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. GARBELMAN,[1]
DR. CALLISTER, MR. POLLARD,
JAMES MUENCHOW, CYNTHIA THORPE,
MICHAEL MEISNER, DON STRAHOTA,
WELCOME ROSE, MELISSA ROBERTS
and SCHWOCHERT,

Defendants.

OPINION and ORDER

11-cv-507-bbc

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Plaintiff Charles Norwood, a prisoner at the Waupun Correctional Institution, has filed this civil action alleging that defendant Department of Corrections employees are violating her[2] Eighth and Fourteenth Amendment rights by failing to treat her for Gender Identity Disorder. Both plaintiff and defendants have filed motions for summary judgment. In addition, plaintiff has filed a handful of non-dispositive motions, including a motion for an extension of time to file an amended complaint and a motion for injunctive relief, both of which I will deny, as well

[1] I have amended the caption to reflect the proper spelling of defendant Garbelman's name.

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

as a motion for the court to accept the late filing of her reply in support of her proposed findings of fact, which I will grant.

After considering the cross motions for summary judgment filed by the parties, I conclude that plaintiff cannot prevail on claims against the named defendants because they are not the prison officials responsible for the alleged delays in her treatment. Accordingly, I will grant defendants' motion for summary judgment and deny plaintiff's motion.

PRELIMINARY MOTIONS

On July 3, 2012, plaintiff filed a motion for a two-week extension of time to file an amended complaint to include new allegations for events occurring after the filing of her original complaint, noting that defendants had already been asking for an extension of time to file their motion for summary judgment. The original dispositive motions deadline was July 6, 2012, but Magistrate Judge Stephen Crocker granted defendants' request to push that deadline back seven days, to July 13, 2012. Plaintiff filed her own motion for summary judgment on July 10, 2012, and defendants followed with their motion on July 13, 2012. Given plaintiff's desire for a July 17, 2012 deadline to file an amended complaint, I conclude that plaintiff's request comes too late; her amended complaint would have postdated both motions for summary judgment. Bethany Pharmacal, Inc. v. QVC, Inc., 241 F.3d 854, 861-62 (7th Cir. 2001) (court did not err in denying motion to amend complaint when defendant had already filed motion for summary judgment).

Plaintiff has also filed a motion for the court to accept the late filing of her reply in

support of the proposed findings of fact she had submitted regarding her motion for summary judgment, stating that she faced restrictions on using ink pens and paper shortly before her deadline, making it impossible to submit all of her materials in reply. I will grant plaintiff's request and consider her reply materials.

SUMMARY JUDGMENT MOTIONS

From the parties' proposed findings of fact and supporting evidentiary materials, I find that the following facts are undisputed.

I. UNDISPUTED FACTS

A. Parties

Plaintiff Charles Norwood is a prisoner at the Waupun Correctional Institution. Defendants Ryan Tobiasz, Jeffrey Garbelman, Todd Callister, James Muenchow, William Pollard, Don Strahota and Michael Meisner work at the Waupun Correctional Institution; Tobiasz is a Psychological Associate, Garbelman is a psychologist who holds the title Psychological Services Supervisor, Callister is a psychiatrist, Muenchow is an Inmate Complaint Examiner, Pollard is the Warden, Strahota is Security Director and Meisner is the Deputy Warden. Defendant Jim Schwochert was the Interim Warden at the prison at all relevant times.

Defendants Cynthia Thorpe, Welcome Rose and Melissa Roberts work in the Wisconsin Department of Corrections Central Office; Thorpe is a Health Services Nursing Coordinator,

Rose is a Corrections Complaint Examiner and Roberts is the Legislative Liaison in the Office of the Secretary.

B. Plaintiff's treatment

Plaintiff identifies herself as a transsexual female and believes that she suffers from Gender Identity Disorder. Gender Identity Disorder is a mental disorder characterized by a strong and persistent cross-gender identification and discomfort with one's sex, or sense of inappropriateness in the gender role of that sex, that causes clinically significant distress or impairment in social, occupational or other important areas of functioning. At some unspecified point in the past, plaintiff had received a diagnosis Gender Identity Disorder, but that disorder was not part of her mental health diagnosis at the beginning of the events that are the subject of this lawsuit. Her mental health diagnosis in March 2011 included Major Depressive Disorder, Recurrent, in Remission; Cocaine and Cannabis Dependence and Personality Disorder NOS [Not Otherwise Specified] with Antisocial Feature.

On March 22, 2011, plaintiff submitted a Psychological Service Request form stating, "I request G.I.D. treatment—requesting any and all provisions to cope with my stress of my womanhood and transition." On March 25, 2011, plaintiff submitted an "Interview/Information Request" form to the Psychological Services Unit stating, "I request hormonal treatment for G.I.D. . . . . This is my second request." On April 5, 2011, defendant Tobiasz responded to both of these requests, saying, "Mr. Norwood, you are not diagnosed with GID by either psychiatry or PSU. Hormonal treatment is only provided to those that carry the

diagnosis by both psychiatry and PSU."

Following these denials, plaintiff sent Tobiasz letters detailing evidence supporting her belief that she has Gender Identity Disorder, such as her desires to wear women's clothing, paint her fingernails and toenails and shave her legs.

On March 23, defendant Garbelman talked to the Department of Corrections Medical Director, Dr. Kevin Kallas, regarding the department's policy related to Gender Identity Disorder. Garbelman did so because there were several inmates of the Waupun prison who had requested hormone treatment. (I note that Garbelman was not specifically aware of plaintiff's requests at this time; Garbelman avers that he became aware that plaintiff was requesting treatment for Gender Identity Disorder in April 2011. Also, plaintiff attempts to dispute this proposed finding, stating that there were not "several" inmates in need of treatment, but only her and fellow inmate Lonnie Jackson. However, plaintiff does not provide any evidence showing that she and Jackson were the only inmates requesting treatment. Finally, she argues that Garbelman's statement that he talked to Kallas is not supported "by any tangible records," but Garbelman's affidavit is sufficient to set forth this fact.)

Garbelman learned that the Gender Identity Disorder Committee was in the process of revising its policy related to the treatment for Gender Identity Disorder, and that all requests for hormone treatment would be reviewed by the committee upon completion of the policy, which was not anticipated to be completed until later in the year. The Gender Identity Disorder Committee was created in 2002 and now consists of the Bureau of Health Services Director, the Medical Director, the Mental Health Director, the Psychology Director, the

Psychiatry Director and the Nursing Director. The committee meets at least quarterly and more often as needed. The purpose of the committee is to make treatment recommendations and address management concerns with regard to specific inmates with Gender Identity Disorder.

Defendant Tobiasz was aware of Garbelman's discussion with Kallas and the ongoing revision of the Gender Identity Disorder policy when he responded to plaintiff's request for treatment. Defendants Garbelman and Tobiasz are obligated to follow the procedures and recommendations put into place by the Gender Identity Disorder Committee. Neither defendant Garbelman nor defendant Tobiasz is authorized to prescribe hormonal therapy or any other type of prescription medicine.

On March 30, 2011, plaintiff filed an inmate grievance regarding the lack of treatment. Ultimately, defendant institution complaint examiner Muenchow rejected the grievance as "moot" after consulting with defendant Garbelman, who told him that plaintiff did not have a diagnosis of Gender Identity Disorder. Plaintiff appealed the rejection but it was affirmed by defendant Thorpe.

On April 5, 2011, plaintiff filed an inmate grievance about the lack of treatment. Defendant Muenchow recommended dismissing the complaint, stating that he had talked to defendant Garbelman, who told him 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 Rose, who

recommended dismissing the appeal, and then to the Office of the Secretary, where defendant Roberts dismissed it.

Also on April 5, 2011, plaintiff sent an interview/information request to defendants Pollard, Schwochert, Strahota and 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, 2011, after meeting with plaintiff, defendant Tobiasz changed plaintiff's mental health diagnosis, removing the Major Depressive Disorder as an Axis 1 diagnosis, because he believed that plaintiff did not meet the criteria for that diagnosis. Tobiasz added a diagnosis of Depressive Disorder NOS (Not Otherwise Specified), to reflect plaintiff's history of reported depressive symptoms, which Tobiasz believed to be in remission.

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

On May 2, 2011, plaintiff filed another grievance about the lack of treatment. Defendant Muenchow rejected the grievance as "moot" because defendant Garbelman

concluded that plaintiff had not received a diagnosis of Gender Identity Disorder. Plaintiff appealed the rejection but it was affirmed by defendant Thorpe.

On May 9, 2011, defendant Tobiasz met with plaintiff and told her that her case would be discussed with Kallas. (Plaintiff states that Kallas was not contacted until November 2011, but presents no evidence in support of this assertion. Thus I will consider defendants' proposed fact undisputed.)

From March 2011 to the present, plaintiff was seen regularly (generally one or two times a month) by Psychological Services Unit staff, most often by defendant Tobiasz, who was her primary clinician. During this time period, plaintiff was placed in suicide observation status several times, at least in part because she threatened self harm in response to not receiving the treatment she had requested for Gender Identity Disorder.

The Department of Corrections developed Division of Adult Institutions policy no. 500.70.27 "Subject: Health Care Treatment of Gender Identity Disorder," effective December 19, 2011. Under that policy, inmates with Gender Identity Disorder diagnoses are given access to psychological treatment that addresses ambivalence or dysphoria or both regarding gender identity, appropriate psychiatric treatment, hormonal treatment and other medically necessary treatment and accommodations. An inmate who is not receiving hormonal medication at the time he enters the Department of Corrections may be started on hormonal medications while incarcerated, provided the inmate cooperates with staff in obtaining confirmation of previous treatment and the Gender Identity Disorder Committee determines that the hormones are medically necessary and not contraindicated for any reasons. Under current standards of care,

an individual must go through a period of assessment, diagnosis and medical testing before such treatment therapies can be contemplated.

At some point (defendants do not explain when), the department determined that it was necessary to utilize an outside Gender Identity Disorder consultant because the department did not "have sufficient in-house expertise in GID to conduct thorough examinations pursuant to the DSM." (Plaintiff disputes this, stating that "[i]n 2009 and 2011 Dr. Todd Callister and Dr. Lesley Baird diagnosed inmate Lonnie Jackson . . . ." The evidence submitted by plaintiff shows that Jackson was given a diagnosis of Gender Identity Disorder in 2009. Defendants do not dispute that fact but state that the department has changed its policy on Gender Identity Disorder evaluations since 2009.) The department contracted with Cynthia Osborne as a consultant. Osborne is an assistant professor in psychiatry and behavioral sciences at Johns Hopkins University School of Medicine.

Osborne made her first trip to Wisconsin as a Gender Identity Disorder consultant in December 2011. (Plaintiff disputes this, stating that Osborne visited Lonnie Jackson in October 2011, but plaintiff does not provide evidence supporting her assertion, and Jackson's affidavit states that he never met with an outside specialist. Therefore, I consider defendants' proposed finding to be undisputed.) Osborne was scheduled to see plaintiff on the last day of this trip, but plaintiff could not attend the meeting because she was out of the prison attending to a different court matter.

Defendant Dr. Callister met with plaintiff on January 11, 2012, and recommended a trial of antidepressant medication for some depressive symptoms that plaintiff exhibited,

although he did not think that plaintiff was clinically depressed or that he had a recurrent depressive disorder. Callister was not asked by clinical services to evaluate plaintiff for Gender Identity Disorder at this appointment.

Osborne came back to Wisconsin from February 14–17, 2012, for another round of interviews with inmates, including plaintiff. On February 15, 2012, Osborne met with plaintiff for approximately four hours. Osborne prepared a Gender Identity Consultation Report concerning plaintiff's treatment.

On April 9, 2012, the Gender Identity Disorder Committee met to discuss plaintiff and tentatively approved hormone treatment. On May 1, 2012, a conference call was conducted between committee members and Waupun Correctional Institution Health Services Unit and Psychological Services Unit staff to complete a treatment plan. On June 6, plaintiff met with outside consultant Dr. Steven Brown to determine whether hormone therapy would be medically contraindicated. Brown recommended the initiation of hormone therapy and plaintiff is currently receiving this treatment.

II. OPINION

A. Deliberate indifference

Under the Eighth Amendment, prison officials have a duty to provide medical care to those being punished by incarceration. Estelle v. Gamble, 429 U.S. 97, 103 (1976). To state an Eighth Amendment medical care claim, a prisoner must allege facts from which it can be inferred that she had a "serious medical need" and that prison officials were "deliberately

indifferent" to this need. Id. at 104.

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). A medical need may be serious if it is life-threatening, carries risks of permanent serious impairment if left untreated, results in needless pain and suffering, Gutierrez v. Peters, 111 F.3d 1364, 1371-73 (7th Cir. 1997), "significantly affects an individual's daily activities," Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), or otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825, 847 (1994).

"Deliberate indifference" means that defendant was aware that the prisoner needed medical treatment but disregarded the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997). A delay in treatment may constitute deliberate indifference if the delay exacerbated the injury or unnecessarily prolonged an inmate's pain. Estelle, 429 U.S. at 104-05; Gayton v. McCoy, 593 F.3d 610, 619 (7th Cir. 2010); Edwards v. Snyder, 478 F.3d 827, 832 (7th Cir. 2007). However, inadvertent error, negligence, gross negligence and ordinary malpractice are not cruel and unusual punishment within the meaning of the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); Snipes, 95 F.3d at 590-91.

The parties agree that Gender Identity Disorder constitutes a "serious medical need" for purposes of the Eighth Amendment. That leaves the question whether any of the defendants acted with deliberate indifference to plaintiff's need.

In her complaint, plaintiff alleged that she had received no treatment for Gender Identity Disorder. Over the course of this litigation, plaintiff has started to receive treatment, but it is clear from her various filings that she believes that there was undue delay in receiving treatment and that she is unhappy with the scope of her treatment. Although defendants explain that Gender Identity Disorder assessments and treatment plans are complex, it is troubling that plaintiff faced such a long delay in receiving treatment; she made her initial requests for treatment in March 2011 but was not scheduled to meet with the department's expert consultant until December 2011 and it appears that she did not begin receiving treatment until June 2012.

However, even assuming for purposes of this opinion that there was an extraordinary delay in treatment, the undisputed facts show that the defendants plaintiff names in this case are not the parties responsible for that delay and thus any claims she may have are outside the scope of this action. The department's current Gender Identity Disorder policy, enacted in December 2011, details the process by which the Gender Identity Disorder Committee is forwarded treatment requests by department health care staff and directs the assessment and treatment of inmates. The contours of the department's policy prior to December 2011 are murkier, but it is undisputed both that department health care staff is obligated to follow the direction of the committee and that at the time plaintiff had made her requests, the committee had postponed reviewing requests for Gender Identity Disorder until the new policy was completed. In short, the members of the Gender Identity Committee "called the shots" regarding treatment, not any of the named defendants in this

case, whether they be health care staff (defendants Garbelman, Tobiasz and Callister), complaint examiners (Muenchow, Thorpe, Rose and Roberts) or high level non-medical staff at the Waupun prison (Pollard, Schwochert, Strahota and Meisner). Burks v. Raemisch, 555 F.3d 592, 595–96 (7th Cir. 2009) ("Bureaucracies divide tasks; no prisoner is entitled to insist that one employee do another's job,"; Section 1983 limits liability to public employees "for their own misdeeds, and not for anyone else's.") Garbelman's and Tobiasz's roles in the department's health care system required them to inform the committee about plaintiff's request and to otherwise provide routine psychological care for plaintiff, both of which they did. Accordingly, I will deny plaintiff's motion for summary judgment and grant defendants' motion on plaintiff's deliberate indifference claims.

B. Equal Protection

Next, plaintiff alleges that defendants have violated her Fourteenth Amendment equal protection rights by failing to provide her treatment for Gender Identity Disorder. 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). To prevail on an equal protection claim, must show that defendants acted with a discriminatory purpose. Billings v. Madison Metropolitan School District, 259 F.3d 807, 812 (7th Cir. 2001). In the prison context, officials may treat prisoners differently if there is a rational basis for doing so. May v. Sheahan, 226 F.3d 876, 882 (7th Cir. 2000).

The crux of plaintiff's argument is that her treatment was delayed because prison

officials are biased against transsexuals. She notes, "Other inmates don't have to show a documented history of headache pain before they receive treatment for their pain and stress caused by the headache." Plaintiff misses the mark here because defendants have set forth undisputed facts explaining that the decision to provide treatment for Gender Identity Disorder is significantly more complex than the decision to treat a headache. In any case, even assuming that the delays in plaintiff receiving treatment could serve to show unequal treatment against inmates with Gender Identity Disorder, her claims cannot succeed in this action because, as discussed above, she is not suing the prison officials who had responsibility for the treatment decisions. Therefore I will grant defendants' summary judgment motion and deny plaintiff's regarding her equal protection claims.

MOTION FOR INJUNCTIVE RELIEF

Finally, plaintiff has filed a document she calls a motion for injunctive relief compelling defendants "to follow recommendations of doctors." Plaintiff argues that the recommendations of Cynthia Osborne and Steve Brown have not been fully implemented by Department of Corrections staff. In particular, she argues that policy no. 500.70.27 unconstitutionally forbids providing transsexual inmates with a "real life experience" such as allowing them to wear women's clothing and undergarments and shave their legs. Regardless what the merits of plaintiff's arguments might be, her motion will be denied as moot because none of her underlying claims survive summary judgment.

ORDER

IT IS ORDERED that

1. Plaintiff Charles Norwood's motion for an extension of time to file an amended complaint, dkt. #42, is DENIED.

2. Plaintiff's motion for the court to accept the late filing of her reply to her proposed findings of fact regarding her motion for summary judgment, dkt. #73, is GRANTED.

3. Plaintiff's motion for summary judgment, dkt. #43, is DENIED.

4. The motion for summary judgment filed by defendants Ryan Tobiasz, Jeffrey Garbelman, Todd Callister, James Muenchow, William Pollard, Don Strahota, Michael Meisner, Jim Schwochert, Cynthia Thorpe, Welcome Rose and Melissa Roberts, dkt. #48, is GRANTED.

5. Plaintiff's motion for injunctive relief, dkt. #76, is DENIED as moot.

6. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 14th day of November, 2012.

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