UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

DONNA DAWN (f/k/a Scott) KONITZER,

Plaintiff,

v.

BYRAN BARTOW, et al.,

Defendants.

Case No. 03-C-717

Hon. Charles N. Clevert, Jr.

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BRIEF IN SUPPORT OF PLAINTIFF'S EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION ENJOINING DEFENDANTS FROM STOPPING PLAINTIFF'S HORMONAL THERAPY

In an overtly retaliatory maneuver against Plaintiff Donna Dawn (f/k/a Scott) Konitzer because of the above-captioned lawsuit, the Wisconsin legislature recently passed, and Governor James Doyle recently signed into law, 2005 Wisconsin Act 105, the "Inmate Sex Change Prevention Act" (the "Prevention Act"). The act, which created Wis. Stat. § 302.386(5m), takes effect on January 24, 2006.[1] Pursuant to the Prevention Act, defendants informed Ms. Konitzer, a biological male in the Wisconsin correctional system,[2] that they plan to begin reducing the female hormones she receives as treatment for her Gender Identity Disorder ("GID") on January 24, 2006. As illustrated in Ms. Konitzer's response to defendants' motion

[1] The Prevention Act, though signed on January 6, will be published on January 23, 2006 and take effect the next day, pursuant to Wis. Stat. § 991.11.

[2] Inmate Konitzer, as a person suffering from Gender Identity Disorder, desires to be called by a feminine name which reflects her inner self-image. Thus, throughout this brief, inmate Konitzer generally will be referred to as "Donna Dawn," "Ms. Konitzer," or by a female pronoun.

for summary judgment, defendants' refusal to provide the real-life experience *in conjunction with hormonal therapy* constitutes cruel and unusual punishment under the Eighth Amendment. Although hormonal therapy alone has not met the standards of care to adequately treat Ms. Konitzer's severe GID, she has significantly benefited from it. Coupled with defendants' counter-therapeutic refusal to socially treat her as a female, their intended action will wreak psychological and physical havoc on Ms. Konitzer, and makes either a castration attempt or attempted suicide a virtual certainty.

To prevent such disastrous consequences, plaintiff asks the Court to enter a Temporary Restraining Order and Preliminary Injunction directing defendants and persons acting under their authority to continue administration of plaintiff's hormonal therapy, and enjoining their enforcement of sec. 302.386(5m), Wis. Stats., because such enforcement, as applied to plaintiff, violates plaintiff's Eighth Amendment right to be free from cruel and unusual punishment; violates plaintiff's First Amendment right to petition the government for a redress of grievances; and violates the Ex Post Facto Clause of Article I, section 10 of the United States Constitution.

STATEMENT OF FACTS

As the Court is aware, Ms. Konitzer is an inmate currently incarcerated at the Wisconsin Resource Center ("WRC") who has been diagnosed with GID.[3] (PFOF ¶ 42.)[4] While incarcerated, and owing to her GID, Ms. Konitzer has attempted castration and suicide multiple

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[3] As the facts of this case are well known to the Court, plaintiff limits her discussion of the facts only to those relevant to the instant motion. For a more expositive discussion of the facts of this case, Ms. Konitzer refers the Court to her Response to Defendants' Motion for Summary Judgment, and her proposed findings of fact and responses to defendants' proposed findings of fact submitted in support of the Response.

[4] Throughout this brief, citations to Plaintiff's Proposed Findings of Fact are referred to herein as "PFOF ¶ __", Defendants' Proposed Findings of Fact are referred to herein as "DFOF ¶ __", and Plaintiff's Response to Defendants' Proposed Findings of Fact are referred to herein as "PRESP ¶ __."

302.386(5m) prohibits the DOC from using federal or state funds to facilitate an inmate's sex change operation or provide an inmate with hormone therapy. (Todd Decl. ¶ 2, Ex. A.) Under the statute, no regard is given to the medical condition of inmates currently on hormone therapy.

It is evident that the act is directed at Ms. Konitzer personally. Around the time the Prevention Act was introduced, legislative press releases noted that the "lawmakers sponsored the legislation after a prisoner at the Wisconsin Resource Center near Oshkosh was given hormone therapy treatments at the expense of taxpayers and is now suing the state to complete his 'gender transformation' to a woman." (Todd Decl. ¶ 3, Ex. B.) Rep. Scott Suder, the bill's co-sponsor, also singled out Ms. Konitzer. As his press releases relate, he "introduced [the bill] after a prison inmate sued the state to fully fund his gender transfer surgery." (Todd Decl. ¶ 4, Ex. C.) Pursuant to the newly-enacted legislation, defendants Bryan Bartow and Dr. Thomas Michlowski informed Ms. Konitzer that the WRC plans to begin reduction of Ms. Konitzer's hormone therapy on January 24, 2006, the effective date of the act, without regard for the current lawsuit or medical condition, and with the intention of eventually stopping the treatment completely.

Defendants' ill-conceived actions will jeopardize Ms. Konitzer's psychological health and create a life-threatening situation. (R. Ettner Decl. ¶ 4.) Female hormones are as necessary for the treatment of GID as insulin is for diabetes. (F. Ettner Decl. ¶ 6.) Ms. Konitzer's history of self-castration and attempted suicide due to her GID is well-documented, and stopping her hormonal therapy exacerbates the risk of self-harm or suicide. (*Id.* ¶ 5.) Moreover, hormones profoundly affect the brain, and the cascading changes in brain chemistry will lead to depression, anxiety, agitation and other mood changes in Ms. Konitzer, (R. Ettner Decl. ¶ 6; F. Ettner Decl. ¶ 5), which may cause her, if provoked, to act out against others as well

as herself. (R. Ettner Decl. ¶ 6.) This is true even for individuals with no history of mental issues. (*Id.*) The Standards of Care explicitly note that rapid withdrawal of hormonal therapy for prisoners places them at risk for psychiatric symptoms and self-injurious behaviors. (*See* F. Ettner Decl., Ex. A, p. 12.) Defendants already are counter-therapeutically treating Ms. Konitzer as a male, and their plans to stop her hormone therapy after six years will almost certainly propel Ms. Konitzer to attempt castration again, or even try to end her own life. (R. Ettner. Decl. ¶¶ 5-6.) Indeed, given Ms. Konitzer's past history and the cruelty of the State's intended course of action, one of those outcomes is a virtual certainty. (*Id.* ¶ 7; F. Ettner Decl. ¶ 6.)

Withdrawing female hormones also wreaks havoc on the body's internal systems and functions. (F. Ettner Decl. ¶ 4.) Stopping Ms. Konitzer's medically necessary female hormones puts her at an increased risk of coronary heart disease and diabetes, and she likely will experience muscle wasting and osteoporosis. (*Id.*)[8] Ms. Konitzer will also deal with stress more poorly, as her body's production of cortisone (an internal anti-stressor), will become disregulated. (*Id.*) This damage is both substantial and irreparable. (*Id.*)

Finally, defendants' own expert, Cynthia S. Osborne, MSW, agrees with the plaintiff that stopping hormone therapy would be "cruel and clinically inappropriate." (Todd Decl. ¶ 5, Ex. D.)

ARGUMENT

Without the Court's intervention, enforcement of sec. 302.386(5m), as applied to Ms. Konitzer, will violate plaintiff's Eighth and First Amendment rights, as well the Ex Post

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[8] These conditions are also likely exacerbated by the fact that Ms. Konitzer has only one testicle, and due to the hormone therapy, that testicle has shriveled. (*See* F. Ettner Decl., Ex. A, p. 12.)

Facto Clause of the Constitution. In addition, Ms. Konitzer is virtually certain to suffer irreparable injury if defendants cease her hormone therapy.

I. Under The Test Traditionally Applicable For Injunctive Relief, This Court Should Order Injunctive Relief To Preserve The Status Quo – Administration of Ms. Konitzer's Hormone Therapy

The standard for granting preliminary injunctive relief is well-established:

> A party seeking to obtain a preliminary injunction must demonstrate: (1) its case has some likelihood of success on the merits; (2) that no adequate remedy at law exists; and (3) it will suffer irreparable harm if the injunction is not granted. *See Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir. 1992).
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> If the court is satisfied that these three conditions have been met, then it must consider the irreparable harm that the nonmoving party will suffer if preliminary relief is granted, balancing such harm against the irreparable harm the moving party will suffer if relief is denied. *See Storck USA, L.P. v. Farley Candy Co.*, 14 F.3d 311 (7th Cir. 1994). Finally, the court must consider the public interest (non-parties) in denying or granting the injunction. *Id.*
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> The court then weighs all of these factors, "sitting as would a chancellor in equity," when it decides whether to grant the injunction. *Abbott Labs.*, 971 F.2d at 12. This process involves engaging in what we term the sliding scale approach; the more likely the plaintiff will succeed on the merits, the less the balance of irreparable harms need favor the plaintiff's position. *Id.* The sliding scale approach is not mathematical in nature, rather "it is more properly characterized as subjective and intuitive, one which permits district courts to weigh the competing considerations and mold appropriate relief." *Id.* (internal citations and quotation marks omitted).

Ty, Inc. v. Jones Group, Inc., 237 F.3d 891, 895-96 (7th Cir. 2001).

A. Ms. Konitzer Has a Substantial Likelihood of Success on the Merits.

In the Seventh Circuit, a party seeking a preliminary injunction must show that it has "some likelihood of success on the merits." *Abbot Labs.*, 971 F.2d at 11. The court has held that "the threshold is low. It is enough that the plaintiff's chances are better than negligible . . .

." *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 387 (7th Cir. 1984). Here, Ms. Konitzer's likelihood of success on the merits is high, and heavily favors a grant of injunctive relief.

1. Enforcement of Sec. 302.386(5m) Will Violate Ms. Konitzer's Eighth Amendment Right to Necessary Medical Treatment

Deliberate indifference by prison officials to a prisoner's serious medical needs constitutes cruel and unusual punishment in violation of the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97 (1976). The test for demonstrating deliberate indifference to Ms. Konitzer's GID is two-fold. First, Ms. Konitzer must show that she suffers from a serious medical need which presents an objectively substantial risk of harm. *Greeno v. Daley*, 414 F.3d 645, 653 (7th Cir. 2005). Second Ms. Konitzer must show that the defendants knew that the risk existed, that the defendants either intentionally, or recklessly ignored it, and that they will continue to do so in the future. *Farmer v. Brennan*, 511 U.S. 825, 842, 846 (1994).

With regard to the first prong, that Ms. Konitzer's GID is a serious medical need is undeniable. *See Meriwether v. Faulkner*, 821 408, 413 (7th Cir. 1987) (finding that "there is no reason to treat transsexualism differently than any other psychiatric disorder" and that "it is a serious medical need."); *see also Phillips v. Michigan Dep't of Corrections*, 731 F. Supp. 792, 800-01 (W.D. Mich. 1990) (finding that whether diagnosis of inmate's condition was transsexualism or gender identity disorder, inmate suffered from a serious medical need and was entitled to preliminary injunction ordering estrogen therapy). Indeed, defendants' concede that Ms. Konitzer suffers from GID and that it is a serious medical need, referring throughout their summary judgment brief to Ms. Konitzer's GID as a "serious medical need." (Defs.' Brief in Support of Motion for Summary Judgment, pp. 1, 6, 9.)

It is also obvious that Ms. Konitzer can demonstrate that defendants are recklessly, even intentionally, ignoring the risk of harm to Ms. Konitzer that their intended action poses. Defendants' actions are attributable solely to the enactment of the Prevention Act. (See Todd Decl. ¶ 6, Ex. E.) The act on its face creates a blanket rule, without the individualized determination that the Eighth Amendment requires. *See De'Lonta*, 330 F.3d 630, 634-35 (4th Cir. 2003) (stating that treatment based upon a blanket rule rather than an individualized determination constitutes deliberate indifference, and that treatment that does not prove to be a reasonable method of reducing self-mutilation can constitute deliberate indifference). And although the Wisconsin legislature went to great lengths to avoid any reference to GID, the statute is the only one plaintiff is aware of in the state of Wisconsin that explicitly crafted to prohibit treatment medically necessary under the standards of care for treatment of an illness. By any measure, defendants' enforcement of the statute against Ms. Konitzer is an intentional, or at the very least a reckless, disregard of risks of harm to her.

Those risks are evident, both in the record and as outlined above. Ms. Konitzer has attempted castration and suicide numerous times, and stopping her hormone treatment will only exacerbate her psychological and physical distress. Defendants' intended action also will damage her internal systems and functions substantially and irreparably. (F. Ettner Decl. ¶ 4). Ms. Konitzer is already in a fragile psychological state, and loss of female hormones that help consolidate her gender identity makes an attempted castration or suicide a virtual certainty. (R. Ettner Decl. ¶¶ 6-7.)

"Female hormones are as necessary for the treatment of GID as insulin is for diabetes." (F. Ettner Decl. ¶ 6.) That is the position of treatment providers with expertise in this area, (*see* R. Ettner Decl.; F. Ettner Decl.); that is the position of the definitive authority for

treating GID, the Harry Benjamin International Gender Dysphoria Association Standards of Care. (R. Ettner Decl. ¶ 3; F. Ettner Decl. ¶ 2 and Ex. A.); and that is the position of courts confronting this issue. *See Phillips*, 731 F. Supp. at 800-01. Even defendants' own expert, Cynthia S. Osborne, MSW, has reached the conclusion, expressed in her expert report that to discontinue hormonal treatment at this point would be cruel and clinically inappropriate. (Todd Decl. ¶ 5, Ex. D.) Defendants' intended action to cease this medically necessary treatment further illustrates their deliberate indifference toward Ms. Konitzer's GID and violates Ms. Konitzer's Eighth Amendment right to be free from cruel and unusual punishment.

2. Enforcement of Sec. 302.386(5m) Will Violate Ms. Konitzer's First Amendment Right to Petition the Government for a Redress of Grievances

The enactment of sec. 302.386(5m) is a direct retaliation against Ms. Konitzer for her current lawsuit claiming that the state is denying her necessary medical treatment. The legislature has sought to punish Ms. Konitzer for filing her lawsuit against the state by taking away the very medical treatment she is already receiving. Such retaliation is, of course, prohibited by the First Amendment's Petition Clause. *See Harris v. Fleming*, 839 F.2d 1232, 1236-38 (7th Cir. 1988) (allegations of retaliation, combined with evidence of termination from prison employment and cell transfers following successful lawsuits, held sufficient to create jury question in section 1983 action).

While facially neutral, sec. 302.386(5m) in reality is not a broad-based legislative judgment regarding the use of state funds or prison policies generally, but a retaliatory measure. In February 2005 (the time the act was introduced), Dr. Kevin Kallas, medical director for the Wisconsin Department of Corrections ("DOC"), acknowledged that while a few other inmates in the DOC received hormones, Ms. Konitzer was by far the most vocal about seeking necessary treatment for her GID. (Todd Decl. ¶ 7, Ex. F.) Moreover, press releases, from members of the

Wisconsin legislature who sponsored the Prevention Act, specifically pointed to Ms. Konitzer's hormone treatment and lawsuit. (Todd Decl., Exs. B, C.)

Furthermore, the timing of the law is suspicious. Ms. Konitzer has been receiving hormone therapy continuously since 1999, and it was not until after she filed her lawsuit that the legislature took up the issue of stopping her hormone therapy. This timing is further evidence that the legislature acted with a retaliatory intent. *See Bruce v. Ylst*, 351 F.3d 1283, 1288 (9th Cir. 2003) ("[T]iming can properly be considered as circumstantial evidence of retaliatory intent.").

The prohibition against state retaliation against inmate lawsuits is settled law. "Persons in prison, like other individuals, have the right to petition the Government for redress of grievances which, of course, includes access of prisoners to the courts for the purpose of presenting their complaints." *Milhouse v. Carlson*, 652 F.2d 371, 373 (10th Cir. 1981). Access to the courts "must be freely exercisable without hindrance or fear of retaliation." *Id.* at 374; *see also Bruce*, 351 F.3d at 1288 ("[A] chilling effect on a prisoner's First Amendment right to file prison grievances is sufficient to raise a retaliation claim.). While admittedly these cases all dealt with retaliation by prison official, state legislation is equally subject to the prohibition of the Petition Clause. *See, e.g., In re Workers' Compensation Refund*, 46 F.3d 813, 833-23 (8th Cir. 1995).

3. Enforcement of Sec. 302.386(5m), as Applied to Ms. Konitzer, Violates the Ex Post Facto Clause.

Section 302.386(5m) also retroactively increases Ms. Konitzer's punishment by altering the conditions of her confinement, in violation of the Ex Post Facto Clause. *See* U.S. Const. art. I, § 10, cl. 1; *Collins v. Youngblood*, 497 U.S. 37, 41-42 (1990), *cited approvingly in Hadley v. Holmes*, 341 F.3d 661, 664 (7th Cir. 2003) ("A change in law violates the federal Ex

B. Ms. Konitzer Does Not Have an Adequate Remedy At Law and Will Suffer Irreparable Harm Without Hormone Therapy.

That Ms. Konitzer does not have an adequate remedy at law is clear. Ms. Konitzer's mental and physical health will be jeopardized absent a preliminary injunction, so an award of damages at some later point would be woefully insufficient. *See Roland Mach.*, 749 F.2d at 386 (An inadequate remedy means only that it is "seriously deficient as a remedy for the harm suffered.").

The Seventh Circuit has defined irreparable harm as "harm that cannot be prevented or fully rectified by the final judgment after the trial." *Id.* at 386. The extreme psychological distress and physical damage Ms. Konitzer will endure, as noted above, because of defendants' intended action is precisely the kind of harm injunctive relief protects against. Such relief is all the more critical because defendants' action puts Ms. Konitzer life in peril. (R. Ettner Decl. ¶ 7; F. Ettner Decl. ¶ 6.)

C. The Balance of Harms Weighs Heavily in Ms. Konitzer's Favor and the Public Interest Will be Served by a Preliminary Injunction.

The WRC is currently providing Ms. Konitzer with hormone therapy, and so a preliminary injunction will result in no actual harm to defendants. *See Phillips*, 731 F. Supp. at 801 (finding that a preliminary injunction requiring the Michigan Department of Corrections to provide plaintiff with estrogen treatment was unlikely to result in harm to others). While the WRC will be forced to continue to pay the costs of Ms. Konitzer's hormone therapy, when this is weighed against the anticipated harm to plaintiff's health, the balance tips dramatically in her favor. Finally, the public interest will be served by granting a preliminary injunction safeguarding constitutional rights in Wisconsin prisons. *See id.*

II. Immediate Injunctive Relief Is Necessary.

The defendants' plan to end Ms. Konitzer's hormone therapy on January 24, 2006 threatens Ms. Konitzer with imminent harm, potentially life-threatening. The enactment of sec. 302.386(5m) and defendants' intended action pursuant to it have unfortunately precipitated this emergency and the need for expedited relief. If injunctive relief is to protect Ms. Konitzer from irreparable harm, it must be entered prior to January 24, 2006. The Court should therefore enter at the least a temporary restraining order effective prior to January 24, to maintain the status quo, pending a future decision regarding preliminary injunctive relief.

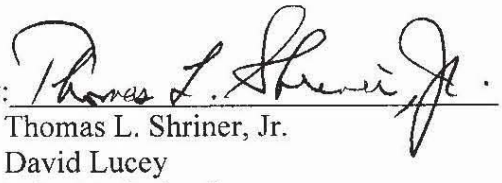
CONCLUSION

Defendants' intended action is the picture of cruel and unusual punishment. As the Court of Appeals wrote only last week about a different but similarly irresponsible piece of legislation from Illinois: "[w]e do not understand how a responsible state legislature could pass, a responsible Governor sign, or any responsible state official contemplate enforcing, such legislation." *520 S. Michigan Ave. Assoc., Ltd. v Devine*, No. 05-2479 (7th Cir. Jan. 10, 2006), slip op. at 6-7. Enforcement of the act in retaliation for Ms. Konitzer's commencement of this lawsuit will do significant damage to her physical and psychological well-being, and may cause her to attempt to take her own life. It should also be an embarrassment to the State of Wisconsin.

Ms. Konitzer has demonstrated that preliminary relief is warranted and, therefore, respectfully requests immediate entry of a temporary restraining order requiring defendants to continue administering her hormone therapy effective until the Court can enter further preliminary injunctive relief.

Dated this 17th day of January, 2006.

FOLEY & LARDNER LLP

By: 
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