IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

REIYN KEOHANE,

Plaintiff,

v.

JULIE L. JONES, in her official capacity as Secretary of the Florida Department of Corrections,

Defendant.

CASE NO. 4:16-cv-511

FDOC'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Plaintiff's response in opposition to summary judgment (doc. 128) fails to establish deliberate indifference. FDOC has not consciously disregarded a substantial risk to plaintiff, and plaintiff continues to receive appropriate medical treatment. Accordingly, summary judgment should be entered in FDOC's favor.

1. FDOC's treatment of plaintiff is well within constitutional standards.

Plaintiff asserts that FDOC's treatment providers lack the qualifications to treat gender dysphoria. Essentially, plaintiff argues that FDOC's doctors are incompetent and that their conclusions regarding medical necessity should be discarded. Even taking the evidence in the light most favorable to plaintiff, there is no reasonable basis for FDOC or the Court to ignore these providers.

In deeming the FDOC medical team incompetent, plaintiff ignores the beneficial treatment that has been provided. Plaintiff has undoubtedly benefited from hormone therapy and mental health counseling. And, plaintiff has been issued a medical pass for a bra. Plaintiff does not take issue with these actions. Plaintiff apparently contends that FDOC doctors are perfectly competent when taking actions plaintiff agrees with, but somehow incompetent when taking actions plaintiff disagrees with.

Plaintiff takes particular issue with Dr. Santeiro and his testimony that he was unaware of the WPATH Standards of Care. (doc. 128 at 18). Dr. Santeiro's testimony, however, makes abundantly clear that he is knowledgeable regarding the substance of those standards, and the treatment for gender dysphoria. (doc. 129-12 at 37; 38; 41; 43-44).

Further, Dr. Stephen Levine, FDOC's medical expert, agrees with FDOC's medical assessment that long hair and makeup are not medically necessary for plaintiff. Plaintiff notes Dr. Levine's opinion that plaintiff may be susceptible to "acute decompensation" if these allowances are withheld. (doc 128 at 14). Importantly, however, Dr. Levin makes clear that this decompensation is due to plaintiff's "narcissistic character," stating that plaintiff tends to decompensate when "thwarted by reality." He also noted that prisoners who lose lawsuits often suffer "period[s] of great disappointment." (doc 125-10 at 90-92). Thus, Dr.

Levine did not deem long hair and make-up to be medically necessary; rather, Dr. Levine tied the potential for plaintiff's possible decompensation to plaintiff's own mental character, not to any medical need.

Indeed, the treatment being afforded plaintiff here far exceeds constitutional requirements. For such treatment to fall below the constitutional threshold, it would, as plaintiff notes, need to rise to the level of "gross incompetence." *Harris v. Thigpen*, 941 F.2d 1495, 1509 (11th Cir. 1991). The doctors' actions must be "so blatantly inappropriate as to evidence intentional mistreatment" likely to aggravate the inmate's condition. *Konitzer v. Frank*, 711 F. Supp. 2d 874, 908 (E.D. Wisc. 2010). Not setting a broken leg or failing to provide CPR to someone not breathing are examples of such "intentional mistreatment." *Id.* Such mistreatment is a far cry from the substantial care given plaintiff here.

Plaintiff cites to no case holding that a prison doctor is grossly incompetent for concluding that long hair and makeup are not medically necessary. There is no basis for concluding that FDOC's providers subjectively knew or even should have known that denying plaintiff's requests was akin to denying CPR. In fact, FDOC's treatment has alleviated plaintiff's condition, not aggravated it. *Konitzer*, *supra*.

Plaintiff's effort to categorize FDOC's medical providers as grossly incompetent is belied by the facts. Legally, not providing *everything* an inmate desires fails to establish a claim of deliberate indifference. *See*, *e.g.*, *Turner v.*

Solorzano, 228 F. App'x 922, 924 (11th Cir. 2007) (A prisoner "cannot establish deliberate indifference based on his desire to receive some other kind of care"). Plaintiff fails to establish an Eighth Amendment violation, and summary judgment should be entered in FDOC's favor.

2. *Konitzer* and *Soneeya* do not support denial of summary judgment.

Plaintiff argues that FDOC ignores two cases involving claims for female grooming standards from inmates with gender dysphoria. Plaintiff refers to *Konitzer v. Frank* and *Soneeya v. Spencer*. (doc. 128 at 11). FDOC discussed those cases at the preliminary injunction stage, and its analysis of these two cases still applies. (doc. 44 at 9-11).

Konitzer recognized the general rule that treatment provided according to the medical judgment of the prison's doctors is not actionable; however, the court determined that because of plaintiff's multiple attempts to self-castrate, as well as multiple suicide attempts while on hormone therapy, it was "[c]lear [that] what the defendants were doing . . . was not working." *Id*. at 908-09.

Here, however, plaintiff's hormone therapy and mental health counseling is alleviating, not exacerbating, plaintiff's distress. Thus, in stark contrast to *Konitzer*, plaintiff's treatment is working, thereby bringing FDOC's actions well within the medical judgment rule.

In *Soneeya*, prison officials rejected the recommendations of even their own treating physicians in treating an inmate with gender dysphoria. *Id.* at 248-249. In fact, the court emphasized that defendants had not followed the recommendations of their own doctors and were simply "looking for an out." *Id.*

Here, by contrast, FDOC is *following* the advice of its treatment providers. Treatments deemed medically necessary (hormone therapy, counseling, a bra) have been provided. Treatments deemed medically unnecessary (makeup, long hair, panties) have not. FDOC is committed to properly treating plaintiff, just not to providing anything and everything requested. Moreover, there is currently no significant risk of suicide or self-harm for plaintiff, or any reason to believe decompensation will take place in the future.

Further, plaintiff does not address *Kosilek v. Spencer*, 774 F.3d 63, 83-84 (1st Cir. 2014). *Kosilek* held that the prison officials' decision not to provide reassignment surgery did not amount to deliberate indifference. *Id.* at 96. It pointed to the inmate's "significant stabilization" in reaching this conclusion and stated that the officials were employing treatments "proven to alleviate [the inmate's] mental distress." *Id.* at 90. Such therapy was found not to "wantonly disregard" the inmate's needs, but to "account[] for them." *Id.* Such is precisely the case here.

Plaintiff also suggests that security concerns and issues are somehow not relevant to this case. (doc. 128 at 30). Security concerns, by definition, always are relevant in any prison litigation, as *Kosilek* specifically stressed:

> When evaluating medical care and deliberate indifference, security considerations inherent in the functioning of a penological institution must be given significant weight. *Battista*, 645 F.3d at 454 ("[S]ecurity considerations also matter at prisons ... and administrators have to balance conflicting demands."). "[W]ide-ranging deference" is accorded to prison administrators "in the adoption and execution of policies and practices that in their judgement are needed to ... maintain institutional security." *Whitley v. Albers*, 475 U.S. 312, 321–22, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986) (quoting *Bell v. Wolfish*, 441 U.S. 520, 547, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)) (internal quotation marks omitted). In consequence, even a denial of care may not amount to an Eighth Amendment violation if that decision is based in legitimate concerns regarding prisoner safety and institutional security. *Cameron v. Tomes*, 990 F.2d 14, 20 (1st Cir.1993) (requiring courts to "embrace security and administration, ... not merely medical judgments" in assessing claims of deliberate indifference); *Sires*, 834 F.2d at 13 ("[S]afety factors are properly *84 included in the evaluation of the medical needs of an inmate."). Importantly, prison administrators need only have " 'responded reasonably to the risk.' " *Giroux v. Somerset Cnty.*, 178 F.3d 28, 33 (1st Cir.1999) (quoting *Farmer*, 511 U.S. at 844, 114 S.Ct. 1970).

Id. at 83–84. Moreover, FDOC's security rationale for the very policy plaintiff seeks an exception to is hardly beside the point.

FDOC is following its doctors' recommendations, and the treatments provided plaintiff are lessening not worsening plaintiff's gender dysphoria.

Kosilek, *supra*. Because FDOC is providing effective treatment, and is individually treating plaintiff, there is no credible argument that plaintiff's treatment constitutes deliberate indifference.

3. WPATH does not mandate allowing everything plaintiff requests.

Plaintiff argues that the standards of care ("SOC") set out in the WPATH guidelines require FDOC to allow everything plaintiff requests. Although the SOC discuss hormone therapy in detail, they include very little regarding the medical necessity of hair styles, make up, and/or undergarments. The SOC list one treatment option for gender dysphoria as changing "gender expression and role (which may involve living part time or full time in another gender role, consistent with one's gender identity.)" (doc. 3-16 at 9). No further details are offered as to how this is accomplished. Regarding children and adolescents diagnosed with gender dysphoria, the SOC reflect that at least a partial social transition could include "wearing clothing and having a hairstyle that reflects [their] gender identity." *Id.* at 16. Otherwise, special hair styles, underwear, and makeup are not discussed.

In addition, WPATH purports to be equally and wholly applicable to those who are incarcerated. *Id.* at 67. WPATH declares that the opportunities available to those in prison "should mirror that which would be available to them if they

were living in a non- institutional setting" and that "all elements of assessment and treatment" discussed in the SOC can be provided to inmates. *Id.*

Kosilek and *Konitzer* both addressed the applicability of WPATH in prison settings. In *Kosilek*, the inmate argued that the triadic sequence in the SOC is the "only constitutionally sufficient treatment" for gender dysphoria. 774 F.3d at 86. The court disagreed, concluding that WPATH provides only "flexible direction" that could be changed by treatment providers. *Id.* at 87.

When *Konitzer* was decided, the sixth edition of WPATH was in place. 711 F. Supp. 2d at 907. Like the current version, the sixth edition established the "triadic therapeutic sequence" of "(1) hormone therapy (2) real-life experience, and (3) sex reassignment surgery." *Id.* The court there reasoned that incarceration rendered some of the SOC's "existing standard treatment guidelines for [gender dysphoria] unrealistic and impossible." *Id.* It also stated that guidelines reflecting the "complexities created by that situation" had not yet been developed. *Id.* Instead of adopting such guidelines, WPATH simply added, by proclamation, the language regarding its appropriateness to prisons. (doc. 129-4 at 47-50).

WPATH offers no real guidance on the limited issues present here: whether long hair and make-up are medically necessary. As Dr. Levine states, the basic principle that WPATH and plaintiff's experts seem to suggest is "once gender dysphoria, the diagnosis, is established, everything the inmate wants is medically

necessary." (doc. 105-4 at 11). There is no medical or legal justification for this principle. Any such principle turns prison doctors into rubber stamps for inmate requests.

This Court should reject the conclusory declaration that WPATH applies equally to those inside and outside of prison. FDOC agrees inmates with gender dysphoria deserve adequate treatment, as evidenced by the significant care plaintiff is receiving here. However, simply saying something – being in prison is no different than not being in prison – hardly makes it so.

Not only does such an argument fly in the face of common sense, but *Konitzer* essentially rejects it. As the court noted there, it is not realistic to believe that everything involving gender dysphoria treatment that is available to a non-incarcerated person would be equally accessible to an inmate. *Konitzer*, 711 F. Supp. 2d at 906.

In addition, the WPATH Standards of Care provide that the "particular course of medical treatment" should "var[y] based on the individualized needs of the person." Compl. ¶ 24; *see also Druley v. Patton*, 601 F. App'x 632, 635 (10th Cir. 2015) ("The Standards of Care are intended to provide *flexible directions for the treatment* of [Gender Dysphoria]"; *accord, e.g., Kosilek, supra*; *Arnold v. Wilson*, 2014 WL 7345755 at *9 (E.D. Va. Dec. 23, 2014) (prison officials not required to "rigidly follow WPATH standards"). Plaintiff's gender dysphoria has

been treated with an "individualized service plan" of mental-health care. Dep. Excerpts of Andre Rivero-Guevara, doc. 125-1 at 53-54; 55:1-3; Decl. of Marlene Hernandez, M.D., C.C.H.P. (doc. 24-1 at ¶¶ 3-6); Decl. of Dr. Jose Santeiro (doc. 44-1 at ¶¶ 4-11).

Plaintiff's gender dysphoria is being treated adequately and humanely. Plaintiff's attempt to characterize this treatment as deliberately indifferent should be rejected. Requiring plaintiff to comply with FDOC's hair-length and grooming policy does not violate the Eighth Amendment's prohibition on deliberate indifference. Summary judgment should be entered in FDOC's favor.

Respectfully submitted this 26th day of June, 2017.

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CERTIFICATION OF COMPLIANCE
PURSUANT TO LOCAL RULE 7.1

Pursuant to N.D. Fla. Local Rule 7.1, I hereby certify that FDOC's Reply Brief in Support of its Summary Judgment is in compliance with the Court's word limit. According to the word processing program used to prepare this pleading, the total number of words in the pleading, inclusive of headings, footnotes and quotations, and exclusive of the case style, signature block, and any certificate of service is 2,013.

CERTIFICATE OF SERVICE

I certify that on June 26, 2017, a copy of the foregoing was filed using the CM/ECF system which will send notice to all counsel of record.

/s/ Kirkland E. Reid
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