

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

MICHELLE RENEE LAMB,
a/k/a THOMAS LAMB

Plaintiff,

vs.

JOE NORWOOD, JOHNNIE GODDARD,
PAUL CORBIER, KANSAS
DEPARTMENT OF CORRECTIONS, and
CORIZON HEALTH SERVICES,

Defendants.

Case No. 16-3077-EFM-DJW

MEMORANDUM AND ORDER

Michelle Renee Lamb is currently serving three consecutive life sentences for two counts of kidnapping and one count of murder. Michelle Renee was born Thomas Preston; she changed her name in 2007.¹ She has been diagnosed with gender dysphoria; although she was born a biological male, she considers herself female. Michelle brings this action against the Kansas Department of Corrections (“KDOC”); Joe Norwood,² the Secretary of Corrections, in his

¹ The Court follows KDOC’s approach and uses female pronouns when referring to Michelle.

² At the time Lamb filed this action, Johnnie Goddard was the acting Secretary of Corrections for the Kansas Department of Corrections. That position is now held by Joe Norwood, who is automatically substituted as a party in this case to the extent that Lamb sued Goddard in his official capacity. *See Fed R. Civ. P. 25(d).*

official capacity; Johnnie Goddard,³ Deputy Secretary of Corrections, in his individual capacity; Corizon Health Services; and Dr. Paul Corbier. She asserts that the Defendants are violating the Eighth Amendment's prohibition against cruel and unusual punishment by failing to adequately treat her gender dysphoria. She also alleges that her constitutional rights are being violated by the conditions of her confinement. Accordingly, she seeks declaratory and injunctive relief. Specifically, she seeks more comprehensive treatment of her gender dysphoria, access to more female items in prison, recognition of her name change, and transfer to a female-only prison facility.

Corizon and Dr. Corbier have each filed a motion for summary judgment (Docs. 35 and 38), arguing that they are not violating the Eighth Amendment because they are not deliberately indifferent to Lamb's medical needs. KDOC, Norwood, and Goddard (the "Prison Officials") have also filed a motion for summary judgment (Doc. 46). They also argue that Lamb cannot demonstrate deliberate indifference to her medical needs. Furthermore, they contend that Lamb's conditions of confinement are constitutional. For the reasons stated below, the Court agrees with the Defendants and grants all three motions for summary judgment.

I. Factual and Procedural Background⁴

In December 1969, Thomas Lamb abducted and murdered a young woman named Karen Sue Kemmerly. Shortly thereafter, in January 1970, Thomas Lamb abducted another young woman named Patricia Ann Childs and sought a ransom in exchange for her release. While in Thomas Lamb's custody, Childs' hands were bound and on several occasions, she was forced to

³ Because Lamb also alleges that Goddard violated her rights in his individual capacity, he remains a defendant to that extent.

⁴ In accordance with summary judgment procedures, the Court has set forth the uncontested facts, and they are related in the light most favorable to the non-moving party.

engage in sexual intercourse with Thomas. Shortly after the ransom was paid and Childs was released, Thomas Lamb was apprehended. Thomas Lamb was convicted of two counts of kidnapping and one count of first degree murder, and is now serving three consecutive life sentences in prison.

While in prison, Thomas Preston Lamb began going by Michelle Renee Lamb. And in 2007, that name change was made official. Michelle Lamb has been diagnosed with gender dysphoria: she was born a biological male, but self identifies as a female transsexual. Lamb is in the custody of the KDOC. At the time she filed this action, Johnnie Goddard was the acting Secretary of Corrections. Currently, that position is held by Joe Norwood. KDOC contracts with Corizon to provide medical care to its inmates. Since either 2012 or 2014,⁵ Lamb has been seen by Dr. Paul Corbier. Dr. Corbier is Corizon's Regional (Kansas) Medical Director.

Lamb receives weekly counseling and therapy sessions. Every week, she meets with Brandon Pratt, a licensed psychologist employed by Corizon. She also receives hormone treatments. Specifically, she takes estrogen and a testosterone-blocking medication. Dr. Corbier asserts that he and a panel of practitioners have deemed that Lamb's treatment is appropriate. In January 2016, Lamb was allowed access to jewelry—specifically earrings—and was also given female undergarments. Pratt explains that access to these items is meant to be therapeutic for Lamb's gender dysphoria. Dr. Corbier stated that Lamb's condition will not decline if her current treatment regimen continues, and in his opinion, “the relative risks and benefits of sexual reassignment surgery render surgery [an] impractical and unnecessary option when more conservative therapies are available and effective.”

⁵ The parties disagree as to when Dr. Corbier's involvement began.

Lamb does not feel that her gender dysphoria is being treated. Lamb contends that the weekly sessions and hormone treatments only treat the depression that results from her untreated gender dysphoria. She claims that various medical doctors and gender dysphoria experts recommend that she receive much more comprehensive treatment. She also asserts that the treatment she is currently receiving falls short of the standard of care set forth by the World Professional Association for Transgender Health (“WPATH”).

Lamb brings this action under § 1983 against Corizon, Dr. Corbier, and the Prison Officials. She alleges that the current treatment that she is receiving for her gender dysphoria violates her Eighth Amendment rights. She seeks injunctive relief, asking the Court to direct that the Defendants provide Lamb with treatment conforming to the WPATH’s standard of care. That treatment would include (1) castration surgery; (2) transfer to a female prison facility; (3) a name change on all of KDOC’s official documents; (4) genital sex reassignment surgery; (5) access to all canteen and property items that are currently available to female inmates; (6) female voice therapy, electrolysis, and/or laser hair removal; and (7) an adjustment of Lamb’s hormone therapy.

Dr. Corbier and Corizon have each filed a motion for summary judgment. The Prison Officials have also filed a motion for summary judgment. In their motions, all of the Defendants argue that the facts show that they are not deliberately indifferent to Lamb’s medical condition because she is receiving adequate treatment. Furthermore, the Prison Officials also argue that Lamb’s constitutional rights are not violated by the conditions of her confinement.

II. Legal Standard

Summary judgment is appropriate if the moving party demonstrates that there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law.⁶ A fact is “material” when it is essential to the claim, and issues of fact are “genuine” if the proffered evidence permits a reasonable jury to decide the issue in either party’s favor.⁷ The moving party bears the initial burden of proof, and must show the lack of evidence on an essential element of the claim.⁸ If the moving party carries this initial burden, the non-moving party that bears the burden of persuasion at trial may not simply rest on its pleading but must instead “set forth specific facts” from which a rational trier of fact could find for the non-moving party.⁹ These facts must be clearly identified through affidavits, deposition transcripts, or incorporated exhibits—conclusory allegations alone cannot survive a motion for summary judgment.¹⁰ To survive summary judgment, the non-moving party’s evidence must be admissible.¹¹ The Court views all evidence and reasonable inferences in the light most favorable to the party opposing summary judgment.¹²

Lamb is proceeding pro se. The Court therefore reviews her pleadings, including those related to Defendants’ motion, “liberally and holds them to a less stringent standard than those

⁶ Fed. R. Civ. P. 56(a).

⁷ *Haynes v. Level 3 Commc’ns, LLC*, 456 F.3d 1215, 1219 (10th Cir. 2006).

⁸ *Thom v. Bristol-Myers Squibb Co.*, 353 F.3d 848, 851 (10th Cir. 2003) (citing *Celotex Corp. v. Cartrett*, 477 U.S. 317, 322-23 (1986)).

⁹ *Id.* (citing Fed. R. Civ. P. 56(e)).

¹⁰ *Mitchell v. City of Moore, Okla.*, 218 F.3d 1190, 1197-98 (10th Cir. 2000) (citing *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670-71 (10th Cir. 1998)).

¹¹ *Adams v. Am. Guar. & Liab. Ins. Co.*, 233 F.3d 1242, 1246 (10th Cir. 2000).

¹² *LifeWise Master Funding v. Telebank*, 374 F.3d 917, 927 (10th Cir. 2004).

drafted by attorneys.”¹³ The Court, however, cannot assume the role of advocate for the pro se litigant.¹⁴ Likewise, Lamb’s pro se status does not relieve her from the obligation to comply with procedural rules, including the Federal Rules of Civil Procedure.¹⁵

III. Analysis

Lamb seeks declaratory and injunctive relief under 42 U.S.C. § 1983. Section 1983 is not a source a substantive rights; it merely provides a mechanism for enforcing rights secured elsewhere under federal law.¹⁶ And so to invoke § 1983, Lamb must first show that she has been deprived of a right secured under federal law.¹⁷ Specifically, she alleges that all of the defendants are violating her Eighth Amendment rights by failing to acknowledge and treat her serious medical condition. She also alleges that the conditions of her confinement are violating her constitutional rights. She seeks an injunction directing the Defendants to properly treat her condition, and requests changes to the condition of her confinement, primarily, transfer to a female-only facility.

A. Lamb’s hormone treatments and weekly therapy sessions do not violate the Eighth Amendment.

Lamb contends that all of the Defendants are violating her Eighth Amendment rights by treating her in a manner that falls short of WPATH standards. She asserts that the Eighth

¹³ *Trackwell v. U.S. Gov’t*, 472 F.3d 1242, 1243 (10th Cir. 2007) (quotations omitted).

¹⁴ *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (“[W]e do not believe it is the proper function of the district court to assume the role of advocate for the pro se litigant.”).

¹⁵ *Murray v. City of Tahlequah*, 312 F.3d 1196, 1199 n.2 (10th Cir. 2002).

¹⁶ *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284-85 (2002).

¹⁷ 13D Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Richard D. Freer, *Federal Practice and Procedure* § 3573.2, 568 (3d ed. 2008) (noting that to prevail on a § 1983 claim, a plaintiff must show “that he has been deprived of a right secured by an appropriate federal law.”).

Amendment requires that she receive the following treatments: castration surgery; genital sex reassignment surgery; female voice therapy, electrolysis, and/or laser hair removal; and an adjustment to the hormone treatment that she is currently receiving. She argues that anything short of the above treatments—such as the care she is currently receiving—constitutes deliberate indifference to her medical needs in violation of the Eighth Amendment.

“A prison official’s deliberate indifference to an inmate’s serious medical needs is a violation of the Eighth Amendment’s prohibition against cruel and unusual punishment.”¹⁸ The deliberate indifference standard involves two components: “an objective component requiring that the pain of deprivation be sufficiently serious; and a subjective component requiring that [prison] officials act with a sufficiently culpable state of mind.”¹⁹ For the purposes of this motion only, the defendants concede that the deprivation of gender dysphoria treatment is sufficiently serious. Therefore, their motion turns on the subjective component.

“A mere ‘negligent failure to provide adequate medical care, even one constituting medical malpractice, does not give rise to a constitutional violation.’ ”²⁰ Nor does a prisoner’s disagreement with a diagnosis or prescribed course of treatment constitute an Eighth Amendment violation.²¹ “Where a doctor ‘orders treatment consistent with the symptoms presented and then continues to monitor the patient’s condition, an inference of deliberate indifference is

¹⁸ *Mata v. Saiz*, 427 F.3d 745, 751 (10th Cir. 2005).

¹⁹ *Miller v. Glanz*, 948 F.2d 1562, 1569 (10th Cir. 1991).

²⁰ *Jackson v. Clowers*, 83 F. App’x 990, 993 (10th Cir. 2003) (quoting *Perkins v. Kan. Dep’t of Corrs.*, 165 F.3d 803, 811 (10th Cir. 1999)).

²¹ *Id.* (citing *Ledoux v. Davies*, 961 F.2d 1536, 1537 (10th Cir. 1992)).

unwarranted under [Tenth Circuit] case law.’²² With that in mind, ‘the subjective component is not satisfied, absent an extraordinary degree of neglect, where a doctor merely exercises his considered medical judgment.’²³

The Defendants argue that they acknowledge and are treating Lamb’s condition. Dr. Corbier—a board certified medical doctor—asserts that he is aware of Lamb’s gender dysphoria diagnosis. He asserts that her diagnosis and treatment regimen has been reviewed and approved by a panel of practitioners that includes specialists in psychiatry and behavioral psychology. Lamb receives weekly counseling and therapy sessions, hormone treatments, and has been provided access to female clothing and accessories, which Brandon Pratt—Corizon’s psychologist—claims is intended to be therapeutic. Dr. Corbier states that Lamb’s condition will not decline if her current treatment regimen continues. In Dr. Corbier’s opinion, ‘the relative risks and benefits of sexual reassignment surgery render surgery [an] impractical and unnecessary option when more conservative therapies are available and effective.’

Lamb attempts to controvert many of Dr. Corbier’s assertions, but she mostly does so improperly. Under Rule 56 of the Federal Rules of Civil Procedure, a party attempting to controvert a fact must do so by ‘citing to particular parts of materials in the record.’²⁴ This District’s local rules also require that in a memorandum opposing summary judgment, ‘[e]ach fact in dispute must be numbered by paragraph, [and] refer with particularity to those portions of

²² *Toler v. Troutt*, 631 F. App’x 545, 548 (10th Cir. 2015) (quoting *Self v. Crum*, 439 F.3d 1227, 1232-33 (10th Cir. 2006)).

²³ *Self*, 439 F.3d at 1232.

²⁴ Fed. R. Civ. P. 56(c)(1)(A).

the record upon which the opposing party relies.²⁵ Lamb mostly fails to cite to the record with any degree of particularity in attempting to controvert the Defendants' facts. Nevertheless, Lamb did support her complaint with a declaration that she swore to under penalty of perjury. Such a document can be treated as an affidavit and serve as evidence in consideration of a motion for summary judgment.²⁶ And so the Court will look to Lamb's declaration to see if a genuine dispute of material fact exists.

Lamb primarily attempts to controvert the assertions of Pratt and Dr. Corbier by arguing that the weekly sessions and hormone treatment only treat depression, and not gender dysphoria. She claims that other medical professionals have told her that her hormone dosage is too low and have recommended gender reassignment surgery. She sets forth various opinions and recommendations related to both her and other individuals' gender dysphoria. Ultimately, she asserts that her treatment falls short of the standard set forth by various experts as well as the WPATH standard of care. Therefore, she argues that the treatment she is receiving is wholly inadequate.

But under Tenth Circuit precedent, Lamb's treatment satisfies the Eighth Amendment. In 1986, the Tenth Circuit decided *Supre v. Ricketts*.²⁷ In *Supre*, the Court noted that prison officials must provide treatment to transgender prisoners.²⁸ But the Court also noted that in that case, the prison was justified in withholding hormone treatment.²⁹ Specifically, the Court stated:

²⁵ D. Kan. R. 56.1(b)(1).

²⁶ *Lewis v. Carrell*, 2014 WL 4450147, at *3 (D. Kan. 2014).

²⁷ 792 F.2d 958 (10th Cir. 1986).

²⁸ *Id.* at 963.

²⁹ *Id.*

While the medical community may disagree among themselves as to the best form of treatment for plaintiff's condition, the Department of Corrections made an informed judgment as to the appropriate form of treatment and did not deliberately ignore plaintiff's medical needs. The medical decision not to give plaintiff estrogen until further study does not represent cruel and unusual punishment.³⁰

In her response to the motions for summary judgment, Lamb states that “[e]very conjecture made in *Supre v. Ricketts*, has now been debunked by the Medical and Behavioral Science Community through scientific & Medical research in gender identity disorder.” But the Tenth Circuit has favorably cited *Supre* as recently as 2015 in *Drueley v. Patton*.³¹ In *Drueley*, the Tenth Circuit considered an argument similar to that advanced by Lamb.³² Specifically, the prisoner in *Drueley* argued that treatments that fell short of WPATH's standard of care violated her Eighth Amendment rights.³³ The Court noted that “[t]he WPATH Standards of Care are intended to provide *flexible directions for the treatment*” of gender dysphoria.³⁴ *Drueley* reflects the reality that the treatment of gender dysphoria is a highly controversial issue for which there are differing opinions. Dr. Corbier exercised his medical judgment to determine a course of treatment for Lamb, and in doing so, he has not violated her Eighth Amendment rights.³⁵ Lamb obviously

³⁰ *Id.*

³¹ 601 F. App'x 632 (10th Cir. 2015).

³² *Id.* at 633 (noting that the plaintiff is “seeking a court order directing the [] defendants to raise her hormone medications to the levels recommended by the Standards of Care established by the World Professional Association for Transgender Health (WPATH), allow her to wear ladies’ undergarment, and move her to a non-air-conditioned building to alleviate asthma symptoms.”).

³³ *Id.*

³⁴ *Id.* at 635 (quoting *Kosilek v. Spencer*, 774 F.3d 63, 70 n.3, 86, 88 (1st Cir. 2014)) (internal quotation marks omitted) (emphasis in orginal).

³⁵ Lamb also asserts that *Supre* and *Drueley* have been overruled by the case *O'Donnabhain v. Commissioner of Internal Revenue*, 134 T.C. 34 (T.C. 2010). In that 2010 case, the United States Tax Court determined that hormone treatment and sex reassignment surgery were tax deductible expenses for medical care. *Id.* at 65-66. Obviously, this 2010 decision regarding tax-deductible expenses does not overturn a 2015 Tenth Circuit

disagrees with Dr. Corbier's treatment decisions, but "disagreement does not give rise to a claim for deliberate indifference to serious medical needs."³⁶

Because the Defendants have recognized Lamb's medical condition and are treating her for it, they have not been deliberately indifferent towards her medical needs. Accordingly, the treatment of Lamb's gender dysphoria does not violate the Eighth Amendment.

B. Lamb's conditions of confinement do not violate the Constitution.

Lamb also objects to certain conditions of her confinement. She seeks an injunction ordering the Prison Officials to provide her access to all female canteen and property items in prison and to refer to her as Michelle, and not Thomas. She also seeks transfer to an all-female prison facility. The Prison Officials seek summary judgment, arguing that Lamb's conditions of confinement satisfy the Constitution.

1. Canteen and Property Items

With regards to the canteen and property items, the record shows that Lamb was given access to jewelry and women's undergarments. But Lamb requests more. She wants access to all prison property items that are listed as "female only." This property apparently include items such as mascara and eye shadow. Deprivation of access to items such as those does not rise to the level of a constitutional violation. "The Eighth Amendment protects inmates from deprivation 'of the minimal civilized measure of life's necessities.' "³⁷ "[C]onditions of confinement violate the Eighth Amendment if they result in 'serious deprivations of basic human

case that addresses the precise issue that is now before the Court. This irrelevant and non-binding opinion has no influence in this case.

³⁶ *Perkins*, 165 F.3d at 811.

³⁷ *Jackson v. Wilkinson*, 671 F. App'x 717, 718 (10th Cir. 2016) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

needs.’”³⁸ Basic human needs include “shelter, sanitation, food, personal safety, and medical care.”³⁹ Mascara, eye shadow, and other such items are not basic human needs. Even in an all-female prison full of biological females, the Eighth Amendment would not require inmate access to cosmetics. There is no such requirement in this case, either.

2. *Name Change*

As noted above, Thomas Preston Lamb has legally changed her name to Michelle Renee Lamb. She now requests that that change be reflected in all of KDOC’s official documents. The Constitution does not require such an accommodation.

At the outset, Lamb’s request fails to give rise to any constitutional right.⁴⁰ But even if it did, KDOC was acting pursuant to a regulation that provides that while incarcerated, a prisoner must respond to the name under which she was convicted.⁴¹ If a prisoner has legally changed her name, the new name is reflected as an alias in parentheses after the convicted name.⁴² “[W]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”⁴³ Here, the Prison Officials argue the relevant KDOC regulation exists “[f]or record-keeping purposes and to reduce confusion,” which

³⁸ *Savage v. Fallin*, 663 F. App’x 588, 592 (10th Cir. 2016) (quoting *Rhodes*, 452 U.S. at 347).

³⁹ *Id.* (quoting *Ramos v. Lamm*, 639 F.2d 559, 566 (10th Cir. 1980)) (internal quotation marks omitted).

⁴⁰ *Kirwan v. Larned Mental Health*, 816 F. Supp. 672, 674 (D. Kan. 1993) (“In the present case, however, the court finds no constitutional right at issue. Plaintiff changed his name for personal reasons, and he complains of prison regulations which interfere with his desire to be referred to by his new name.”).

⁴¹ K.A.R. 44-12-506.

⁴² K.A.R. 44-12-506.

⁴³ *Turner v. Safely*, 482 U.S. 78, 89 (1987).

constitutes a legitimate penological interest. Moreover, the legitimacy of such regulations has been recognized by this and other federal courts.⁴⁴

3. *Transfer to a Female Facility*

Finally, Lamb is not entitled to transfer to a female facility. “Inmates do not have a constitutional right to choose their place of confinement.”⁴⁵ And although Lamb argues that “transfer does not raise serious safety and security concerns,” the Court cannot overlook the heinous crimes for which Lamb is serving three life sentences. Thomas Lamb murdered Karen Sue Kemmerly—a woman. Shortly thereafter, he kidnapped Patricia Ann Childs—another woman—and forced her to have sex with him while she was held against her will. Thomas was ordered to serve three life sentences so that he would never kill or hurt another woman again. Thomas is now Michelle, but Michelle is still a convicted kidnapper and murderer of women, and the justification for her sentence has not changed.

“Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel Accordingly, we have held that even when an institutional restriction infringes on a specific constitutional guarantee, . . . the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security.”⁴⁶

⁴⁴ See *United States v. White*, 2011 WL 13174484, at *1 (D. Kan. 2011); *Strope v. Gibbens*, 2003 WL 1906458, at *5 (D. Kan. 2003); *Kirwan*, 816 F. Supp. at 673-74; see also *Matthews v. Morales*, 23 F.3d 118 (5th Cir. 1994).

⁴⁵ *United States v. Neighbors*, 2012 WL 2449865, at *1 (D. Kan. 2012); see also *Cox v. Fluery*, 2009 WL 3011221, at *5 (W.D. Mich. 2009) (“A prisoner has no right under federal law to compel or prevent a transfer to another facility.”); *Lamb v. Maschner*, 633 F. Supp. 351, 353 (D. Kan. 1986) (“Even though a transfer may relieve plaintiff’s anxieties, clearly a violation of the women’s rights would be at issue.”).

⁴⁶ *Bell v. Wolfish*, 441 U.S. 520, 547 (1981).

KDOC has determined that the transfer of Michelle to a female facility would give rise to safety and security concerns. The Court has no reason to upset that determination.⁴⁷

IV. Conclusion

The Defendants have an obligation to treat Lamb's gender dysphoria, but they are not obligated to treat it in the specific manner that Lamb prefers. Gender dysphoria is a sensitive and highly debated topic in today's society, and if she were not in prison, Lamb would be free to seek whatever treatments and lifestyle changes that she felt were necessary. But she is not free: she is serving three consecutive life sentences for kidnapping and murder. And to the extent that the treatment she is receiving falls of short of what she feels that she needs, such limitations, even if restrictive or harsh, "are part of the penalty that criminal offenders pay for their offenses against society."⁴⁸

IT IS THEREFORE ORDERED that Defendant Paul Corbier's Motion for Summary Judgment (Doc. 35) is **GRANTED**.

IT IS FURTHER ORDERED that Defendant Corizon Health Services's Motion for Summary Judgment (Doc. 38) is **GRANTED**.

IT IS FURTHER ORDERED that Defendants Joe Norwood's, Johnnie Goddard's, and the Kansas Department of Corrections's Motion for Summary Judgment (Doc. 46) is **GRANTED**.

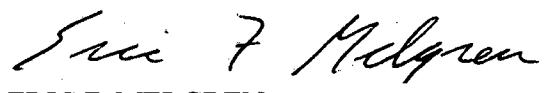
⁴⁷ Had any of Lamb's claims survived summary judgment, the Court would note that Lamb's cause of action against KDOC would be barred by the Eleventh Amendment. KDOC is a state agency, and "[a]ctions commenced pursuant to 42 U.S.C. § 1983 cannot be brought against the State of Kansas or any state agencies since the state is not a person within the meaning of the Eleventh Amendment of the United States Constitution." *Lee v. McManus*, 589 F. Supp. 633, 638 (D. Kan. 1984); *see also Murray v. Kan. Dep't of Corrs.*, 2009 WL 1617664, at *3 (D. Kan. 2009) ("[B]ecause KDOC is a state agency and state agencies are not subject to suit under 42 U.S.C. § 1983, the Court must dismiss Plaintiff's claims against KDOC brought pursuant to 42 U.S.C. § 1983.").

⁴⁸ *Rhodes*, 452 U.S. at 347.

IT IS FURTHER ORDERED that the Defendants' Joint Motion to Stay Discovery (Doc. 33) is **DENIED AS MOOT**.

IT IS SO ORDERED.

Dated this 6th day of July, 2017.



ERIC F. MELGREN
UNITED STATES DISTRICT JUDGE

PUBLISH

UNITED STATES COURT OF APPEALS

August 15, 2018

FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

MICHELLE RENEE LAMB, a/k/a
Thomas Lamb,

Plaintiff - Appellant,

v.

JOE NORWOOD; JOHNNIE GODDARD;
PAUL CORBIER; KANSAS
DEPARTMENT OF CORRECTIONS;
CORIZON HEALTH SERVICES,

Defendants - Appellees.

No. 17-3171
(D.C. No. 5:16-CV-03077-EFM-DJW)
(D. Kan.)

ORDER

Before **BACHARACH**, **McKAY**, and **BALDOCK**, Circuit Judges.

Plaintiff-Appellant Michelle Renee Lamb has filed a petition for rehearing en banc. The panel has sua sponte decided to grant panel rehearing in part and only to the limited extent reflected in the amendments made to the attached revised opinion. Any request for panel rehearing is otherwise denied. The clerk is directed to file the new opinion effective the date of this order.

The petition for rehearing en banc was also circulated to all the members of the court in regular active service who are not otherwise disqualified. *See* Fed. R. App. P.

46(a). As no judge on the original panel or the en banc court called for a poll, the request for en banc reconsideration is denied.

The American Civil Liberties Union (ACLU), The ACLU of Kansas, Lambda Legal Defense and Education Fund, Inc., The National Center for Transgender Equality, and Transcend Legal also filed a motion for leave to file an amicus brief. The motion for leave to file an amicus brief is granted. The clerk is directed to file the proposed brief submitted with the motion effective the date of the original submission.

Entered for the Court



ELISABETH A. SHUMAKER, Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

August 15, 2018

FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

MICHELLE RENEE LAMB, a/k/a
Thomas Lamb,

Plaintiff - Appellant,

v.

No. 17-3171

JOE NORWOOD; JOHNNIE
GODDARD; PAUL CORBIER;
KANSAS DEPARTMENT OF
CORRECTIONS; CORIZON
HEALTH SERVICES,

Defendants - Appellees.

**Appeal from the United States District Court
for the District of Kansas
(D.C. No. 5:16-CV-03077-EFM-DJW)**

Submitted on the briefs*:

Michelle Renee Lamb a/k/a Thomas Lamb, pro se.

Dwight R. Carswell, Assistant Solicitor General, Bryan C. Clark, Assistant Solicitor General, and Rachael D. Longhofer, Assistant Attorney General, Office of Attorney General for the State of Kansas, Topeka, Kansas, for Defendants-Appellees Joe Norwood, Johnnie Goddard, and the Kansas Department of Corrections; Casey L. Walker and Trevin Erik Wray,

* The parties have not requested oral argument, and it would not materially aid our consideration of the appeal. Thus, we have decided the appeal based on the briefs. *See* Fed. R. App. P. 34(a)(2)(C); 10th Cir. R. 34.1(G).

Simpson, Logback, Lynch, Norris, P.A., Overland Park, Kansas, for Defendant-Appellee Paul Corbier; and Jeffrey T. Donoho and Roger W. Slead, Horn Aylward & Bandy, LLC, Kansas City, Missouri, for Defendant-Appellee Corizon Health Services.

Before **BACHARACH**, **McKAY**, and **BALDOCK**, Circuit Judges.

BACHARACH, Circuit Judge.

Michelle Renee Lamb was born a male. From a young age, however, Michelle displayed feminine characteristics and identified as a female. Michelle is now in state prison and is experiencing gender dysphoria. For this condition, she is receiving medical treatment, though she claims that the treatment is so poor that it violates the Eighth Amendment. For this claim, Michelle must show that prison officials have acted with deliberate indifference to her gender dysphoria.¹

The undisputed evidence shows that Michelle is receiving hormone treatment, testosterone-blocking medication, and weekly counseling sessions. A 1986 precedent, *Supre v. Ricketts*, 752 F.2d 958 (10th Cir. 1986), suggests that these forms of treatment would preclude liability for an Eighth Amendment violation. Based partly on this precedent, the district court granted summary judgment to the prison

¹ See *Perkins v. Kan. Dep't of Corrs.*, 165 F.3d 803, 811 (10th Cir. 1999).

officials. Michelle challenges the grant of summary judgment, and we affirm.

1. What is gender dysphoria and how is it treated?

To address Michelle's appeal, we must consider what gender dysphoria is and consider the available forms of treatment. The term “[g]ender dysphoria describes the psychological distress caused by identifying with the sex opposite to the one assigned at birth.”² Treatment forms currently include

- [c]hanges in gender expression and role (which may involve living part time or full time in another gender role, consistent with one's gender identity);
- [h]ormone therapy to feminize or masculinize the body;
- [s]urgery to change primary and/or secondary sex characteristics (e.g., breasts/chest, external and/or internal genitalia, facial features, body contouring);
- [p]sychotherapy (individual, family, or group) for purposes such as exploring gender identity, role, and expression; addressing the negative impact of gender dysphoria and stigma on mental health; alleviating internalized transphobia; enhancing social and peer support; improving body image; and promoting resilience.³

² Sven C. Mueller, et al., *Transgender Research in the 21st Century: A Selective Critical Review from a Neurocognitive Perspective*, 174 Am. J. Psychiatry 1155, 1155 (2017).

³ E. Coleman et al., *Standards of Care for the Health of Transsexual, Transgender, & Gender-Nonconforming People, Version 7*, 13 Int'l J.

2. What are the applicable legal tests?

To determine whether the prison's treatment for Michelle's gender dysphoria was constitutionally adequate, we consider the constitutional test, the standard for summary judgment, and our standard of review.

The Eighth Amendment prohibits officials from acting with deliberate indifference to a prisoner's serious medical need.⁴ The seriousness of Michelle's medical need is uncontested for purposes of summary judgment. Thus, the only substantive issue is whether the existing treatment constituted deliberate indifference to Michelle's gender dysphoria.

This issue arose in summary judgment proceedings. To obtain summary judgment, the prison officials needed to show the absence of a genuine dispute of material fact and their entitlement to judgment as a matter of law.⁵ In considering the district court's application of the summary judgment test, we engage in *de novo* review.⁶

⁴ *Transgenderism* 165, 171 (2011); *see* R., Doc. 43-1 (Decl. of Dr. Randi C. Ettner at 5–6 ¶ 23).

⁵ *Perkins v. Kan. Dep't of Corrs.*, 165 F.3d 803, 811 (10th Cir. 1999).

⁶ *Fed. R. Civ. P.* 56(a).

⁶ *Rife v. Okla. Dep't of Pub. Safety*, 854 F.3d 637, 643 (10th Cir.), *cert. denied*, 138 S. Ct. 364 (2017).

3. What does our 1986 precedent say?

As noted above, we addressed a similar issue in 1986, when we issued *Supre v. Ricketts*, 792 F.2d 958 (10th Cir. 1986).⁷ There an inmate with gender dysphoria claimed violation of the Eighth Amendment based on a refusal to provide estrogen therapy. We concluded that the treatment did not violate the Eighth Amendment, reasoning that the state's department of corrections had made an informed judgment about treatment options in the face of disagreement within the medical community.⁸

4. Do subsequent medical advances render *Supre* obsolete?

Strictly speaking, *Supre* does not answer our question. There the claim involved denial of estrogen therapy, and Michelle is not complaining about a lack of estrogen therapy. She wants other forms of treatment, including greater doses of hormones and authorization for surgery. But if the Eighth Amendment was not violated by the denial of estrogen therapy, it stands to reason that Michelle's current treatment methods do not constitute deliberate indifference.

Michelle's rejoinder is that *Supre* is too old to provide guidance because it rested on outdated medical assumptions. As Michelle points out,

⁷ Less than two months before issuance of the opinion in *Supre*, Michelle lost a similar suit on summary judgment. *Lamb v. Maschner*, 633 F. Supp. 351 (D. Kan. 1986).

⁸ *Supre*, 792 F.2d at 963.

science has advanced since 1986, resulting in new forms of treatment for gender dysphoria.⁹ But even if we were to reconsider our earlier medical assumptions, *Supre* would continue to provide our analytical framework.

5. Does the existing treatment of Michelle constitute deliberate indifference?

Under this analytical framework, we conclude that the summary judgment record does not contain any evidence of deliberate indifference to Michelle's treatment needs.

We have consistently held that prison officials do not act with deliberate indifference when they provide medical treatment even if it is subpar or different from what the inmate wants.¹⁰ These holdings apply here because Michelle is obtaining psychological counseling and hormone treatments, including estrogen and testosterone-blocking medication. Though prison officials have not authorized surgery or the hormone dosages that Michelle wants, the combination of the existing treatment and sparseness of the summary judgment record precludes a reasonable fact-finder from inferring deliberate indifference.

⁹ See Tim C. van de Grift et al., *Surgical Satisfaction, Quality of Life, & Their Association After Gender-Affirming Surgery: A Follow-Up Study*, 44 J. of Sex & Marital Therapy 138, 139 (2018) (“In the past decades, (surgical) care for people diagnosed with gender dysphoria is increasingly provided in specialized, interdisciplinary health-care facilities following the Standards of Care.”)

¹⁰ *Perkins v. Kan. Dep't of Corrs.*, 165 F.3d 803, 811 (10th Cir. 1999).

Paul Corbier, M.D. stated under oath that Michelle's existing treatment has proven beneficial and that surgery is impractical and unnecessary in light of the availability and effectiveness of more conservative therapies. Though Michelle disagrees with Dr. Corbier's opinion, the disagreement alone cannot create a reasonable inference of deliberate indifference. And even if Dr. Corbier had been wrong, prison officials could not have been deliberately indifferent by implementing the course of treatment recommended by a licensed medical doctor like Dr. Corbier.¹¹

Michelle questions Dr. Corbier's opinion based on a case in Tax Court, *O'Donnabhain v. Commissioner of Internal Revenue*, 134 T.C. 34 (T.C. 2010). There the Tax Court held that expenses for hormone therapy and sex reassignment surgery constituted expenses for medical care, triggering a deduction under the Tax Code.¹² But Tax Court opinions do not bind our court. And *O'Donnabhain* bears little relevance to our issue because the prison officials have not questioned the medical nature of hormone therapy or sex reassignment surgery. Instead, the prison officials

¹¹ See *Kosilek v. Spencer*, 774 F.3d 63, 91 (1st Cir. 2014) (stating that even if sex reassignment surgery were the only medically adequate treatment for gender identity disorder, an Eighth Amendment violation would have taken place only if prison officials knew or should have known this fact and failed to appropriately respond).

¹² 134 T.C. at 77.

contend only that they could not have been deliberately indifferent by providing hormone therapy and psychological counseling.

In our view, the summary judgment record precludes a reasonable fact-finder from inferring deliberate indifference.

6. Did the district court erroneously restrict discovery?

Michelle also raises procedural challenges involving discovery. These challenges stem from the district court's order for an investigative report.

Under the Prison Litigation Reform Act, the district court had to screen the amended complaint to determine whether it was frivolous, malicious, failed to state a claim on which relief could be granted, or triggered the defendants' immunities from monetary relief.¹³ To facilitate this screening process, district courts in our circuit frequently require investigative reports and stay discovery until the filing of these reports.

The district court followed this process here, requiring an investigative report and staying discovery until the report was filed. Prison officials filed the report and sought summary judgment at the same time. With the filing of the report, the stay automatically terminated and Michelle was free to conduct discovery.

¹³ 28 U.S.C. §§ 1915(e)(2)(B), 1915A(a)–(b); 42 U.S.C. § 1997e(c)(1).

One month later, the defendants moved to stay further discovery until the district court ruled on the summary judgment motion. The motion for a stay remained pending for roughly six months. During this period, Michelle was free to conduct discovery. But she apparently thought that the defendants' motion for a stay automatically curtailed discovery. It didn't.

Michelle also seems to have misunderstood the impact of the investigative report. The report concluded that Michelle's treatment was acceptable; Michelle disagreed and moved for an order requiring prison officials to supplement the report with additional documentation. The district court overruled this motion, and Michelle challenges this ruling.

We have little reason to question the ruling. The investigative report's function was to facilitate the district court's screening process.¹⁴ And on screening, the district court allowed the action to proceed.

When the defendants moved for summary judgment, the investigative report served as the equivalent of an affidavit supporting the summary judgment motion.¹⁵ To rebut the investigative report, Michelle was free to

¹⁴ See *Rachel v. Troutt*, 820 F.3d 390, 396 (10th Cir. 2016) (“Courts order the [investigative] report not to provide discovery, but to aid in screening the complaint.”).

¹⁵ See *Northington v. Jackson*, 973 F.2d 1518, 1521 (10th Cir. 1992) (stating that investigative reports are treated like affidavits when filed as evidence supporting summary judgment motions).

present her own evidence, including her own affidavit and material obtained through discovery. Michelle did not need supplementation of the investigative report to obtain such material. As a result, the district court did not err in overruling Michelle's motion to require supplementation of the investigative report.

7. Conclusion

We conclude that no genuine issue of material fact exists. In light of the prison's treatment for Michelle's gender dysphoria, no reasonable fact-finder could infer deliberate indifference on the part of prison officials. And the district court did not improperly curtail Michelle's opportunity to conduct discovery. Thus, we affirm the award of summary judgment to the prison officials.

* * *

Judge Baldock concurs only in the judgment.