IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DONNA DAWN KONITZER aka S.A. Konitzer,

OPINION AND ORDER

Plaintiff,

12-cv-874-bbc

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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This is a proposed civil action in which plaintiff Donna Dawn Konitzer alleges that state defendants have failed to treat her[1] gender identity disorder despite a settlement agreement in a previous case. In an October 25, 2013 order, I stated that plaintiff could proceed on several Eighth Amendment medical care and state law malpractice claims. Dkt. #30. Additionally, I stayed a decision on plaintiff's request for leave to proceed on her remaining state law claims (related to the breach of the settlement agreement) until plaintiff submitted a supplement to her complaint explaining whether she complied with state law

[1] Plaintiff refers to herself using female pronouns, so the court will do the same.

notice of claim requirements under Wis. Stat. § 893.82. Id. Finally, I dismissed several other claims under Federal Rule of Civil Procedure 8 because they did not contain enough detail to put defendants on notice of what they did to violate her rights. Id.

Plaintiff responded to the October 25, 2013 order by filing a motion for an extension of her legal loan in order to cover the costs of submitting a second amended complaint. Dkt. #31. Defendants responded by stating that they would grant plaintiff funds to submit the amended complaint, and plaintiff followed up by submitting a second amended complaint as well as a motion for assistance in recruiting counsel. Because the legal loan issue has been resolved, I will deny plaintiff's motion for an extension of her legal loan as moot.

I turn to plaintiff's second amended complaint. As I stated in the October 25 order, "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." Dkt. #30. Plaintiff has not completely heeded this advice. For the most part, plaintiff's allegations are very similar to those in her first amended complaint and add further detail about some of her claims, which is helpful. She also states that she no longer seeks to bring state law breach of contract claims and instead attempts to bring these claims as federal causes of action. Unfortunately, she fails to flesh out other aspects of her complaint mentioned in her previous pleadings, and it would be unfair to make defendants try to respond to allegations in three separate complaints.

Now that plaintiff has had three opportunities to set out her claims in an

understandable complaint, I will consider her most recent submission as the operative pleading, and I will not allow further amended complaints.

The next step is to screen the second amended complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. §§ 1915. In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. McGowan v. Hulick, 612 F.3d 636, 640 (7th Cir. 2010). After considering plaintiff's allegations, I will allow her to proceed on Eighth Amendment medical care and state law medical malpractice claims. However, I will deny her leave to proceed on her attempt to raise federal claims for breach of contract or fraud and deny her motion for the court's assistance in recruiting counsel.

Plaintiff alleges the following facts in her second amended complaint.

ALLEGATIONS OF FACT

Plaintiff Donna Dawn Konitzer suffers from gender identity disorder. In September 2010, plaintiff settled a case against Department of Corrections officials in the Eastern District of Wisconsin about the provision of treatment for this malady. Plaintiff believes that she was fraudulently induced into entering the agreement. For instance, during the settlement discussions with high-ranking Department of Corrections officials (defendants Daniel Westfield, Kevin Kallas, David Burnett and Timothy Lundquist) and their counsel (Finkelmeyer, Schmelzer and Sullivan), defendants stated that plaintiff could not be allowed

to use Rogaine for hair growth because it contained alcohol. Instead they offered generic Propecia. However, plaintiff later found out that two of the defendants' gender identity disorder experts had told them that this medication would not work with plaintiff's biochemistry, but the defendants decided to utilize the medication anyway.

Also, plaintiff believes that the defendants have taken measures to circumvent their responsibility to treat her gender identity disorder both under the terms of the settlement agreement and existing constitutional and state law standards. (It is unclear from plaintiff's submissions whether the settlement agreement continues to be in effect.)

For instance, plaintiff alleges that defendants Kevin Kallas, David Burnett and James Greer (all high-level Department of Corrections medical officials) added language to the "medical offsite request form" stating, "Don't prescribe comfort measures unrelated to your specialty." Defendants Corey Finkelmeyer, Monica Burkert-Brist, Jody Schmelzer and Francis Sullivan (all assistant attorneys general) "played a key role to get the DOC defendants . . . to add the comfort measures scheme to the offsite service request." Plaintiff believes that because there is no "area of specialty or board certification" for gender identity disorder, the new language prevents outside doctors from recommending certain necessary treatments.

Additionally, prison officials (whom I understand to be defendants Kallas, Burnett and health service unit managers Lori Alsum and Lillian Tenebrusco) "loudly suggest[ed]" to an outside doctor that he recommend discontinuing plaintiff's spironolactone. Defendants then accepted the coerced recommendation to discontinue the medication. This

caused plaintiff "even more severe hair loss and body fat." Also, "defendants" (plaintiff does not identify which ones) forced plaintiff to use depilatory creams that were ineffective because the cream did not remove hair from the root.

Defendant doctor Dalia Suliene told plaintiff that she "was never going to receive further treatment for her GID." Defendants Suliene, Kallas and Burnett are "blanketly denying" further treatment, including provisions for the "real life experience and test." Defendants' treatments do not conform with standards set by the World Professional Association for Transgender Health or the National Center for Correctional Healthcare.

OPINION

A. Fraud/Breach of Contract

Originally, plaintiff sought to bring several types of state law claims related to the breach of the settlement agreement for fraud in inducing the agreement. In particular, plaintiff asserts that defendants Westfield, Kallas, Burnett, Lundquist, Finkelmeyer, Schmelzer and Sullivan fraudulently induced plaintiff into entering into a provision allowing her the use of generic Propecia for hair growth, even though these defendants knew it would not work.

After I directed plaintiff to supplement her complaint to explain whether she had complied with state law notice of claim requirements under Wis. Stat. § 893.82 regarding these claims, plaintiff now states that she wishes to abandon those state law claims. However, she states that she "has since restated most of these claims as federal claims one

of which governs frauds and swindles." She cites 42 U.S.C. § 1985 (conspiracy to interfere with civil rights), 18 U.S.C. § 1349 (attempt and conspiracy) and 18 U.S.C. § 1509 (obstruction of court orders), 18 U.S.C. § 241 (conspiracy against rights). None of these statutes help plaintiff. The last three are criminal statues inapplicable in this civil proceeding, and 42 U.S.C. § 1985 adds nothing to plaintiff's medical care claims. Turley v. Rednour, 729 F.3d 645, 649 n.2 (7th Cir. 2013) ("When, as here, the defendants are all state actors, a § 1985(3) claim does not add anything except needless complexity." (quotation omitted)). Her breach of contract or fraud claims are state law claims that cannot be maintained in this action unless plaintiff shows that she complied with state law notice of claim requirements. Accordingly, to the extent she tries to bring her breach of contract and fraud claims as federal claims, I will deny her leave to proceed on them. Because these are the only claims plaintiff brings against defendants Westfield and Lundquist, these defendants will be dismissed from the case.

Even with regard to her other claims about ongoing medical treatment and their possible relation to the settlement agreement reached in an earlier case, I note that in certain circumstances, parties to a settlement may not seek relief from issues covered by the agreement in a brand new lawsuit such as this one, but rather must seek a modification of the agreement reached in the previous case. United States v. Fisher, 864 F.2d 434, 439 (7th Cir. 1988) ("A consent decree . . . bars either party from reopening the dispute by filing a fresh lawsuit. Alternatively, it is a contract in which the parties deal away their right to litigate over the subject matter.") It is unclear from plaintiff's filings whether this rule

applies to this case, because I cannot tell how much of her treatment is the direct result of the settlement agreement or whether the settlement agreement is even still in effect. In any case, plaintiff should be aware that it may be an issue that is raised later in the proceedings. For the time being, I will treat her Eighth Amendment and medical malpractice claims as ones that may be brought in a separate lawsuit such as this.

B. 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?

1. Prison officials

From the allegations in plaintiff's current complaint, I understand her to be stating that prison officials were deliberately indifferent to her in the following ways:

- Defendants Suliene, Kallas and Burnett are "blanketly denying" further treatment, including provisions for the "real life experience and test."

- Defendants Kallas, Burnett, Alsum and Tenebrusco persuaded the gender identity expert to recommend the discontinuation of plaintiff's spironolactone.

  Defendants Kallas, Burnett and Greer amended the "medical offsite request form" to prevent outside doctors from recommending necessary treatments for gender identity disorder.

- Unnamed defendants forced plaintiff to use depilatory creams that were ineffective because the cream did not remove hair from the root.

The first two of these claims have been discussed in screening plaintiff's previous complaints; at this point, plaintiff has sufficiently alleged that gender identity disorder is a serious medical need and that defendants have acted with deliberate indifference toward her medical need. I will allow her to proceed on these claims.

The third of these claims, that defendants intentionally amended the "medical offsite request form" to limit the type of treatment outside doctors could prescribe, was discussed in the previous screening orders, but I had concluded that plaintiff failed to properly show who was involved in these efforts. Now that plaintiff asserts that defendants Kallas, Burnett

and Greer were the prison officials who made the amendment, the substance of this claim can be addressed. I conclude that she may proceed on this claim because it is reasonable to infer that these defendants acted maliciously, knowing harm would come to plaintiff because of the changes.

Plaintiff's fourth claim, about depilatory cream, has also been discussed in the previous screening orders. In the October 25 order, I dismissed the claim under Rule 8 because plaintiff did not explain whether the claim overlapped with her other claims or what defendants were responsible for these actions. Plaintiff has not provided any more information about the claim this time around, so I will dismiss it.

2. Assistant attorneys general

Plaintiff originally named assistant attorneys general Corey Finkelmeyer, Jody Schmelzer and Francis Sullivan as defendants in this lawsuit and continues to allege that they were involved in the violation of her rights. (Plaintiff includes assistant attorney general Monica Burkert-Brist in her new allegations but because she was never named as a defendant, I will not consider any allegations against her.) Specifically, plaintiff asserts that these defendants were involved in the decision to amend the medical offsite request form.

Although it is unusual for prisoners to proceed on Eighth Amendment medical care claims against Department of Justice lawyers, I conclude that it is warranted at this point. I can infer from plaintiff's complaint that she is alleging that the lawyers worked with prison officials to harm her by intentionally fashioning a policy limiting the treatment offsite

doctors could prescribe. I caution plaintiff that at either summary judgment or trial, she will have to show that these defendants were personally involved in making the decision that harmed her and that they did not just defer to other defendants' medical decisions. If it turns out that these lawyers merely assisted prison officials clerically or otherwise did not possess the necessary "deliberately indifferent" state of mind toward plaintiff's medical problems, her claims against these defendants will be dismissed.

C. Medical Malpractice

Plaintiff seeks to bring state law medical malpractice claims parallel to those of her deliberate indifference claims. To prevail on a claim for medical malpractice in Wisconsin, plaintiff must prove that defendant breached their duty of care to her and that she suffered injury as a result. Paul v. Skemp, 2001 WI 42, ¶ 17, 242 Wis. 2d 507, 625 N.W.2d 860. At this point, I conclude that plaintiff's allegations state malpractice claims and will allow her to proceed on claims against the medical professionals noted above regarding her Eighth Amendment claims (I understand defendants Suliene, Burnett, Kallas, Alsum, Tenebrusco and Greer to be medical professionals subject to this claim).

D. 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.

E. Other Named Defendants

Plaintiff names Greg Grams, Timothy Douma, Janel Nickel and J.B. Van Hollen as defendants but does not include any allegations against them in her new complaint. Therefore, I will dismiss these defendants from the case.

F. Motion for Assistance in Recruiting Counsel

Finally, plaintiff has submitted a motion for the court's assistance in recruiting counsel to assist her in "drafting the fraudulent conduct under 42 U.S.C. § 1985, solely on this issue." Dkt. #34. I will deny this motion because plaintiff will not be allowed to proceed on § 1985 claims. Even if she had been allowed to proceed on this type of claim, I would have to deny the motion because plaintiff has not shown that she has made reasonable efforts to find a lawyer on her own and has been unsuccessful or that she has been prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). Usually, to prove that she has made reasonable efforts to find a lawyer, a plaintiff must give the court the names and addresses of at least three lawyers that she has asked to represent her in this case and who turned her down. Plaintiff is free to renew her motion at a later date, but she will have to show that she was not able to locate an attorney herself.

ORDER

IT IS ORDERED that

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

> a. Defendants Dalia Suliene, Kallas and Burnett are "blanketly denying" her further treatment, including provisions for the "real life experience and test."
>
> b. Defendants Kallas, Burnett, Lori Alsum and Lillian Tenebrusco persuaded the gender identity expert to recommend discontinuance of plaintiff's spironolactone.
>
> c. Defendants Kallas, Burnett, Greer, Finkelmeyer, Schmelzer and Sullivan amended the "medical offsite request form" to prevent outside doctors from recommending necessary treatments for gender identity disorder.

2. Additionally, plaintiff is GRANTED leave to proceed on her state law medical malpractice claims against defendants Suliene, Burnett, Kallas, Alsum, Tenebrusco, Greer and Wall.

3. Plaintiff is DENIED leave to proceed on the following claims

> a. Claims that defendants violated her rights under federal law through fraud or breach of contract.
>
> b. unnamed defendants forced plaintiff to use depilatory creams that were ineffective because the cream did not remove hair from the root.

4. Defendant Edward Wall will remain as a defendant in the case for the purposes of carrying out any injunctive relief that would be ordered.

5. Defendants Daniel Westfield, Timothy Lundquist, Greg Grams, Timothy Douma, Janel Nickel and J.B. Van Hollen are DISMISSED from the case.

6. Plaintiff's motion for an extension of her legal loan, dkt. #31, is DENIED as moot.

7. Plaintiff's motion for the court's assistance in recruiting her counsel, dkt. #34, is DENIED without prejudice.

8. Under an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's second amended complaint and this order are being sent today to the Attorney General for service on the state defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service on behalf of the state defendants.

9. For the time being, plaintiff must send defendants a copy of every paper or document that she files with the court. Once plaintiff has learned what lawyer or lawyers will be representing defendants, she should serve the lawyers directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that she has sent a copy to defendants or to defendants' attorney.

10. Plaintiff should keep a copy of all documents for her own files. If plaintiff does not have access to a photocopy machine, she may send out identical handwritten or typed copies of her documents.

11. Plaintiff is obligated to pay the balance of her unpaid filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust

fund account until the filing fee has been paid in full.

Entered this 23d day of December, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge