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

Reiyn Keohane, Plaintiff, v. Julie Jones, *in her official capacity as* Secretary of the Florida Department of Corrections, Trung Van Le, *in his official capacity as* Chief Health Officer of the Desoto Annex, Teresita Dieguez, *in her official capacity as* Medical Director of Everglades Correctional Institution, and Francisco Acosta, *in his official capacity as* Warden of Everglades Correctional Institution, Defendants.	Case No. 4:16-cv-511

MOTION TO DISMISS

Julie Jones, in her official capacity as Secretary of the Florida Department of Corrections, and Francisco Acosta, in his official capacity as Warden of Everglades Correctional Institution (collectively, "FDOC"), two of the defendants

in the above-styled lawsuit, respectfully request that this Court enter an Order, pursuant to *Fed. R. Civ. P.* 12(b)(6), dismissing plaintiff's complaint.

This motion to dismiss is supported by FDOC's memorandum in support filed contemporaneously herewith, and incorporated herein by reference.

WHEREFORE, FDOC respectfully requests that this Court dismiss plaintiff's complaint pursuant to *Fed. R. Civ. P.* 12(b)(6). FDOC requests such other and further relief as justice may require.

Respectfully submitted this 12th day of September, 2016.

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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 this motion to dismiss 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 113.

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CERTIFICATE OF SERVICE

I certify that on September 12, 2016, I filed the foregoing using the CM/ECF system, which will send notification to all counsel of record.

/s/ Kirkland E. Reid

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
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Reiyn Keohane,

Plaintiff,

v.

Julie Jones,
in her official capacity as
Secretary of the Florida Department of Corrections,

Trung Van Le,
in his official capacity as
Chief Health Officer of the Desoto Annex,

Teresita Dieguez,
in her official capacity as
Medical Director of Everglades Correctional Institution, and

Francisco Acosta,
in his official capacity as
Warden of Everglades Correctional Institution,

Defendants.

Case No. 4:16-cv-511

MEMORANDUM IN SUPPORT OF FDOC'S MOTION TO DISMISS

Defendants Julie Jones, in her official capacity as Secretary of the Florida Department of Corrections, and Francisco Acosta, in his official capacity as Warden of Everglades Correctional Institution (together, "FDOC"), submit this memorandum in support of their motion to dismiss the complaint filed by plaintiff, Reiyn Keohane [Dkt. 1.]

BACKGROUND[1]

Reiyn Keohane is a biologically male inmate in the custody of FDOC who was diagnosed with Gender Dysphoria in 2010. Compl. ¶ 28. Gender Dysphoria is the "medical diagnosis for the incongruence between one's gender identity and one's sex assigned at birth." *Id.* ¶ 15. Thus, although plaintiff's "external anatomy" is that of a male, plaintiff's "internal sense" is that plaintiff is a woman. *Id.* ¶¶ 11, 13. Plaintiff entered FDOC custody after pleading guilty in 2014 to attempted second degree murder. Compl. ¶ 31.

In prison, Keohane's Gender Dysphoria has been treated with an "individualized service plan" of mental-health care. Compl. ¶ 55; *see also id.* ¶ 35 (listing the "numerous DOC medical and mental-health officials" who have evaluated plaintiff during plaintiff's imprisonment). Plaintiff has filed administrative grievances and appeals asserting that this mental-health care is

[1] Because this memorandum supports a motion to dismiss pursuant to *Fed. R. Civ. P.* 12(b)(6), this section takes as true the facts alleged in plaintiff's complaint. *See infra* p. 5.

insufficient treatment, and that plaintiff instead needs hormone therapy, in accordance with the "prescription [plaintiff had] when [plaintiff] was arrested." *Id.* ¶ 37; *see also id.* ¶¶ 47, 53, 56, 57, 65, 66, 76, 79. In plaintiff's grievances, plaintiff has asserted that "[t]o deny" hormone therapy "is to cause depression and suicidal tendencies, which [plaintiff] must face on a daily basis." *Id.* ¶ 53. Plaintiff has also demanded to be able to wear "female underwear" and "grow[] her hair" in female styles. *Id.* ¶¶ 36, 66.

Because Keohane's prescription for hormone therapy was "suspended" at the time plaintiff entered prison, plaintiff's requests for hormone therapy allegedly have been denied under FDOC's "freeze-frame policy," under which "[i]nmates who have undergone treatment for [Gender Dysphoria] will be maintained only at the level of change that existed at the time they were received by the Department." *Id.* ¶¶ 55, 85. Plaintiff's requests to wear female underwear and to grow hair longer than allowed have also been denied under FDOC policies. In particular, Fla. Admin. Code r. 33-602.101 provides that "[i]nmates shall at all times wear … regulation clothing," which for male inmates includes "under shorts" and for female inmates includes "panties" and a "bra or athletic bra." 33-602.101(2). Rule 33-602.101 further provides that "[m]ale inmates shall have their hair cut short to medium uniform length at all times with no part of the ear or collar covered." *Id.* at 33-602.101(4).

On August 15, 2016, plaintiff filed the complaint, alleging that FDOC's failure to provide plaintiff with hormone therapy, to permit plaintiff to wear female underwear, and to permit plaintiff to grow hair past "medium uniform length" violate the Cruel and Unusual Punishments Clause of the Eighth Amendment of the United States Constitution. *See id.* ¶¶ 87–97. Named as defendants were two of the medical professionals who responded to plaintiff's administrative grievances, along with Julie Jones, the Secretary of the Department of Corrections, and Francisco Acosta, the Warden of Everglades Correctional Institution, both in their official capacities. *Id.* ¶¶ 7–10.[2]

Following the filing of the Complaint, Keohane was evaluated by an outside medical professional at FDOC's request, who determined that it was medically appropriate for Keohane to be provided hormone therapy. FDOC promptly agreed that Keohane be put on hormone therapy, and plaintiff has now been on such therapy for approximately one week.

[2] Warden Acosta is plainly an improper defendant in this case. Because an Eighth Amendment plaintiff must show a causal connection between each defendant and the constitutional deprivation, the only proper defendants in a deliberate-indifference case like Keohane's are persons who (1) "personally participated in the alleged constitutional deprivation; (2) were "on notice of a history of widespread abuse of constitutional rights, but failed to take corrective action"; (3) "had a policy in place that condoned the alleged constitutional deprivation"; or (4) "directed subordinates to act unlawfully or knew that subordinates would act unlawfully and failed to stop them from doing so." *Sealey v. Pastrana*, 399 F. App'x 548, 552 (11th Cir. 2010) (internal quotation marks omitted). The Complaint does not allege that any of these grounds applies to Warden Acosta; indeed, it mentions Warden Acosta just once, and then only to say that he "will respond to any injunctive relief ordered by the Court." Compl. ¶ 10. Thus, although the rest of this memorandum will address the substantive reasons why Keohane's Eighth Amendment claim fails as to her clothing and grooming claims, Keohane's claims also should be dismissed in their entirety insofar as they are asserted against Warden Acosta on this basis alone.

LEGAL STANDARD

A motion to dismiss under *Fed. R. Civ. P.* 12(b)(6) tests "the legal sufficiency of the complaint." *Odion v. Google Inc.*, 628 F. App'x 635, 639 (11th Cir. 2015). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A complaint that states a plausible claim to relief is one that "'contain[s] either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory.'" *Frazile v. EMC Mortg. Corp.*, 382 F. App'x 833, 836 (11th Cir. 2010) (quoting *Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 683 (11th Cir. 2001)).

LAW AND ARGUMENT

The complaint alleges that plaintiff is constitutionally entitled to an injunction directing the Defendants to provide (1) hormone therapy; and (2) "access to female clothing and grooming standards"—*i.e.*, to permit plaintiff to wear female underwear and to grow hair longer than the "medium uniform length" permitted by DOC policy. As explained above, Keohane is currently being provided with hormone therapy, so that request—as well as Keohane's challenge to the "freeze-frame" policy that plaintiff alleges is responsible for the denial of

post-incarceration hormone therapy, *see* Compl. ¶¶ 85–86—is moot. *See, e.g., Smith v. Sec'y, Dep't of Corr.*, 602 F. App'x 466, 471 (11th Cir. 2015) ("Smith's claim that he required placement of a crown on his molar was moot once the tooth was fixed."); *Fla. Ass'n of Rehabilitation Facilities, Inc. v. State of Fla. Dep't of Health & Rehabilitative Servs.*, 225 F.3d 1208, 1219 (11th Cir. 2000) (under *Ex parte Young* exception to the Eleventh Amendment, a suit against state officials under must seek "to end *continuing* violations of federal law") (emphasis added).

As for plaintiff's remaining requests—that plaintiff be permitted to wear female underwear and grow hair to a length violative of DOC policy—they do not state a claim for relief under the Eighth Amendment. It is well established that restrictions on a prisoner's hair or clothing are not sufficiently serious deprivations to trigger Eighth Amendment protections. Moreover, even if they were, Keohane has not and cannot adequately allege either (1) that FDOC subjectively knew that refusing to provide female underwear and an exception to the hair-length rule would subject plaintiff to a substantial risk of serious harm; or (2) that the prison's failure to provide female undergarments and an exception to the hair-length rule amounts to a complete failure to treat plaintiff's Gender Dysphoria, given that plaintiff was being treated with mental-health counseling and is now on hormone therapy. Accordingly, insofar as plaintiff seeks these two forms of injunctive relief, the complaint fails to state a claim.

I. Refusing to permit Keohane to wear female underwear and hair longer than "medium uniform length" does not constitute an objectively serious deprivation subject to Eighth Amendment scrutiny.

The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. In prohibiting "cruel and unusual punishments," the Eighth Amendment "does not mandate comfortable prisons." *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981). To the contrary, "[i]f prison conditions are merely 'restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.'" *Chandler v. Crosby*, 379 F.3d 1278, 1289 (11th Cir. 2004) (quoting *Rhodes*, 452 U.S. at 347).

This does not mean, of course, that prison conditions may "involve the wanton and unnecessary infliction of pain." *Rhodes*, 452 U.S. at 347. But because "[l]awful incarceration" by necessity "brings about the necessary withdrawal or limitation of many privileges or rights," the State is not required to make prisoners as comfortable as they would be outside prison. *Pell v. Procunier*, 417 U.S. 817, 822 (1974) (internal quotation marks omitted); *see also Harris v. Thigpen*, 941 F.2d 1495, 1511 n.24 (11th Cir. 1991) ("[N]othing in the Eighth Amendment … requires that [prisoners] be housed in a manner most pleasing to them." (internal quotation marks omitted)). Instead, "a prison official violates the Eighth Amendment only when," among other things, the alleged deprivation of the

plaintiff's rights is "objectively, sufficiently serious" that it amounts to "the denial of the minimal civilized measure of life's necessities." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (internal quotation marks omitted).

Applying these well-established standards, courts have routinely held that a prison's regulation of its inmates' hair length and clothing does not violate the Eighth Amendment. For instance, in *Hood v. Dep't of Children & Families*, No. 2:12-cv-637-FtM-29DNF, 2014 WL 757914 (M.D. Fla. Feb. 26, 2014), the plaintiff, a transgender woman, alleged that she was constitutionally entitled to wear "female clothing" in accordance with the same WPATH Standards of Care relied on in Keohane's Complaint. *Id.* at *2; *see also* Compl. ¶¶ 19–24. The civil commitment center, citing its policy prohibiting residents from wearing female clothing, took the position that any such clothing found in the plaintiff's possession would be considered "contraband," and filed a motion to dismiss. *Hood*, 2014 WL 757914, at *1–2. The court granted the motion and dismissed the complaint, finding

> no … authority indicating that a transgender person has the right to choose the clothing worn while confined or that the facility is constitutionally obligated to purchase all the clothing and feminine products requested. In fact, generally, federal courts have held the opposite. *See, e.g., Murray v. United States Bureau of Prisons*, 106 F.3d 401 (6th Cir. 1997) (transsexual prisoner not entitled to wear clothing of his choice and prison officials do not violate the Constitution simply because the clothing is not aesthetically pleasing); *Star v. Gramley*, 815 F. Supp. 276 (C.D. Ill. 1993) (noting that provision of female clothing to transsexual prisoner would be unduly

> burdensome for prison official and would make little fiscal sense); *Jones v. Warden of Stateville Corr. Ctr.*, 918 F. Supp. 1142 (N.D. Ill. 1995) ("Neither the Equal Protection Clause nor the First Amendment arguably accord [Plaintiff] the right of access to women's clothing while confined in a state prison.").

Id. at *8. The cases collected in *Hood* are merely a partial list. *See Praylor v. Tex. Dep't of Criminal Justice*, 430 F.3d 1208, 1208–09 (5th Cir. 2015) (rejecting prisoner's Eighth Amendment claim that he was entitled to an injunction instructing the defendant "to provide him with … brassieres"); *Smith v. Hayman*, Civil Action No. 09-2602 (FLW), 2010 WL 948822, at *13 (D.N.J. Feb. 19, 2010) ("Prison authorities must have the discretion to decide what clothing will be tolerated in a male prison and the denial of female clothing and cosmetics is not a constitutional violation." (internal quotation marks and alterations omitted)); *Long v. Nix*, 877 F. Supp. 1358, 1361, 1366 (S.D. Iowa 1995) (finding no Eighth Amendment violation where "[h]undreds of times, [the plaintiff] ha[d] asked for, and prison officials had denied, permission to receive and wear women's clothing and make-up").

The law is equally clear that the Eighth Amendment does not require that prisoners be permitted to wear any particular hairstyle. Courts around the country and in this Circuit have held that "limits on hair length" do not constitute denials of "'the minimal civilized measures of life's necessities.'" *LaBranch v. Terhune*, 192 F. App'x 653, 653–54 (9th Cir. 2006) (quoting *Farmer*, 511 U.S. at 834); *see also*

DeBlasio v. Johnson, 128 F. Supp. 2d 315, 325–26 (E.D. Va. 2000) (prison's hair restrictions were "part and parcel of" "the ordinary discomfort accompanying prison life" (internal quotation marks omitted)), *aff'd*, 13 F. App'x 96 (4th Cir. 2001); *Larkin v. Reynolds*, 39 F.3d 1192, 1994 WL 624355, at *2 (10th Cir. 1994) (Table) ("forced compliance with the" prison's "grooming code" was not "unnecessary and wanton infliction of pain" illegal under the Eighth Amendment); *Blake v. Pryse*, 444 F.2d 218, 219 (8th Cir. 1971) (hair-length requirement, "however annoying it may be to petitioner personally, does not deprive him of any federal or civil constitutional right"); *Taylor v. Gandy*, Civil Action No. 11-00027-KD-B, 2012 WL 6062058, at *4 (S.D. Ala. Nov. 15, 2012) (a prisoner's "disagreement with the" prison's haircut policy "fails to demonstrate that Defendants acted with deliberate indifference"); *Casey v. Hall*, No. No. 2:11-cv-588-FtM-29SPC, 2011 WL 5583941, at *3 (M.D. Fla. Nov. 16, 2011) (requirement that plaintiff "shave his hair" "is not a 'serious' or 'extreme' condition, or one that violates 'contemporary standards of decency'").

This holds true even as to transgender plaintiffs. In *Murray v. U.S. Bureau of Prisons*, the Sixth Circuit considered a claim by a transgender prisoner that the prison's failure to continue to provide her "hair and skin products that she claim[ed were] necessary for her to maintain a feminine appearance" violated the Eighth Amendment. 106 F.3d 401 (Table), 1997 WL 34677, at *2 (6th Cir. 1997). The

Sixth Circuit had little difficulty determining that the claim failed, explaining that "[c]osmetic products are not among the minimal civilized measure of life's necessities." *Id.*

The rationale behind this overwhelming caselaw is simple: "restrictions placed on [a prisoner's] choice of haircut," or her choice of undergarments, simply "do no present the type of deprivation of life's necessities that rise to an Eighth Amendment violation." *Casey*, 2011 WL 5583941, at *3 (citing *Chandler v. Crosby*, 379 F.3d 1278, 1298 (11th Cir. 2004)). Plaintiff is receiving the hormone therapy that plaintiff needs. While plaintiff might be more comfortable also having the hairstyle or clothing of plaintiff's choice, plaintiff's inability to wear long hair and female undergarments is justified by legitimate penological concerns,[3] and therefore is merely among the "significant restrictions, inherent in prison life, on rights and privileges free citizens take for granted." *McKune v. Lile*, 536 U.S. 24, 40 (2002).

[3] For example, the Eleventh Circuit has recently recognized that requiring prisoners to maintain short hair can (1) prevent prisoners from easily changing their appearances upon escape; (2) prevent prisoners from using long hair "to conceal weapons and contraband"; (3) address "hygiene … concerns"; and (4) promote[] order and discipline while removing a physical characteristic that inmates can use to form gangs." *Knight v. Thompson*, 797 F.3d 934, 944–45 (11th Cir. 2015). Further, other courts have explained that permitting a transgender prisoner housed with men to dress as a woman and wear longer hair than otherwise permitted at the prison "could pose a security risk to [her] safety and the safety of others," *Smith v. Hayman*, Civil Action No. 09-2602 (FLW), 2010 WL 9488822, at *13 (D.N.J. Feb. 19, 2010), primarily by creating "an increased risk of sexual assault." *Arnold v. Wilson*, No. 1:13cv900 (LMB/TRJ), 2014 WL 7345755, at *3, 7 (E.D. Va. Dec. 23, 2014).

II. Even if refusing to permit Keohane to wear female undergarments and grow hair past the permitted length were an objectively serious deprivation, no FDOC official was subjectively aware that refusing to provide female undergarments and an exception to the hair-length rule would subject plaintiff to a substantial risk of serious harm.

Assuming *arguendo* that FDOC's refusal to permit plaintiff to wear female undergarments or to grow hair past "medium uniform length" *could* be of Eighth Amendment significance, plaintiff's claims still would fail because plaintiff has not plausibly alleged that FDOC took these actions while subjectively aware that they would subject plaintiff to a substantial risk of serious harm. Indeed, FDOC's actions are firmly rooted in objective safety and institutional security considerations of its established policies.

Because the Cruel and Unusual Punishments Clause applies only to *punishment*, "a claim of deliberate indifference requires proof of more than gross negligence." *Townsend v. Jefferson Cnty.*, 601 F.3d 1152, 1158 (11th Cir. 2010). To be "deliberately indifferent," the prison official must "know[] of and disregard[] an excessive risk to inmate health or safety"; that is, he "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837. Thus, to adequately allege an Eighth Amendment claim, a prisoner must allege that the defendant official was "informed" or otherwise *actually knew* that, without the sought-after treatment, the prisoner would be placed in substantial risk

of suffering serious harm. *See, e.g., Chatham v. Adcock*, 334 F. App'x 281, 289 (11th Cir. 2009). And while a risk of purely psychological harm potentially may suffice, that harm must be "severe," *Wilson v. Silcox*, 151 F. Supp. 2d 1345 (N.D. Fla. 2001); akin to the harm caused by a "guard placing a revolver in [an] inmate's mouth and threatening to blow [the] prisoner's head off." *Hudson v. McMillan*, 503 U.S. 1, 16 (1992) (Blackmun, J., concurring) (citing this as an example of the kind of "infliction[] of psychological harm—without corresponding physical harm—that might prove to be cruel and unusual punishment").

Keohane's complaint is utterly devoid of any allegation that any defendant named in the complaint *actually knew* that not wearing female underwear or growing hair past the ear or collar would subject plaintiff to a substantial risk of serious harm. The complaint alleges that Keohane has engaged in genital mutilation, has attempted suicide, and has thoughts of "self-harm and suicide." Compl. ¶¶ 37, 49, 59. But Keohane has repeatedly tied the potential for self-harm to requests for *hormone therapy*, not requests to wear female underwear and grow long hair. *Id.* ¶¶ 37 ("I need my hormone therapy resumed. … . Without it I consider self-harm and suicide every single day."); 53 ("Plaintiff explained that it was cruel and unusual punishment for the DOC to deny her the medication that she needed. She stated …. '[t]o deny it is to cause depression and suicidal tendencies.'").

To inform FDOC that plaintiff not being on hormone therapy, recommended by a physician, poses a substantial risk that plaintiff will suffer severe psychological distress or make further attempts at self-harm is one thing; however, to inform FDOC that wearing boxer shorts and not having long hair poses such a risk is quite another. In other words, there is simply no allegation in the Complaint that any FDOC official had *subjective knowledge* that, even if Keohane were provided with hormone therapy, there would *still* be a substantial risk of her suffering serious harm because of her not being able to wear female underwear or grow long hair. Because this motion relates only to Keohane's claims for these two forms of relief, and not to her request for hormone therapy, this alone is a straightforward, narrow, and compelling reason that the motion must be granted.

III. Even if refusing to permit Keohane to wear female underwear and grow hair past the permitted length were an objectively serious deprivation, the Defendants have not been deliberately indifferent to Keohane's medical needs.

Finally, plaintiff's claims relating to FDOC's hair and grooming standards must fail because plaintiff cannot establish that the Defendants have enforced the regulations out of deliberate indifference to serious medical needs.

Once a prisoner shows that the defendant prison official actually knew of a substantial risk of serious harm, the prisoner must establish that the official was *deliberately indifferent* to that risk. Eleventh Circuit caselaw "has provided

guidance concerning the distinction between" actionable "deliberate indifference" and inactionable conduct that does not rise above the level of "gross negligence." *See Farrow v. West*, 320 F.3d 1235, 1246 (11th Cir. 2003). For instance, the cases have made clear that "an official acts with deliberate indifference when he knows that an inmate is in serious need of medical care, but he fails or refuses to obtain medical treatment for the inmate." *Id.* (internal quotation marks omitted). But that a plaintiff is entitled to *some* treatment for his serious medical needs does not mean that he is "entitled to treatment of his choice," *Hood v. Dep't of Children & Families*, No. 2:12-cv-637-FtM-29DNF, 2015 WL 686922, at *9 (M.D. Fla. Feb. 18, 2015); or even that the treatment must rise above a level that would constitute "medical malpractice" under state tort law. *E.g., Chatham*, 334 F. App'x at 287–88. Instead, so long as the prison provides the plaintiff with at least *some* treatment, and that treatment is not "so cursory as to" in reality "amount to no treatment at all," the Eleventh Circuit has held again and again that the low bar of deliberate indifference is satisfied. *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999) (internal quotation marks omitted); *see also Carter v. Broward Cnty. Sheriff's Dep't Med. Dep't*, 558 F. App'x 919, 22 (11th Cir. 2014) ("A simple difference in medical opinion between the medical staff and an inmate as to the latter's diagnosis or course of treatment does not establish deliberate indifference."); *Loeber v. Andem*, 487 F. App'x 548, 549 (11th Cir. 2012) ("The Defendants did

not ignore Plaintiff's … condition; instead they chose an alternative treatment … to address [it]."); *Leonard v. Dep't of Corr. Fla.*, 232 F. App'x 892, 894–95 (11th Cir. 2007) ("[A] difference of opinion between an inmate and prison medical staff does not—by itself—give rise to a claim under the Eighth Amendment.").

Courts have repeatedly applied these fundamental principles to the treatment of Keohane's medical condition, Gender Dysphoria. For instance, in *Supre v. Ricketts*, 792 F.2d 958 (10th Cir. 1986), the plaintiff, a biologically male prisoner who had "engaged in various forms of mutilation of his sex organs," requested to be treated with estrogen to treat his Gender Dysphoria. *Id.* at 960. The prison instead prescribed "testosterone replacement therapy and mental health treatment," and the plaintiff sued. *Id*. The Tenth Circuit held that the failure to provide the plaintiff with his *preferred* treatment did not constitute deliberate indifference, because the prison had at least provided him with *some* treatment:

> While the medical community may disagree among themselves as to the best form of treatment for plaintiff's condition, the Department of Corrections made an informed judgment as to the appropriate form of treatment and did not deliberately ignore plaintiff's medical needs. The medical decision not to give plaintiff estrogen until further study does not represent cruel and unusual punishment. This case … does not present a situation where there was a total failure to give medical attention. At most, plaintiff might have made a case for negligence or medical malpractice, but he could not have established a constitutional violation."

Id. at 963.

Similarly, in *Barnhill v. Cheery*, No. 8:06-cv-922-T-23TGW, 2008 WL 759322 (M.D. Fla. Mar. 20, 2008), the plaintiff was a biological male who had been diagnosed with Gender Dysphoria, had been prescribed estrogen for 17 years before going to prison, and had been living as a female for 15 years before going to prison. *Id.* at *1–2. "[H]is female hormone treatments ceased" once he arrived in prison, and the prison instead put the plaintiff on a regimen of mental health counseling. *Id.* at 12. The plaintiff sued, alleging that the Eighth Amendment required the prison to continue his hormone therapy, but the court disagreed. The plaintiff's preference for hormone therapy over psychiatric care reflected "a simple difference in medical opinion" that "does not constitute deliberate indifference." *Id.* at *13 (internal quotation marks omitted). Thus, because the plaintiff had been receiving "mental health counseling for transsexualism," his "medical needs clearly ha[d] not been disregarded" within the meaning of the Eighth Amendment. *Id.* at *11.

This principle is dispositive of Keohane's claims based on clothing and grooming standards. For plaintiff to adequately allege that it violates the Eighth Amendment for FDOC to refuse to permit plaintiff to wear female underwear or to grow hair longer than permitted under prison policy, plaintiff would have to allege that any treatment that does not include these elements is effectively no treatment at all. Yet plaintiff makes no such allegation. Instead, plaintiff alleges only that

"dressing, grooming, and presenting oneself to others in accordance with one's gender identity" is part of the "[t]reatment protocols under the WPATH Standards of Care." But the test under the Eighth Amendment is not whether the treatment provided is perfectly commensurate with the most up-to-date medical recommendations; it is, again, whether the treatment is "so cursory as to amount to no treatment at all." *McElligott*, 182 F.3d at 1255 (internal quotation marks omitted); *see also Harris v. Thigpen*, 941 F.2d 1495, 1510 (11th Cir. 1991) ("[I]t is not constitutionally required that [medical care provided to prisoners] be perfect, the best obtainable, or even very good."). Plaintiff does not allege that any treatment plan that does not allow wearing female underwear or growing hair past "medium uniform length" would fall below this standard.

Nor could plaintiff. For one thing, the WPATH Standards of Care do not even purport to constitute the *sine qua non* of proper medical treatment for Gender Dysphoria; instead, as plaintiff concedes, the Standards 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]." (internal quotation marks omitted)); *accord, e.g., Kosilek v. Spencer*, 774 F.3d 63, 87 (1st Cir. 2014); *Arnold v. Wilson*, No. 1:13cv900 (LMB/TRJ), 2014 WL 7345755, at *9 (E.D. Va. Dec. 23, 2014) (prison

officials not required to "rigidly follow WPATH standards"). Moreover, although "there is disagreement," both in the medical community and in the courts, as to "the proper treatment for" Gender Dysphoria, *Barnhill*, 2008 WL 759322, at *12, most "circuits that have considered the issue have concluded that declining to provide a transsexual with hormone treatment does not amount to acting with deliberate indifference to a serious medical need." *Praylor*, 430 F.3d at 1209; *see also White v. Farrier*, 849 F.2d 322, 327 ("[I]nmates do not have a constitutional right to hormone therapy."); *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987) (prisoner with Gender Dysphoria "does not have a right to any particular type of treatment, such as estrogen therapy"); *Supre*, 792 F.2d at 963 ("The medical decision not to give plaintiff estrogen until further study does not represent cruel and unusual punishment."). If not even hormone therapy is constitutionally required for transgender prisoners, it is inconceivable to think that a prison official (like FDOC here) who has *actually provided* the prisoner with hormone therapy, but has refused to, in addition, provide female undergarments or an exception from general haircut policies has acted with deliberate indifference toward the prisoner's Gender Dysphoria.

FDOC is currently providing plaintiff with the medical treatment that current medical evaluations indicate is appropriate, and it will continue to do so. To the extent that plaintiff simply disagrees with the prison's medical professionals'

determination that it is not medically necessary for plaintiff to be able to wear female clothing and plaintiff's preferred hairstyle, that disagreement does not constitute an actionable Eighth Amendment violation. *Harris*, 941 F.2d at 1505.

CONCLUSION

FDOC does not doubt that plaintiff feels discomfort with the contrast between plaintiff's gender understanding and the clothes and hairstyle plaintiff is required to maintain as a prisoner at an all-male prison. But the Eighth Amendment is violated only when "society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk." *Helling v. McKinney*, 509 U.S. 25, 36 (1993). Prisoners routinely are required to forfeit rights to self-expression that they would enjoy outside of prison, not merely out of a desire on the part of prison officials to inflict pain, but to promote penological interests in security and uniformity, for the safety of correctional officers and inmates alike.

FDOC has not been deliberately indifferent to plaintiff's needs, and FDOC's requiring plaintiff to follow its hair-length and clothing regulations, while providing plaintiff with individualized mental-health counseling and hormone therapy, does not constitute cruel and unusual punishment. Accordingly, the Complaint should be dismissed.

Respectfully submitted this 12th day of September, 2016.

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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 this memorandum in support of motion to dismiss 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 4,833.

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CERTIFICATE OF SERVICE

I certify that on September 12, 2016, I filed the foregoing using the CM/ECF system, which will send notification to all counsel of record.

/s/ Kirkland E. Reid
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