IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CHARLES NORWOOD,
aka MS. CHELSY,

Plaintiff,

v.

DR. TOBIASZ, DR. GARBLEMAN,
DR. CALLISTER, MR. POLLARD,
JAMES MUENCHOW, CYNTHIA THORPE,
MICHAEL MEISNER, DON STRAHOTA,
WELCOME ROSE, JOHN OR JANE DOE
REGIONAL NURSING COORDINATOR,
MELISSA ROBERTS and SCHWOCHERT,

Defendants.

OPINION and ORDER

11-cv-507-bbc

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Plaintiff Charles Norwood, a/k/a Ms. Chelsy, a prisoner at the Waupun Correctional Institution, has filed this civil action alleging that several Department of Corrections employees are violating her[1] Eighth Amendment and Fourteenth Amendment rights by failing to treat her for Gender Identity Dysphoria. In her complaint she includes a motion for preliminary injunctive relief.

Plaintiff seeks leave to proceed with her complaint in forma pauperis. However, because plaintiff has struck out under 28 U.S.C. § 1915(g), she cannot obtain indigent

[1] Plaintiff refers to herself as a "transsexual female" so throughout this opinion I will refer to her using female pronouns.

status under § 1915 unless her complaint alleges facts from which an inference may be drawn that she is in imminent danger of serious physical injury.

After considering plaintiff's submissions, I conclude that plaintiff may proceed with her Eighth Amendment deliberate indifference and Fourteenth Amendment equal protection claims against each defendant except the John Doe defendant, who will be dismissed as redundant to defendant Cynthia Thorpe.

ALLEGATIONS OF FACT

Plaintiff Charles Norwood is a prisoner at the Waupun Correctional Institution. She is a transsexual female who is also known as Chelsy Norwood. Plaintiff suffers from Gender Identity Dysphoria; she identifies as female and currently feels "trapped in the wrong body."

In late March 2011, plaintiff twice contacted psychological services staff, including defendant Dr. Callister, requesting hormonal treatment for Gender Identity Dysphoria. Callister did not respond initially, but defendant Dr. Tobiasz did, stating that plaintiff would not receive such treatment because she did not have a diagnosis of Gender Identity Dysphoria. Plaintiff later learned that Callister had received plaintiff's request, but denied it months later, in June 2011.

On March 30, 2011, plaintiff filed an inmate grievance regarding the lack of treatment. On March 31, 2011, plaintiff wrote to defendant Dr. Garbleman, who supervises psychiatric staff at the prison. Garbleman responded by referring plaintiff to Tobiasz's response. Ultimately, defendant institution complaint examiner James Muenchow rejected

the grievance as "moot" because defendant Garbleman concluded that plaintiff does not have a diagnosis of Gender Identity Dysphoria. Plaintiff appealed the rejection but it was affirmed by defendant Cynthia Thorpe.

On April 5, 2011, plaintiff filed an inmate grievance about the lack of treatment. Defendant Muenchow recommended dismissing the complaint, stating that he contacted defendant Garbleman, who stated that plaintiff "is not currently diagnosed with Gender Identity Disorder and therefore he is correct that he is not receiving mental health services directly related to the disorder." Defendant Thorpe reviewed the decision and agreed that the grievance should be dismissed. Plaintiff appealed this decision to defendant corrections complaint examiner Welcome Rose, who recommended dismissing the appeal, and then to the Office of the Secretary, where defendant Melissa Roberts dismissed it.

Also on April 5, 2011, plaintiff sent an interview/information request to defendants Warden Pollard, substitute Warden Schwochert, Security Director Don Strahota and Deputy Warden Michael Meisner, stating that she was being denied an examination and that litigation was "in progress." They stated "noted" as their response but did nothing else. Plaintiff followed up by filing three inmate grievances about her treatment and the failure of Pollard, Schwochert, Strahota and Meisner to intervene. Each of these grievances was rejected by defendant Muenchow and her appeals were denied by Pollard.

On April 7 and 8, 2011, plaintiff sent memos to defendant Tobiasz, explaining why she believed she had Gender Identity Dysphoria, and explaining that she had "suicidal ideations." Tobiasz responded by stating that plaintiff had no documented history of having

this disorder.

On April 12, 2011, plaintiff wrote defendant Garbleman, stating that defendant Tobiasz was biased against transsexuals and was acting against sound medical judgment by refusing to treat her or even examine her. Garbleman responded by asking whether plaintiff had ever discussed with Tobiasz the criteria for diagnosing Gender Identity Dysphoria. He told plaintiff to "respond back to Dr. Tobiasz if you wish to collaboratively resolve this matter."

On April 19, 2011, plaintiff sent defendants Garbleman and Tobiasz a letter explaining that she feels as if she is "trapped inside the wrong body," stating that she now understands these feelings to be Gender Identity Dysphoria and requesting an examination. Tobiasz asked plaintiff to "enlighten him" about Gender Identity Dysphoria and the state of the law. Plaintiff sent him another letter on May 4, 2011, discussing her condition and explaining that courts have recognized Gender Identity Dysphoria as a serious medical need mandating treatment under the Eighth Amendment.

At some point, plaintiff presented defendants Tobiasz, Garbleman and inmate complaint review staff with excerpts from files from the Mendota Mental Heath Institute indicating that she was "effeminate," and a cross-dresser who wore "red polished nails," and sentencing records in which plaintiff stated that she is transsexual. Also, plaintiff showed these defendants mail sent to her by friends and family that addressed her as "Miss" or "Ms." Charles Norwood.

Plaintiff filed another grievance about the lack of treatment on May 2, 2011.

Defendant Muenchow rejected the grievance as "moot" because defendant Garbleman had concluded that plaintiff does not have Gender Identity Dysphoria. Plaintiff appealed the rejection but it was affirmed by defendant Cynthia Thorpe.

Because plaintiff is not getting treatment for Gender Identity Dysphoria, she is "deteriorating" mentally and having suicidal thoughts.

OPINION

A. Imminent Danger

Plaintiff seeks leave to proceed in forma pauperis in this case under 28 U.S.C. § 1915. However, as stated above, plaintiff has struck out under 28 U.S.C. § 1915(g). This provision states as follows:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

On at least three prior occasions, plaintiff has been denied leave to proceed in forma pauperis in lawsuits that were legally frivolous. Norwood v. Hamblin; 04-cv-854-bbc (W.D. Wis. Dec. 2, 2004); Norwood v. Hamblin; 04-cv-846-bbc (W.D. Wis. Nov. 24, 2004); Norwood v. Hamblin; 04-cv-813-bbc (W.D. Wis. Nov. 24, 2004). Plaintiff remains struck out even following the November 2, 2010 opinion in Turley v. Gaetz, 09-3847, 2010 WL 4286368, in which the Court of Appeals for the Seventh Circuit held that "a strike is incurred under

§ 1915(g) when an inmate's case is dismissed in its entirety based on the grounds listed in § 1915(g)," rather than when only one claim out of several is dismissed under § 1915(g). Each of the cases in which plaintiff received a strike was dismissed in its entirety.

To meet the imminent danger requirement of 28 U.S.C. § 1915(g), a prisoner must allege a physical injury that is imminent or occurring at the time the complaint is filed and show that the threat or prison condition causing the physical injury is real and proximate. Ciarpaglini v. Saini, 352 F.3d 328, 330 (7th Cir. 2003) (citing Heimermann v. Litscher, 337 F.3d 781 (7th Cir. 2003); Lewis v. Sullivan, 279 F.3d 526, 529 (7th Cir. 2002)). In her complaint, plaintiff alleges that defendants' failure to treat her Gender Identity Dysphoria causes her mental anguish, including suicidal thoughts.

In considering whether plaintiff's complaint meets the imminent danger requirement of § 1915(g), a court must follow the well established proposition that pro se complaints must be liberally construed. Ciarpaglini, 352 F.3d at 330. Further, it is improper to adopt a "complicated set of rules [to discern] what conditions are serious enough" to constitute "serious physical injury" under § 1915(g). Id. at 331.

Given this framework, I conclude that plaintiff's allegations qualify under the imminent danger standard. Therefore, plaintiff may proceed without prepayment of the $350 filing fee. Usually the court requires an initial partial payment of the $350 fee, but after reviewing plaintiff's trust fund account statement, I conclude that she is completely indigent and does not have to provide an initial partial payment. I will proceed to screen the merits of her case under 28 U.S.C. § 1915(e)(2).

B. Screening Plaintiff's Claims

In screening plaintiff's claims, the court must construe the complaint liberally. Erickson v. Pardus, 551 U.S. 89, 94 (2007). However, I must dismiss any claims that are legally frivolous, malicious, fail to state a claim upon which relief may be granted or ask for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915(e)(2)(B).

I understand plaintiff to be bringing claims that defendants violated her Eighth Amendment rights against cruel and unusual punishment and her Fourteenth Amendment equal protection rights by failing to provide her treatment for Gender Identity Dysphoria.

1. Deliberate indifference

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?

After considering plaintiff's allegations, I conclude that she states deliberate indifference claims against defendants. Several courts, including the Court of Appeals for the Seventh Circuit, have considered Gender Identity Dysphoria or transsexualism to be a serious medical need for the purposes of the Eighth Amendment. E.g., Fields v. Smith, 2011 WL 3436875 (7th Cir. 2011); Cuoco v. Moritsugu, 222 F.3d 99, 106 (2d Cir. 2000); White v. Farrier, 849 F.2d 322, 325 (8th Cir. 1988); Meriwether v. Faulkner, 821 F.2d 408, 411-13 (7th Cir. 1987).

As for defendants' deliberate indifference, I must accept as true plaintiff's allegation that she never received treatment for Gender Identity Dysphoria at the Waupun Correctional Institution. Even so, there are questions about the viability of her claims. One question is whether defendants knew she had the disorder. Some of her allegations suggest that at least some of the defendants did not believe her assertions because they believed that she had never received a formal diagnosis of the disorder. However, plaintiff alleges that prison officials have been refusing to undertake an examination that could result in such a

diagnosis, even though she is suffering from severe mental anguish. These allegations are enough to support her claims at this point.

The next question is whether each named defendant was personally involved in denying plaintiff medical treatment. Liability under § 1983 must be based on a defendant's personal involvement in the constitutional violation. Palmer v. Marion County, 327 F.3d 588, 594 (7th Cir. 2003); Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995). Because plaintiff alleges that defendants Callister, Tobiasz, Garblemen, Pollard, Schwochert, Strahota and Meisner each rejected plaintiff's requests for treatment, I conclude that she states claims against these defendants.

Plaintiff alleges that defendants Muenchow, Thorpe, Rose, Roberts and Pollard were involved by denying grievances she filed regarding the alleged denial of medical care. In George v. Smith, 507 F.3d 605, 609-10 (7th Cir. 2007), the court limited the extent to which a prisoner may sue an official for denying a grievance:

> Only persons who cause or participate in the violations are responsible. Ruling against a prisoner on an administrative complaint does not cause or contribute to the violation. A guard who stands and watches while another guard beats a prisoner violates the Constitution; a guard who rejects an administrative complaint about a completed act of misconduct does not.

Id. at 609-10. A broad reading of this statement would suggest that officials can never be sued for denying a grievance. However, one reading is that the limitation applies only to a "completed act of misconduct." That is, it may be possible to sue grievance examiners if they have the ability to correct the violation. For example, an examiner cannot undo a physical assault, but he could stop ongoing censorship of a banned publication. In the present case,

these defendants may have been able to address plaintiff's concerns about the ongoing lack of medical treatment by investigating her treatment history and ordering an examination. Instead, they denied her grievances. Because this area of the law is unclear, I will allow plaintiff to proceed against defendants Muenchow, Thorpe, Rose, Roberts and Pollard regarding the denial of her grievances. However, defendants remain free to argue at later stages in the case that they did not have sufficient involvement in the alleged constitutional violation to be held liable for it.

Finally, plaintiff alleges that defendant John or Jane Doe Regional Nursing Coordinator accepted defendant Muenchow's recommendation to dismiss her April 5, 2011 grievance. Records attached by plaintiff show that defendant Thorpe was the person who accepted the recommendation, so there is no need to continue with a placeholder Doe defendant for Thorpe, who is already listed as a defendant in this case.

2. Equal protection

Next, plaintiff alleges that defendants have violated her Fourteenth Amendment equal protection rights by failing to provide her treatment for Gender Identity Dysphoria. The general rule of the equal protection clause is that similarly situated individuals should be treated alike, City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985), and that government officials must have at least a rational basis for differences in treatment. May v. Sheahan, 226 F.3d 876, 882 (7th Cir. 2000). To prevail on an equal protection claim, plaintiff must show that defendants acted with a discriminatory purpose. Billings v.

Madison Metropolitan School District, 259 F.3d 807, 812 (7th Cir. 2001).

In order to state a claim, the complaint must include enough detail about what each defendant did to show a real possibility (and not just a guess) that plaintiff might be able to prove each element of her claims after she has an opportunity to fully investigate them. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007); Riley v. Vilsack, 665 F. Supp. 2d 994, 1004 (W.D. Wis. 2009). Plaintiff has alleged facts showing that she was treated differently from other inmates who ordinarily receive medical treatment for illnesses, whereas plaintiff did not. The problematic part of plaintiff's claim is whether defendants intentionally discriminated against her because she is a transsexual. Plaintiff does not include any allegations directly stating that defendants chose to discriminate against her because of her transsexualism. However, given the nature of her claims, I conclude that discriminatory intent can be inferred, if only barely. Plaintiff's allegations that defendants chose to withhold treatment for symptoms specifically arising from her transexualism (rather than something unrelated to it, such as a broken leg), imply that defendants do not wish to treat maladies specific to transsexuals. Therefore, I will allow her to proceed on equal protection claims against each of the defendants (with the exception of the Doe defendant, who will be dismissed, as discussed above).

C. Preliminary Injunctive Relief

Plaintiff's complaint includes a request for preliminary injunctive relief. Under this

court's procedures for obtaining a preliminary injunction, a copy of which is attached to this order, plaintiff must file with the court and serve on defendants a brief supporting her claim, proposed findings of fact and any evidence she has to support her request for relief. She may have until October 25, 2011 to submit these documents. Defendants may have until the day their answer is due in which to file a response. I will review the parties' preliminary injunction submissions before deciding whether a hearing will be necessary.

Despite the fact that I have allowed plaintiff to proceed on certain claims, I wish to make it clear to her that the bar is significantly higher for obtaining injunctive relief or ultimately prevailing on her claims than it is on her request for leave to proceed. In her proposed findings of fact, plaintiff will have to lay out the facts of her case in detail, explaining the treatment she needs, how she requested treatment, what each defendant did to keep her from receiving treatment, why they withheld treatment and how this harmed her. Plaintiff will have to show that she has some likelihood of success on the merits of her claims and that irreparable harm will result if the requested relief is denied. If she makes both showings, the court will then consider the balance of hardships between plaintiff and defendants and whether an injunction would be in the public interest, considering all four factors under a "sliding scale" approach. In re Forty-Eight Insulations, Inc., 115 F.3d 1294, 1300 (7th Cir. 1997).

Finally, I warn plaintiff about the ramifications facing litigants who abuse the imminent danger exception to their three-strike status. The only reason that plaintiff has been allowed to proceed in forma pauperis in this case is that her allegations suggest that she

was under imminent danger of serious physical injury at the time that she filed her complaint. The "imminent danger" exception under 28 U.S.C. § 1915(g) is available "for genuine emergencies," where "time is pressing" and "a threat . . . is real and proximate." Lewis v. Sullivan, 279 F.3d 526, 531 (7th Cir. 2002). In certain cases it may become clear from the preliminary injunction proceedings that a plaintiff who has already received three strikes under § 1915(g) for bringing frivolous claims has exaggerated or even fabricated the existence of a genuine emergency in order to circumvent the three-strikes bar. In such a case, this court may revoke its grant of leave to proceed in forma pauperis once it is clear that plaintiff was never in imminent danger of serious physical harm. Plaintiff would then be forced to pay the full $350 filing fee or have her case dismissed.

ORDER

IT IS ORDERED that

1. Plaintiff Charles Norwood is GRANTED leave to proceed on claims that defendants Dr. Callister, Dr. Tobiasz, Dr. Garbleman, James Muenchow, Cynthia Thorpe, Welcome Rose, Melissa Roberts, Warden Pollard, substitute Warden Schwochert, Don Strahota and Michael Meisner violated her Eighth Amendment deliberate indifference rights and Fourteenth Amendment equal protection rights by failing to provide her treatment for Gender Identity Dysphoria.

2. Plaintiff is DENIED leave to proceed on claims against defendant John or Jane Doe Regional Nursing Coordinator because this defendant is redundant to defendant

Thorpe. The Doe defendant is DISMISSED from this case.

3. Plaintiff may have until October 25, 2011, in which to file a brief, proposed findings of fact and evidentiary materials in support of her motion for a preliminary injunction. Defendants may have until the date their answer is due to file materials in response.

4. 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 will be representing defendants, she should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless she shows on the court's copy that she has sent a copy to defendants or their attorney.

5. 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.

6. Pursuant to an informal service agreement between the Attorney General and this court, copies of plaintiff's amended complaint and this order are being sent today to the Attorney General for service on the state defendants. Although it is usual for defendants to have 40 days under this agreement to file an answer, in light of the urgency of plaintiff's allegations, I would expect that every effort will be made to file the answer in advance of that deadline.

7. Plaintiff is obligated to pay the unpaid balance of her filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at the

Waupun Correctional Institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

Entered this 4th day of October, 2011.

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