate issued. Kosilek's petition for review by the Supreme Court was denied on May 4, 2015. See Kosilek v. O'Brien, No. 14-1120, 575 U.S. ____ (May 4, 2015). This memorandum memorializes the history of the electrolysis issue, which may be relevant to deciding possible questions of fact preclusion or issue preclusion if Kosilek files another case seeking electrolysis.

In the context of the foregoing, this case is hereby DISMISSED.


UNITED STATES DISTRICT JUDGE