

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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DONNA DAWN KONITZER aka S.A. Konitzer,

Plaintiff,

v.

EDWARD WALL, GREG GRAMS,  
TIMOTHY DOUMA, JANEL NICKEL,  
DALIA SULIENE, TIMOTHY LUNDQUIST,  
KEVIN KALLAS, DAVID BURNETT, JAMES GREER,  
DANIEL WESTFIELD, J.B. VAN HOLLEN,  
COREY FINKELMEYER, JODY SCHMELZER,  
FRANCIS SULLIVAN, LILLIAN TENEBRUSCO and  
LORI ALSUM,

Defendants.  
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OPINION AND ORDER

12-cv-874-bbc

This is a proposed civil action in which plaintiff Donna Dawn Konitzer alleges that state defendants have failed to treat her<sup>1</sup>gender identity disorder despite a settlement agreement in a previous case. ( Plaintiff refers to herself using female pronouns, so I will do the same.) In a May 24, 2013 order, I allowed plaintiff to proceed on Eighth Amendment medical care and state law malpractice claims against defendants Dalia Suliene, David Burnett and Edward Wall, severed plaintiff's failure to protect claim against defendants Janel Nickel and Edward Wall from this case, and dismissed plaintiff's complaint under Fed. R.

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<sup>1</sup> Plaintiff refers to herself using female pronouns, so the court will do the same.

Civ. P. 8 as to her state law claims regarding breach of the settlement agreement because she did not explain which defendants were liable on those claims. I stayed service of the complaint on defendants Suliene, Burnett and Wall and gave plaintiff a chance to submit an amended complaint explaining her claims more fully. After an extension of time and further delay on the part of plaintiff in submitting her amended complaint, the complaint is now before the court. Plaintiff moved to stay the case pending a criminal investigation involving some of the defendants, but she subsequently filed a motion to withdraw that motion. That motion is granted.

At the outset I note that plaintiff's proposed amended complaint, dkt. #26, does not conform with this court's requirement that the amended complaint be one document that completely replaces the original complaint. Ordinarily, I would return the proposed amended complaint to plaintiff to redo. Given the amount of time that has elapsed, however, I will make an exception in this case and consider this document to be a supplement to the original complaint.

After considering plaintiff's allegations, I conclude that plaintiff may proceed on Eighth Amendment medical care and state law medical malpractice claims against several state officials. I will stay screening of plaintiff's remaining state law claims until she shows that she has complied with the Wisconsin notice of claim statute. The portions of plaintiff's complaint that continue to violate Rule 8 will be dismissed.

Plaintiff alleges the following facts in her original complaint and proposed supplement.

## ALLEGATIONS OF FACT

Plaintiff Donna Dawn Konitzer is incarcerated at the Columbia Correctional Institution. She suffers from gender identity disorder. On September 20, 2006, plaintiff met with Drs. Roger Kulstad and Elaine Pelley at the University of Wisconsin Hospital endocrinology clinic. The doctors recommended plaintiff's use of a bra as medically necessary, Rogaine to treat hair loss and depilatory cream to retard facial hair growth. Defendants held a teleconference with Pelley and "tried to intimidate" her into withdrawing the recommendations, stating that she was not a gender identity disorder specialist. Pelley withdrew the recommendations and plaintiff was never allowed to return to the endocrinology clinic.

On September 1, 2010, plaintiff reached a settlement with the state of Wisconsin in a case filed in federal court in the Eastern District of Wisconsin (Case No. 03-cv-717-cnc) involving her claim against the state for treatment of her gender identity disorder. Under the conditions of the settlement, the state was required to contract with an expert in the disorder to independently evaluate and treat plaintiff; continue to provide female hormone therapy; consider implementing recommendations made by the gender identity expert; provide speech therapy to feminize plaintiff's voice; provide depilatories; and provide plaintiff hair-loss treatment at defendants' expense for the first six months and at plaintiff's expense thereafter.

At mediation, defendant Kevin Kallas (the Department of Corrections mental health director) offered generic Propecia for hair loss, falsely stating that medications containing

alcohol were forbidden for security reasons. Defendants were aware that generic Propecia would be ineffective for someone with plaintiff's hormone therapy and biochemistry. Defendants Kallas, David Burnett (the Department of Corrections medical director) and "defense counsel" decided beforehand to cease giving plaintiff a drug called spironolactone, which has "feminizing properties" in higher doses. Plaintiff had been taking this drug for 12 years previous to the settlement. Defendants Kallas, Burnett, Lori Alsum and Lillian Tenebrusco (prison health service managers) provided the gender identity expert, Dr. Steven Brown, documents "very loudly suggest[ing]" discontinuing this medication. Brown agreed with the suggestion and the state defendants, including defendant Dalia Suliene, followed. In response, plaintiff experienced "escalating hair loss and weight loss with regard to [her] physical secondary sex characteristics."

Dr. Brown made other recommendations in his report that defendant Burnett concluded were not "actual" recommendations and so declined to follow them. Defendants James Greer (the Department of Corrections health services director) and Kallas "were part of the response" provided by Burnett regarding this issue. Defendants Kallas, Daniel Westfield (the Department of Corrections security chief) and Timothy Lundquist (deputy secretary of the department) stated that they would consider recommendations made by the contracted gender identity disorder expert. Following the settlement, they "did nothing of the sort."

Defendants concluded that speech therapy was a "leisure time activity" and refused to have it administered by the Health Services Unit or allow plaintiff to record and play back

her speech therapy exercises. Also, defendants forced plaintiff to use depilatory creams that were “not acceptable” because the cream did not remove hair from the root.

Defendant Dr. Dalia Suliene told plaintiff that she would never receive the treatment she was seeking and that she was receiving as much treatment as she would ever get. Plaintiff would not have agreed to the settlement had she known that defendants were not going to provide her hair-loss treatment and would not consider the recommendations made by Brown.

Plaintiff tried to get the Eastern District court to rescind the settlement agreement, but the court denied her motion. When plaintiff tried to petition the United States Supreme Court, defendants “made [her] petitions and related papers disappear.” As a result, plaintiff was not able to file a petition until May 25, 2012, one day before her deadline.

Defendants revised their “Offsite Service Request and Report” form to include an instruction to offsite doctors stating, “Don’t prescribe comfort measures unrelated to your specialty.” The defendants “involved” in altering the form were Greer, Burnett, Kallas, then-Governor Jim Doyle, Attorney General J.B. Van Hollen, and Department of Justice attorneys Corey Finkelmeyer, Jody Schmelzer and Francis Sullivan. Plaintiff believes that no doctor is a gender identity “specialist” and thus no one will make proper recommendations about her treatment. Defendants later changed the form cosmetically to obtain a newer revision date for the purposes of obscuring the fact that this policy was put in place even before plaintiff’s settlement. Plaintiff believes the changes were made in response to her 2006 appointment at the University of Wisconsin Hospital endocrinology clinic.

Defendant Aurora Sinai Medical Center was going to host an examination of plaintiff by Brown but it “revoked that permission.”

Prison officials are “grooming outside physicians to join defendant organization World Professional Association for Transgender Health and then use that name as a significant credential to support their abusive medical recommendations.”

## OPINION

I understand that plaintiff is trying to bring Eighth Amendment claims regarding her medical care, access to the courts claims and various state law claims, including medical malpractice and state law theories regarding breach of the settlement agreement concerning her medical care. I will address these claims in turn.

### A. Eighth Amendment Medical Care

A prison official may violate a prisoner’s right to adequate medical care under the Eighth Amendment if the official is "deliberately indifferent" to a "serious medical need." Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). A "serious medical need" may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. Johnson v. Snyder, 444 F.3d 579, 584-85 (7th Cir. 2006). The condition does not have to be life threatening. Id. A medical need may be serious if it "significantly affects an individual's daily activities," Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), if it causes significant pain, Cooper v. Casey, 97 F.3d 914,

916-17 (7th Cir. 1996), or if it otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825 (1994). "Deliberate indifference" means that the officials are aware that the prisoner needs medical treatment, but are disregarding the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997).

Thus, under this standard, plaintiff's claim has three elements:

- (1) Did plaintiff need medical treatment?
- (2) Did defendants know that plaintiff needed treatment?
- (3) Despite their awareness of the need, did defendants fail to take reasonable measures to provide the necessary treatment?

In the previous screening order, I concluded that plaintiff stated claims upon which relief may be granted against defendants Suliene and Burnett for failing to adequately treat her gender identity disorder. Now that plaintiff has supplemented her complaint with further detail, I will allow her to proceed on several of her claims alleging deliberate indifference: claims that defendant Kallas offered her treatment he knew was ineffective; defendants Kallas, Burnett, Alsum and Tenebrusco persuaded the gender identity expert to recommend plaintiff's spironolactone be discontinued; and Burnett, Greer, Kallas, Westfield and Lundquist declined to consider the expert's recommendations.

Additionally, plaintiff attempts to bring a claim against defendants Greer, Burnett and Kallas as well as former Governor Doyle, the Wisconsin attorney general and three Department of Justice attorneys for being "involved" in revising the "Offsite Service Request and Report" form to make it difficult for outside doctors to recommend treatment. This is

essentially a rehash of her previous allegations that several defendants conspired against her to insure she would not receive proper treatment. As I stated in the previous screening order, conspiracy allegations are generally held to a higher standard than other allegations. Cooney v. Rossiter, 583 F.3d 967, 971 (7th Cir. 2009). In order to state this type of a claim, a plaintiff must allege that “(1) a state official and private individual(s) reached an understanding to deprive the plaintiff of his constitutional rights; and (2) those individual(s) were willful participant[s] in joint activity with the State or its agents.” Reynolds v. Jamison, 488 F.3d 756, 764 (7th Cir. 2007). A “bare conclusion” or “mere suspicion that persons adverse to the plaintiff had joined a conspiracy against him or her” is insufficient to survive a motion to dismiss for failure to state a claim.” Id. Because plaintiff fails to explain how any of the defendants were involved in the revision of the form, I will dismiss this portion of the complaint pursuant to Fed. R. Civ. P. 8(a)(2) (pleading must contain “a short and plain statement of the claim showing that the pleader is entitled to relief”). If plaintiff wishes to proceed with this claim, she will either have to explain how each of the named defendants was involved in these efforts, or if she does not know who revised the form, she should amend her complaint to name “John Doe” defendants as the revisors instead.

#### B. Access to the Courts

Plaintiff alleges that defendants took her legal papers when she was trying to petition the United States Supreme Court regarding the case that she settled. In the previous screening order, I stated that plaintiff failed to explain how she was harmed since she was



ultimately able to send out her petition and that she did not explain which defendants violated her rights on this claim. I dismissed this portion of the complaint under Fed. R. Civ. P. 8 and gave her a chance to amend her complaint. However, her supplement to the complaint does not contain any new information about this claim, so it will remain dismissed.

### C. State Law Claims

Plaintiff attempts to bring several types of Wisconsin state law claims in her complaint and supplement, including medical malpractice for the lack of treatment for her gender identity disorder and claims related to the breach of the settlement agreement. When an individual intends to sue a government official acting in the course of his or her duties, Wisconsin law requires the individual to file a notice of claim with the attorney general's office. The individual cannot bring suit until the claim has been disallowed or rejected. Ibrahim v. Samore, 118 Wis. 2d 720, 726, 348 N.W.2d 554, 558 (1984) ("The notice of injury statute 'is not a statute of limitation but imposes a condition precedent to the right to maintain an action.'"). Wis. Stat. § 893.82(3m) states:

If the claimant is a prisoner, as defined in s. 801.02 (7)(a)2., the prisoner may not commence the civil action or proceeding until the attorney general denies the claim or until 120 days after the written notice under sub. (3) is served upon the attorney general, whichever is earlier.

"A complaint that fails to show compliance with § 893.82 fails to state a claim upon which relief can be granted." Weinberger v. State of Wisconsin, 105 F.3d 1182, 1188 (7th Cir. 1997). In her complaint, plaintiff does not say whether she has filed a notice of claim

that has been disallowed. Because this is a threshold requirement for filing most of her state law claims (as discussed below, the statute does not apply to medical malpractice), I will stay a decision on whether to grant plaintiff leave to proceed on all of her state law claims except her medical malpractice claims, and give her a short time to supplement her complaint with this information. Upon receiving plaintiff's supplement, I will screen her other state law claims and arrange for service of the complaint and supplements on defendants. If plaintiff does not submit a supplement to her complaint by that date, those state law claims will be dismissed.

In any case, plaintiff's state law medical malpractice claims are not subject to the notice of claim provision. Wis. Stat. § 893.82(5m) ("With regard to a claim to recover damages for medical malpractice, the provisions of subs. (3), (3m), and (4) do not apply.") This means that she may proceed on medical malpractice claims against the medical professionals subject to her Eighth Amendment claims (I understand defendants Suliene, Burnett, Kallas, Alsum, Tenebrusco and Greer to be medical professionals subject to this claim).

#### D. Other Claims Violating Fed. R. Civ. P. 8

Portions of plaintiff's allegations continue to lack enough information to put defendants on proper notice of those claims. To the extent that any of her medical claims are not encompassed by the claims on which she is already proceeding (for example, it is difficult to tell whether her assertions that "defendants" hampered her speech therapy or

provided her substandard depilatory creams overlap with her claims against properly named defendants), she will not be allowed to proceed on those claims. In addition, plaintiff attempts to bring claims against defendants Aurora Sinai Medical Center and World Professional Association for Transgender Health, but her allegations against these defendants are so threadbare that it is not possible to determine what legal theory might apply to these claims against these defendants.

**NOTE:** To the extent that plaintiff wishes to amend her complaint further, she must submit an entirely new complaint that contains *all* of the allegations supporting her claims in one document that will entirely replace her original complaint and supplement. The one exception is her response regarding the Wisconsin notice of claim provision discussed above; she is free to file a short supplement explaining whether she has complied with this law, but she will not be allowed to include any substantive allegations regarding her claims in that supplement.

#### E. Official Capacity Claims

As I stated in the previous screening order, Department of Corrections Secretary Edward Wall is a defendant in this case in his official capacity, meaning that he is included for the purposes of carrying out any injunctive relief that would be ordered. Accordingly, he will remain in the present case as a defendant concerning each of plaintiff's claims.

ORDER

IT IS ORDERED that

1. Plaintiff Donna Dawn Konitzer is GRANTED leave to proceed on the following claims:

a. Eighth Amendment medical care claims against defendants Dalia Suliene, David Burnett, Kevin Kallas, Lori Alsum Lillian Tenebrusco, James Greer, Daniel Westfield and Timothy Lundquist and Edward Wall.

b. State law medical negligence claims against defendants Suliene, Burnett, Kallas, Alsum, Tenebrusco, Greer and Wall.

2. A decision on plaintiff's request for leave to proceed on all of her state law claims other than her medical malpractice claims is STAYED. Plaintiff may have until November 8, 2013, in which to supplement her complaint with information about her compliance with notice requirements under Wis. Stat. § 893.82. If plaintiff does not submit a supplement to her complaint by that date, those state law claims will be dismissed.

3. The remainder of plaintiff's complaint is DISMISSED under Fed. R. Civ. P. 8.

4. Plaintiff's motion to withdraw her previous motion to stay the case pending a criminal investigation, dkt. #29, is GRANTED. The motion to stay proceedings, dkt. #25, is considered withdrawn.

Entered this 25th day of October, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge