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

JOHN H. BALSEWICZ
also known as
MELISSA BALSEWICZ,

Plaintiff, OPINION AND ORDER

v.

19-cv-806-wmc

KEVIN KALLAS, M.D.,
CYNTHIA OSBORNE, MSW,
TORIA VAN BUREN, L.P.,
GAYLE GRIFFITH, P.A.,
and CASEY SCHMUDE, O.O.A,

Defendants.

Pro se plaintiff John H. Balsewicz is a transgender prisoner also known as Melissa Balsewicz. She brings this lawsuit under 42 U.S.C. § 1983, alleging that: (1) all of the defendants unconstitutionally delayed her hormone treatment; and (2) defendant Keven Kallas did so in retaliation for her having filed previous lawsuits against other officials with the Wisconsin Department of Corrections ("DOC"). Before the court is Balsewicz's motion to transfer this case to the Eastern District of Wisconsin (dkt. #13) and her motion to proceed *in forma pauperis* (dkt. #2). Having now screened Balsewicz's complaint as required by 28 U.S.C. 1915A, the court will allow her to proceed on constitutional claims against some of the named defendants, but deny her motion to transfer for the reasons

that follow.[1]

ALLEGATIONS OF FACT[2]

While Balsewicz currently is incarcerated at New Lisbon Correctional Institution, she was incarcerated at Waupun Correctional Institution during the relevant time period for this lawsuit. She names the following as defendants: Dr. Kevin Kallas, DOC's Mental Health Director, as well as member of its Transgender Committee; and Cynthia Osborne, a DOC gender dysphoria consultant. Balsewicz also names the following Waupun psychological services unit ("PSU") staff: Supervisor Toria Van Buren; Psychological Associate Gayle Griffith; and Office Operations Associate Casey Schmude.

Balsewicz is transgender, who claims to suffer from gender dysphoria. On March 31, 2016, she requested hormone therapy and sex reassignment surgery to address this condition. Although the complaint is vague on this point, further consideration of Balsewicz's proper accommodations and treatment needs were apparently delayed, causing her mental health to deteriorate. According to Balsewicz, by the time she first saw gender dysphoria consultant Osborne in February of 2017, almost a year after requesting therapy,

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[1] Balsewicz also filed a motion for judgment on the pleadings, accompanied by 306 pages of documents in support. (Dkt. ##10, 11-1.) However, Federal Rule of Civil Procedure 12(c) permits a party to move for judgment only *after* the parties have filed the complaint and answer, and defendants have yet to be served. *N. Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 452 (7th Cir. 1998); *Brunt v. Serv. Employees Int'l Union*, 284 F.3d 715, 718 (7th Cir. 2002). Since the pleadings are now just barely open and certainly not closed, this motion will be denied as premature.

[2] In addressing a pro se litigant's complaint, the court must read the allegations generously, resolving ambiguities and drawing reasonable inferences in plaintiff's favor. *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

she had already allegedly attempted suicide three times. Even then, Osborne appears not to have recommended hormone therapy, citing Balsewicz's psychological and behavioral instability. Instead, Osborne suggested that: (1) Balsewicz remain focused on psychological interventions to stabilize her behavior; and (2) while doing so, she be permitted to use female undergarments. While Dr. Kallas allegedly agreed with Osborne's assessment, Balsewicz claims that her co-existing mental health conditions and suicide attempts were reason enough to approve hormone therapy immediately, pointing to the World Professional Association for Transgender Health's Standards of Care for gender dysphoric people living in institutions.

Over a year later, on April 2, 2019, Osborne re-evaluated Balsewicz and issued a report on May 11, 2018, that noted she still displayed maladaptive personality traits, including a "litigious" attitude, but also observed that she had made a noticeable effort over the past year to better manage those traits. (Dkt. #1 at 6.) In combination with the duration of Balsewicz's reported gender dysphoria and the remaining length of her term of incarceration, therefore, Osborne concluded in the same report that it was now reasonable for Balsewicz to start hormone therapy.

Even then, Balsewicz did not actually begin hormone therapy until completing another consultation in September of 2018. During the period between the May 11 report and the end of August 2018, Balsewicz claims to have frequently communicated with PSU staff about obtaining a copy of Osborne's report and starting hormone therapy. In particular, Balsewicz alleges that Waupun's PSU Office Operations Associate Schmude had the report as of May 30, 2018, but Psychology Associate Griffith told Balsewicz that the

report was not yet available in response to her June 3 request for a copy. And even though, on July 22, Griffith forwarded Balsewicz's follow-up inquiry about the report and request to begin hormone therapy to the Transgender Committee, Balsewicz alleges that the report was not in her medical file when she met with a nurse on August 5 for a file review. After Balsewicz requested to be seen in the PSU, she was scheduled for an August 17 appointment.

Finally, on August 17, 2018, Schmude sent Balsewicz a copy of Osborne's report. After Balsewicz complained to PSU Supervisor Van Buren about the approximately two-month delay, Griffith responded that she had only received the final version of Osborne's report herself on July 26, and had scheduled a session with Balsewicz on August 17 to review it together. However, Van Buren allegedly told an inmate complaint examiner investigating Balsewicz's grievances that PSU staff had received the report on June 4. Although Balsewicz acknowledges that PSU staff "may not have the authority to recommend, approve, [or] start [her] hormone treatments," she asserts that these conflicting responses evidence a "concerted effort" on their part to deny her a copy of Osborne's report and "hinder[ ] the start of" her hormone treatment. (Dkt. #1 at 8.)

On September 10, 2018, Balsewicz filed two formal inmate complaints about the delay in her starting hormone treatment. In response, Dr. Kallas wrote Balsewicz a letter on September 17, explaining that *he* had decided against an immediate referral for hormonal treatment after reviewing Osborne's May 11 report. Kallas stated that in his view, Osborne's "caveats to her therapy recommendation" had supported placing Balsewicz's file on a "follow-up" status "for review later in the summer" rather than an

immediate treatment referral. (Dkt. #1 at 9.) Kallas further asserted that he only decided to schedule Balsewicz for a hormone therapy consultation after receiving follow-up reports from PSU staff in August of 2018, noting Balsewicz's improved "institutional adjustment and level of cooperation with providers." (Dkt. #1 at 9.) Finally, Kallas asserted that the decision to refer an inmate for a hormone evaluation rested solely with him as the mental health director.

Ultimately, Balsewicz claims that Kallas's decision to delay hormone treatment until September 2018 was based on inappropriate considerations, including Balsewicz's disciplinary record, her litigation history, and retaliation for two lawsuits she had filed in the Eastern District of Wisconsin concerning past medical and psychiatric treatment for gender dysphoria.[3] Finally, Balsewicz alleges that she suffered "prolonged pain and suffering" while waiting to begin her hormone treatment. (Dkt. #1 at 5, 10.) For their alleged roles in causing this delay, Balsewicz seeks punitive damages against each named defendant in his or her individual capacity.

OPINION

I. Deliberate Indifference to a Serious Medical Need

A prison official violates the Eighth Amendment in the context of a prisoner's medical treatment when acting with "deliberate indifference" to a "serious medical need." *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976); *Forbes v. Edgar*, 112 F.3d 262, 266 (7th Cir.

[3] Specifically, Balsewicz references *Balsewicz v. Pawlyk*, No. 18-cv-97-jps (E.D. Wis. 2018), and *Balsewicz v. Bartow*, No. 17-cv-360-jps (E.D. Wis. 2017), in her complaint (dkt. #1 at 4, 9), although publicly available records indicate that Dr. Kallas was not a defendant in either lawsuit.

1997). "Deliberate indifference" encompasses two elements: (1) awareness that the prisoner needs medical treatment; and (2) disregard of this need by conscious failure to take reasonable measures in response. *Estelle*, 429 U.S. at 104. "Serious medical needs" include: (1) conditions that are life-threatening or carry a risk of permanent, serious impairment if left untreated; (2) needless pain and suffering; or (3) conditions that have been "diagnosed by a physician as mandating treatment." *Gutierrez v. Peters*, 111 F.3d 1364, 1371 (7th Cir. 1997).

Allegations of delayed care, even of just a few days, may violate the Eighth Amendment if the alleged delay caused the inmate's condition to worsen or unnecessarily prolong her pain. *Estelle*, 429 U.S. at 104-05; *McGowan v. Hulick*, 612 F.3d 636, 640 (7th Cir. 2010); *see also Petties v. Carter*, 836 F.3d 722, 730-31 (7th Cir. 2016) (inexplicable delay in medical treatment for a prisoner that serves no penological interest can support an inference of deliberate indifference for purposes of a prisoner's Eighth Amendment claim). Thus, plaintiff's claim must satisfy three elements: (1) plaintiff objectively needed medical treatment; (2) defendant knew that plaintiff needed treatment; and (3) despite this awareness, defendant consciously delayed taking reasonable measures to provide the necessary treatment.

Here, Balsewicz alleges that defendants were deliberately indifferent to her serious medical need. As to the first element, the court must accept for purposes of screening that her gender dysphoria constitutes a serious medical need requiring on-going attention and treatment. *Fields v. Smith*, 653 F.3d 550, 556 (7th Cir. 2011). Second, each of the defendants was apparently aware of her diagnosis and requests for hormone therapy.

Specifically, defendants Osborne and Kallas were allegedly directly involved in Balsewicz's gender dysphoria assessment and in formulating a treatment plan, while one can reasonably infer on the pleading that the PSU defendants would have become aware of her ongoing mental health treatment for gender dysphoria, as well as her requests in 2018 for Osborne's report and to start hormone therapy, based on Osborne's May 11 recommendation.

This leaves the third element of plaintiff's claim: whether she has alleged sufficient facts to permit a reasonable inference that each of the named defendants acted with deliberate indifference to the risk that she would suffer needlessly by delaying hormone therapy. At this early stage at least, plaintiff's allegations appear to support a reasonable inference that psychologist Osborne and Dr. Kallas recklessly disregarded that risk. Specifically, Balsewicz alleges that even though these defendants were aware of her deteriorating mental state and suicide attempts, they nonetheless declined in February of 2017 to begin immediate hormone treatment in contravention of prevailing professional standards of care. Moreover, even after Osborne changed course in May of 2018 and recommended hormone therapy, Kallas allegedly delayed her treatment until the following September based on allegedly inappropriate, non-medical considerations, such as Balsewicz's disciplinary record and earlier lawsuits. Further, Balsewicz claims to have endured "prolonged pain and suffering" as a result. (Dkt. #1 at 10.)

Of course, additional fact-finding may reveal that these defendants reasonably exercised their medical judgment in treating Balsewicz's gender dysphoria. *E.g.*, *Howell v. Wexford Health Sources, Inc.*, 987 F.3d 647, 660 (7th Cir. 2021) ("A negligent exercise of medical judgment is not enough to show deliberate indifference. Plaintiff must show a

failure to exercise medical judgment at all."). In particular, Balsewicz should be aware going forward that a "mere disagreement with a doctor's medical judgment" is not enough to prove an Eighth Amendment violation. *Berry v. Peterman*, 604 F.3d 435, 441 (7th Cir. 2010). At this stage, however, each of those factual issues is for another day, since the court must construe all ambiguities and draw all inferences in plaintiff's favor. Indeed, under the lenient pleading standard for a *pro se* litigant, *Haines,* 404 U.S. at 521, the court must allow plaintiff to proceed on deliberate indifference claims against these two defendants.

At the same time, the court cannot reach the same conclusion with respect to the three PSU staff members named as defendants. At most, plaintiff alleges that these PSU staff members gave her inaccurate information about the availability of Osborne's May 2018 report, and neither provided her a copy of the report, nor discussed its contents with her until August 2018. In plaintiff's view, this is enough to find that these defendants "delayed and/or interfered with the start of [her] hormonal treatments" for several months *and* "turned a blind eye" to the consequences of their conduct. (Dkt. #1 at 8.) However, the same allegations reflect that the PSU defendants promptly responded to Balsewicz's inquiries, scheduled her for an appointment, and conducted a file review when asked. They also forwarded her July request to start treatment to the Transgender Committee.

More importantly, although Balsewicz was understandably anxious to begin treatment, the complaint does not shed light on how *any* of these PSU defendants could have helped "speed up [that] process" as plaintiff contends. On the contrary, the allegations suggest this was Kallas's decision alone to make, perhaps with input from

Osborne and her report. And, as much as Balsewicz understandably wanted a copy of Osborne's report, it is not at all apparent why Kallas's decision was dependent on *plaintiff* receiving a copy of the report. (Dkt. #1 at 9.) Again, Balsewicz appears to concede that none of the three PSU staff named as defendants had the authority to approve, much less start, her hormone treatment. (Dkt. #1 at 8.)

At most, plaintiff alleges that PSU staff gave her the runaround with respect to Osborne's report. To the extent PSU staff was negligent or even grossly negligent in mishandling Balsewicz's inquiries, which is a stretch given their apparently limited role in making *any* decision about Balsewicz's treatment for gender dysphoria, that action does *not* rise to deliberate indifference to a medical need. *Hildreth v. Butler*, 960 F.3d 420, 426 (7th Cir. 2020) ("negligence, gross negligence, or even recklessness as the term is used in tort cases is not enough—the prison officials' state of mind must rise to the level of deliberate indifference."). If anything, a decision to put off plaintiff's receipt of Osborne's report while the powers that be decided the proper course of her treatment arguably does not concern her *medical needs* at all. Accordingly, plaintiff may not proceed against defendants Van Buren, Griffith, and Schmude on a claim under the Eighth Amendment as currently pleaded.[4]

II. First Amendment Retaliation

Balsewicz also alleges that defendant Kallas retaliated against her. (Dkt. #1 at 9-

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[4] At the same time, the court does not intend to minimize the impact on plaintiff from not *knowing* if some relief is on its way, and Balsewicz is not precluded from filing an amended complaint to clarify the basis of her allegations against the three PSU staff defendants or to include any details she may have inadvertently omitted about their alleged involvement in her actual medical care.

10.) A claim for First Amendment retaliation requires a plaintiff to allege that: (1) she engaged in activity protected by the Constitution; (2) the defendant subjected the plaintiff to adverse treatment because of the plaintiff's constitutionally protected activity; and (3) the treatment was sufficiently adverse to deter a person of "ordinary firmness" from engaging in that protected activity in the future. *Gomez v. Randle*, 680 F.3d 859, 866-67 (7th Cir. 2012); *Bridges v. Gilbert*, 557 F.3d 541, 555-56 (7th Cir. 2009).

Plaintiff has pleaded sufficient facts to support this claim as well. As to the first element, plaintiff claims that Kallas retaliated against her because of past lawsuits concerning her treatment for gender dysphoria. Filing a lawsuit is protected activity. *See Zorzi v. County of Putnam*, 30 F.3d 885, 896 (7th Cir. 1994) ("Retaliation for filing a lawsuit is prohibited by the First Amendment's protection of free speech."). Moreover, a months-long delay in receiving medically necessary hormonal treatment that causes prolonged pain and suffering certainly could deter a prisoner of ordinary firmness from filing a future lawsuit. Finally, Balsewicz's allegations that Kallas was aware of her lawsuits *and* based his decision to delay treatment in part on her litigation history supports an inference that his actions were motivated (at least in part) by a desire to punish her for past filings, even if he was not personally named as a defendant in either case.

Although the court will allow Balsewicz to proceed on this claim, she should again keep in mind that "[a] claim for retaliation presents a classic example of a claim that is easy to allege but hard to prove." *Davis v. Huibregtse*, No. 3:07-CV-667-BBC, 2008 WL 4615427, at *3 (W.D. Wis. Jan. 23, 2008). To do so, she will have to come forward with admissible evidence either at summary judgment or at trial that Kallas delayed treatment

because of the exercise of her constitutional rights. And even if she can prove Kallas knew about the lawsuits, she will have to prove a retaliatory *motive* with evidence of, for example, suspicious timing or statements by Kallas suggesting that he was bothered by her earlier, protected conduct. *E.g., Mullin v. Gettinger*, 450 F.3d 280, 285 (7th Cir. 2006) (evidence of suspicious timing can support an inference of improper motive, but the inference weakens as the time period between protected activity and adverse action increases); *Culver v. Gorman & Co.*, 416 F.3d 540, 545-47 (7th Cir. 2005) (plaintiff's circumstantial evidence supporting prima facie case of retaliation included suspicious timing, the supervisor's sudden dissatisfaction with the plaintiff's job performance, and the supervisor's warnings to plaintiff against speaking with another supervisor). Moreover, even when the exercise of the right and the adverse action occur close in time, this is rarely enough to prove an unlawful motive without additional evidence. *Sauzek v. Exxon Coal USA, Inc.*, 202 F.3d 913, 918 (7th Cir. 2000) ("The mere fact that one event preceded another does nothing to prove that the first event caused the second.") Accordingly, in going forward with this claim against Kallas, plaintiff may well still have a difficult road ahead of her.

III. Motion for Change of Venue (dkt. #13)

Finally, Balsewicz also seeks to transfer this case to the Eastern District of Wisconsin, where Waupun is located. Under 28 U.S.C. § 1404(a), a district court has the discretion, for the convenience of parties and witnesses and in the interest of justice, to transfer a civil action to any other district where it might have been brought. Also, under 28 U.S.C. § 1391(a) and (b), venue is proper in a district where one or more of the defendants reside or where a substantial part of events giving rise to lawsuit occurred. "The

weighing of factors for and against transfer necessarily involves a large degree of subtlety and latitude, and, therefore, is committed to the sound discretion of the trial judge." *Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 219 (7th Cir. 1986).

Here, plaintiff explains that although all the alleged events in this case took place at Waupun where defendants work, she believed the filing of her case in this district was required by the Wisconsin Department of Corrections ("DOC") maintaining its headquarters here. (Dkt. #13.) However, at this point, plaintiff is not being allowed to even proceed against the PSU defendants who allegedly work at Waupun; she is only being permitted to proceed on claims challenging the decision-making of defendants Kallas and Osborne, neither of whom the court can reasonably infer reside in the Eastern District. On the contrary, Kallas is a DOC administrator with the Bureau of Health Services located in Madison, Wisconsin, and likely works and resides in this district, while Osborne is a gender dysphoria consultant for the DOC, not exclusively Waupun. (*See* dkt. #1 at 3.)

Because the court has no basis to infer that venue in this district is improper or that the Eastern District is "clearly more convenient" for the remaining parties, and because the court has now invested time in screening plaintiff's complaint and her case can now proceed in this district without further delay, the court will deny her motion. *See Coffey*, 796 F.2d at 220 (the movant has the burden of establishing that the transferee forum is clearly more convenient).

ORDER

IT IS ORDERED that:

1) Plaintiff is GRANTED leave to proceed on:

   a. Eighth Amendment deliberate indifference claims against defendants Osborne and Kallas for delaying hormone therapy; and

   b. a First Amendment retaliation claim against defendant Kallas.

2) Defendants Van Buren, Griffith, and Schmude are DISMISSED.

3) Plaintiff's motion for judgment on the pleadings (dkt. #10) is DENIED.

4) Plaintiff's motion for a change of venue (dkt. #13) is DENIED.

5) Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's 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 60 days from the date of the Notice of Electronic Filing in this order to answer or otherwise plead to plaintiff's complaint if it accepts service for the defendants.

6) For the time being, plaintiff must send defendants a copy of every paper or document 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 plaintiff shows on the court's copy that she has sent a copy to defendants or to the defendants' attorney.

7) 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.

8) If plaintiff is transferred or released while this case is pending, it is her obligation to inform the court of his new address. If she fails to do this and defendants or the court is unable to locate her, his case may be dismissed for failure to prosecute.

Entered this 17th day of June, 2021.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge