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Kosilek v. Nelson

United States District Court for the District of Massachusetts
September 12, 2000, Decided
C.A. No. 92-12820-MLW

Reporter: 2000 U.S. Dist. LEXIS 13355; 2000 WL 1346898

MICHELLE KOSILEK, Plaintiff, v. DAVID R. NESON,
et al., Defendants.

Judges: Mark L. Wolf, United States District Court.

Opinion by: Mark L. Wolf

Opinion

MEMORANDUM AND ORDER

WOLF, D.J.

September 12, 2000

This memorandum is based upon the transcript of the decision rendered orally on August 8, 2000, allowing defendant Michael T. Maloney's motion to dismiss the claims against him in his individual capacity and defendant David R. Nelson's motion **[*2]** for summary judgment. This memorandum adds citations, deletes some colloquy, and clarifies some language.

* * *

I. SUMMARY

The court finds that the motion of Michael T. Maloney ("Maloney") to dismiss the claims for damages against him in his individual capacity is meritorious based on qualified immunity. In addition, the court finds that David R. Nelson's ("Nelson") motion for summary judgment is meritorious and is being allowed. As a result of this decision, Nelson will no longer be a party to the case. In addition, the possible award of money damages is no longer an issue in this case.

The question of whether the plaintiff, Michelle Kosilek, has a constitutional right to the treatment that she is seeking while in prison remains open and will be the focus of future proceedings. [1] As Maloney has acknowledged, there are no grounds for resolving this issue at this time and, therefore, Maloney has not moved to dismiss Kosilek's claim for mandatory injunctive relief. *See* June 6, 2000 Transcript ("Tr.") at 6, 19; June 15, 2000 Tr. at 2-3; Aug. 8, 2000 Tr. at 3. Accordingly, the question of whether Kosilek has a constitutional right to counseling, estrogen therapy, and/or sex **[*3]** reassignment surgery will be decided on a future motion for summary judgment or, if necessary, at trial.

II. ANALYSIS

A. *Maloney's Motion to Dismiss.*

HN1 With regard to Maloney's motion to dismiss, the general Federal Rule of Civil Procedure 12(b)(6) standard is applicable. "[The] court must take the allegations in the complaint as true and must make all reasonable inferences in favor of the [plaintiff]." *Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993)*. "'[The] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Miranda v. Ponce Federal Bank, 948 F.2d 41, 44 (1st Cir. 1991)* (quoting *Conley v. Gibson, 355 U.S. 41, 45, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957))*. **[*4]**

In this case, the standards relating to qualified immunity are also implicated. ***HN2*** There are two prongs to a qualified immunity analysis. *See* *Soto v. Flores, 103 F.3d 1056, 1064 (1st Cir. 1997)* (citing *St. Hilaire v. Laconia, 71 F.3d 20, 24 (1st Cir. 1995))*. The court must determine "whether the constitutional right in question was clearly established at the time of the alleged violation." *Id.* If so, the court must decide if a reasonable person in the defendant's position "should have understood that the challenged conduct violated that right." *Id.*(internal quotation marks omitted).

HN3 The court must consider the alleged particular conduct involved, rather than whether the constitutional right was clearly established at a highly abstract level. *See* *Ringuette v. City of Fall River, 146 F.3d 1, 5 (1st Cir. 1998)*. This court addressed the concept of clearly established rights in *Gonsalves v. City of New Bedford, 939 F. Supp. 921, 928-29 (D.Mass. 1996)*. In that case, this court recognized that it is not necessary that the very action in question have previously been held unlawful for a right to be "clearly established. **[*5]** " *See* *Gonsalves, 939 F. Supp. at 929* (quoting *St. Hilaire, 71 F.3d at 24*). See *also* *Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996)*. This principle had been explained earlier by the

[1] Kosilek is anatomically a male. It is not for present purposes disputed that Kosilek is a transsexual. Kosilek prefers to be referred to as a female. The court has respected that preference in this Memorandum and Order.

Supreme Court in Anderson v. Creighton, 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987).

It is also important to recognize, however, that ***HN4*** the doctrine of "qualified immunity leaves ample room for [possibly] mistaken judgments and protects all but the plainly incompetent or those who knowingly violate the law." Bilida v. McCleod, 211 F.3d 166, 174 (1st Cir. 2000) (quoting Malley v. Briggs, 475 U.S. 335, 341, 89 L. Ed. 2d 271, 106 S. Ct. 1092 and 43 (1986)) (internal quotation marks omitted).

The alleged facts regarding Maloney, which are the focus of the decision concerning the motion to dismiss, are contained in the Second Amended Complaint. It alleges the following.

Maloney is the Commissioner of the Department of Corrections. Compl. at P 6. It was stipulated during the August 8, 2000 hearing that he took office in 1996. *See* Aug. 8, 2000 Tr. at 5. Maloney's duties and powers include **[*6]** the duty to institute and supervise policies for the provision of medical services to prisoners in the custody of the Massachusetts Department of Corrections. Compl. at P 6.

The plaintiff informed the Department of Corrections, including Maloney, of her transsexual condition. *Id. at P 18*. The Department of Corrections and Maloney each denied plaintiff treatment for her transsexual condition. *Id.*

Transsexualism is a serious medical condition. *Id. at PP 27* and 28. Maloney knew of the plaintiff's condition and did not provide or allow treatment for it. *See* Compl. at PP 14, 18, 27-29, 34-36. Therefore, it is asserted that Maloney was deliberately indifferent to a serious medical condition and thus inflicted cruel and unusual punishment on the plaintiff in violation of the Eighth Amendment. *Id. at PP 30-31, 37-38*. As a result, it is alleged the plaintiff suffered and continues to suffer damages. *Id. at PP 32, 39*.

The court finds that Maloney is protected from suit for money damages, in his individual capacity, by the doctrine of qualified immunity. The constitutional right allegedly violated was not clearly established in the relevant period, August, 1996 to the **[*7]** present. In addition, a reasonable person in Maloney's position would not know that his alleged acts and omissions violated any such constitutional right.

Prior to 1996, a series of cases deemed transsexualism to be a serious medical condition, requiring some form of therapy or treatment, but left prison officials discretion to determine what form of medical attention was most appropriate. *See, e.g.,* Supre v. Ricketts, 792 F.2d 958, 963 (10th Cir. 1986); Meriwether v. Faulkner, 821 F.2d 408, 413 (7th Cir. 1987); White v. Farrier, 849 F.2d 322, 325-28 (8th Cir. 1988). Neither the Court of Appeals for the First Circuit nor the Supreme Court has ever addressed this issue. On July 15, 1996, the Court of Appeals for the Eighth Circuit decided *Long v. Nix,* which held that the 1994 Supreme Court decision in *Farmer v. Brennan,* and subsequent cases, placed in doubt the Eighth Circuit's holding in *White v. Farrier* that transsexualism is a serious medical need. *See* Long, 86 F.3d 761, 765 n.3 (8th Cir. 1996) (citing Farmer v. Brennan, 511 U.S. 825, 128 L. Ed. 2d 811, 114 S. Ct. 1970 (1994); White, 849 F.2d at 325). **[*8]**

On December 9, 1997, the Court of Appeals for the Seventh Circuit, which had previously decided *Meriwether v. Faulkner,* issued its decision in *Maggert v. Hanks,* in which it discussed transsexualism, a form of gender dysphoria, as being a serious medical need. *See* Maggert, 131 F.3d 670, 671 (7th Cir. 1997). However, the court held that "***HN5*** except in special circumstances that we do not at present foresee, the Eighth Amendment does not entitle a prison inmate to curative treatment for his gender dysphoria," *Id. at 672*.

On December 18, 1998, the Court of Appeals for the District of Columbia Circuit decided *Farmer v. Moritsugu,* in which the court assumed without finding that transsexualism is a serious medical condition. *See* Farmer v. Moritsugu, 333 U.S. App. D.C. 319, 163 F.3d 610, 614-15 (D.C. Cir. 1998). It held, however, that the fact of transsexualism alone does not necessarily entitle a prisoner to psychotherapy. 163 F.3d at 615.

Therefore, ***HN6*** at least since 1996, it has not been clearly established that a transsexual has a constitutional right to any therapy or treatment while incarcerated. *See, e.g.,* Long, 86 F.3d at 765 n.3; **[*9]** Maggert, 131 F.3d at 671; Farmer v. Moritsugu, 163 F.3d at 614-15. Accordingly, Maloney is entitled to have the claims against him in his individual capacity dismissed because he is protected by the doctrine of qualified immunity. *See* Soto, 103 F.3d at 1064.

The court does not regard the decision that Maloney has qualified immunity to be inconsistent with the decision of the Court of Appeals for the Ninth Circuit in South v. Gomez, 211 F.3d 1275, 2000 WL 222611 (9th Cir. 2000) (unpublished opinion). In *South,* the Ninth Circuit said that the critical consideration was that the plaintiff had been receiving female hormones while incarcerated and that treatment was abruptly terminated when South was transferred to another prison. *Id. at *2*. Those allegations differ from the facts alleged in the Second Amended Complaint in this case. *See* Compl. at PP 16-18. More specifically, in this case it is alleged that prior to being transferred into the custody of the defendants Maloney and

the Department of Correction in January 1993, Kosilek had not received treatment for transsexualism while she was being **[*10]** detained in the Bristol County Jail. *Id.*[2]

[*11] Therefore, the motion to dismiss the claims against Maloney in his individual capacity is being allowed. Thus, the issue of recovering money damages from Maloney is extinguished. [3]

B. *Nelson's Motion for Summary Judgment.*

With regard to Nelson's motion for summary judgment in his official and individual capacities, the court has considered the plaintiff's request for an opportunity to conduct more discovery pursuant to *Federal Rule of Civil Procedure 56(f)*. *See* Kosilek's Opposition to Defendant Nelson's Motion for Summary Judgment at 6. This case was **[*12]** for many years before Magistrate Judge Karol, who has, regrettably, died. He established a period for the completion of discovery which expired September 30, 1999. *See* March 4, 1999 Order of Karol, M.J., (Docket No. 69); July 2, 1999 Endorsement Order of Karol, M.J., (Docket No. 85). Nelson's motion for summary judgment was filed on November 29, 1999.

Earlier this year, this court appointed counsel for the plaintiff. *See* February 17, 2000 Order of Wolf, J. (Docket No. 151). The court understands that if previous requests for the appointment of counsel had been granted, and if present counsel had participated during the period allowed for discovery, current counsel would have conducted more discovery. However, the standard for determining a motion for further discovery under *Federal Rule of Civil Procedure 56(f)* was discussed recently by the Court of Appeals for the First Circuit. *See* *Simas v. First Citizens' Federal Credit Union, 170 F.3d 37, 45 n. 4 (1st Cir. 1999)*. It stated that:

> ***HN7*** Normally, a *Rule 56(f)* motion must: (1) be made within a 'reasonable time' after the filing of the summary judgment motion; (2) place the district court on notice that **[*13]** movant wants the court to delay action on the summary judgment motion, whether or not the motion cites *Rule 56(f)*; (3) demonstrate that movant has been diligent in conducting discovery, and show 'good cause' why the additional discovery was not previously practicable with reasonable diligence; (4) 'set forth a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist,' and 'indicate how the emergent facts, if adduced, will influence the outcome of the pending summary judgment motion'; and (5) attest that the movant has personal knowledge of the recited grounds for the requested continuance.

Id. The court finds that this standard is not met here.

The plaintiff has not submitted an affidavit stating that she did not know that she could conduct depositions or obtain other discovery. The plaintiff filed many motions. The case is eight years old. The schedule established by Magistrate Judge Karol was adhered to by Nelson, who filed his motion for summary judgment within the time allowed by the court. The motion for summary judgment relates to matters that occurred in the period from 1990 to 1993. *See* Affidavit **[*14]** of Michael J. Murray (the "Murray Aff.") at P 3, Ex. C to Nelson's Motion for Summary Judgment. Nelson is no longer the Sheriff of Bristol County. *See* Aug. 8, 2000 Tr. at 9; Murray Aff. at P 2. In the circumstances, the court finds that Nelson is entitled to a decision on his motion for summary judgment based upon the present record.

The applicable standard for deciding the motion for summary judgment is established by *Federal Rule of Civil Procedure 56*. ***HN8*** *Rule 56* provides, in pertinent part, that the court may grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. Once again, the facts must be

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[2] Although the court does not rely on this fact, it notes that Maloney would probably also be entitled to qualified immunity on another ground if his affidavit were considered. *See* Affidavit of Michael T. Maloney (the "Maloney Aff."), Ex. 1 to Maloney's Supplemental Memorandum of Law in Support of his claim of Qualified Immunity. The court has not considered that affidavit, because it has not deemed it to be necessary or appropriate to treat Maloney's motion to dismiss as a motion for summary judgment. *See* *Garita Hotel Limited Partnership v. Ponce Federal Bank,* 958 F.2d 15, 18 (1st Cir. 1992). However, at this time it is undisputed that Mahoney is not the person who decides whether a prisoner has a serious medical need and, if so, what attention to it is appropriate. *See* Maloney Aff. at P 4. That was one of the grounds for granting the motion to dismiss against Maloney's counterpart in *Farmer v. Moritsugu.See,*163 F.3d at 615-16.

[3] There is no claim for money damages made against the Department of Corrections, which the court understands is an agency of the Commonwealth of Massachusetts. The court infers that plaintiff has not made such a claim because it is recognized that the Eleventh Amendment prohibits federal courts from awarding money damages against the Commonwealth. *See* *Lane v. First National Bank of Boston,* 871 F.2d 166, 167-68 (1st Cir. 1989).

viewed in the light most favorable to the non-moving party. *See*Woods v. Friction Materials Inc., 30 F.3d 255, 259 (1st Cir. 1994).

However, "when a party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party bears the burden of proof at trial, there can **[*15]** no longer be a genuine issue as to any material fact . . . and the moving party is entitled to judgment as a matter of law." Smith v. Stratus Coin Computer, Inc., 40 F.3d 11, 12 (1st Cir. 1994), *cert. denied,*514 U.S. 1108, 131 L. Ed. 2d 850, 115 S. Ct. 1958 (1995).

In this case, the court finds first that Nelson is entitled to summary judgment with regard to the claims against him in his official capacity.

Although the court does not rely on this, if this case were to proceed it would be necessary to address the issue of whether Nelson is the proper person to be sued in an effort establish the liability of Bristol County. ***HN9*** Municipal liability under 42 U.S.C. § 1983 attaches "only if it is proven that the unconstitutional conduct of its employees implements or executes a municipal policy or custom." Gonsalves v. City of New Bedford, 939 F. Supp. 915, 916 (D.Mass. 1996) (citing Monell v. Department of Social Services, 436 U.S. 658, 694, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978)). As explained in *Gonsalves:*

> This means that the actions of subordinate officials alone cannot create municipal **[*16]** liability. Rather, the City is potentially liable only for the conduct of its final policymaker or policymakers concerning the conduct in question.

Id. (citing Monell, 436 U.S. at 692; City of St. Louis v. Praprotnik, 485 U.S. 112, 123, 99 L. Ed. 2d 107, 108 S. Ct. 915 (1988)).

At this point, the record is insufficient for the court to determine if Nelson is the final policymaker for Bristol County on the matters at issue. ***HN10*** In determining who the final policymaker is for a municipality, the court must examine both the relevant state law and also the customs or policies of the municipality. *Id.* (citing Jett v. Dallas Independent School District, 491 U.S. 701, 737, 105 L. Ed. 2d 598, 109 S. Ct. 2702 (1989); Praprotnik, 485 U.S. at 126; Bordanaro v. McLeod, 871 F.2d 1151, 1161 (1st Cir. 1989)).

> Once the final policymaker(s) are identified, it is for the jury to decide whether the policymaker or policymakers' decisions have caused the deprivation of rights at issue by policies which affirmatively command that those violations occur or by acquiescence in a long-standing practice **[*17]** or custom which constitutes the 'standard operating procedure' of the local governmental entity.

939 F. Supp. at 916-17 (citing Jett, 491 U.S. at 737).

In addition, there is now no evidence before the court that the alleged violation of the plaintiff's constitutional rights are part of a custom or policy. Thus, there may be no municipal liability under the standards described in Gonsalves.Id. at 916. However, the court does not now rest its decision on this issue.

The court assumes, without finding, that transsexualism is a serious medical need and that Nelson is the proper official to be sued. In order to prevail against Nelson in his official capacity the plaintiff must prove, first, that Nelson actually knew about Kosilek's need for medical attention and, second, that Nelson was deliberately indifferent to that need. *See* Farmer v. Brennan, 511 U.S. at 837. As the Supreme Court has explained, "***HN11*** a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware **[*18]** of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id. Seealso* Layne v. Vinzant, 657 F.2d 468, 471 (1st Cir. 1991) ("***HN12*** When a supervisory official is placed on actual notice of a prisoner's need for physical protection or medical care, 'administrative negligence can rise to the level of deliberate indifference to or reckless disregard for that prisoner's safety."); Barrie v. Grand County, Utah, 119 F.3d 862, 868-69 (10th Cir. 1997) ("[***HN13*** A] prisoner, whether he be an inmate in a penal institution after conviction or a pre-trial detainee in a county jail, does not have a claim against his custodian for failure to provide adequate medical attention unless the custodian knows of the risk involved, and is 'deliberately indifferent' thereto."). In addition, as the Supreme Court has held, ***HN14*** mere negligence is not enough to establish a constitutional violation. *See* Estelle v. Gamble, 429 U.S. 97, 106, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976); *see also* Layne, 657 F.2d at 471. The Court of Appeals for the First Circuit has further explained that: ***HN15*** **[*19]**

> where a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments and to constitutionalize claims which sound in

> state tort law. We do not say that treatment received may never be so clearly inadequate as to amount to a refusal to provide essential care.

Layne, 657 F.2d at 474 (citations and internal quotation marks omitted).

In this case, it is a close question whether the plaintiff has submitted sufficient evidence to prove that Nelson actually knew of her condition. However, the court assumes, without finding, that the evidence is adequate to create a triable issue on that fact.

It should be noted, however, that the court may only consider admissible evidence. *See*Fed. R. Civ. P. 56(e). The plaintiff testified that she told Nelson of her gender dysphoria and desire for medical attention through her attorneys and others. *See* Kosilek Deposition of August 25, 1999 (the ″Kosilek Dep.″) at 76-78, 84, Ex. B to Kosilek's Opposition to Defendant Nelson's Motion for Summary Judgment. In essence, she testified that she was told that **[*20]** others had informed Nelson of her situation. *Id.* More specifically, Kosilek testified that she informed Nelson of her gender dysphoria and desire for counseling through her attorney Bettina Borders, Dr. Nancy Strapko, and Dr. Steven Karlin. This is a classic form of inadmissible hearsay. *See*Fed. R. Evid. 801(c); Fed. R. Evid. 802. The people the plaintiff relied on to communicate that message have not filed affidavits or testified that they communicated with Nelson. Attorney Michael Murray of Bristol County (″Murray″) submitted an affidavit asserting that the plaintiff's attorney communicated with him, and that he did not contact Nelson concerning those communications. *See* Murray Aff. at P 5.

However, an October 8, 1992 letter from Murray to the plaintiff's attorney regarding many matters, including the visit from Dr. Nancy Strapko that was being planned to evaluate the plaintiff, shows a carbon copy going to Nelson. *See* October 8, 1992 Murray Letter to Borders, Ex. I to Nelson's Motion for Summary Judgment. In addition, the plaintiff testified that she ran for Sheriff and broadcast radio ads to try to draw public attention to the fact that she was being denied medical **[*21]** treatment for gender dysphoria. *See* Kosilek Dep. at 70. In view of the court's obligation to look at the record in the light most favorable to the plaintiff, and keeping in mind that the plaintiff did not take Nelson's deposition, the court assumes, without finding, that there is a triable issue regarding whether Nelson knew of the plaintiff's condition.

However, the evidence is insufficient to permit a reasonable factfinder to conclude that Nelson was deliberately indifferent to the plaintiff's medical needs even if he did know of her condition, The most relevant undisputed facts are summarized in Nelson's reply memorandum to Kosilek's opposition to the motion for summary judgment, submitted on March 31, 2000. They include the following.

Kosilek, while incarcerated in the Bristol County Jail, saw a psychiatrist employed by the County, Dr. Steven Karlin, at least nine times. *See* Murray Aff. at P 4; Kosilek Dep. at 80-81; Record of Kosilek's Medical Care, Bristol County Correctional Facility (″Record of Kosilek's Medical Care″), Ex. F to Nelson's Motion for Summary Judgment; Request for Commitment for Observation, Ex. K to Nelson's Motion for Summary Judgment. Kosilek did **[*22]** not immediately raise issues of treatment for gender identity disorder with Dr. Karlin. *See* Record of Kosilek's Medical Care. The records indicate that this issue was first discussed by the plaintiff in February, 1992. *Id.* In an October 24, 1991 note, Dr. Karlin wrote that Kosilek ″has feminized manner and appearance, but declines speaking [re:] transsexualism.″ *Id.* In a February 6, 1992 note, Dr. Karlin wrote that the plaintiff had begun ″questioning options for transsexualism.″ *Id.* In a May 15, 1992 note, Dr. Karlin wrote that he had communicated with therapists on plaintiff's behalf. *Id.* He also stated that ″they reported that they would be more than willing to come and provide the initial evaluation while [Kosilek] was in prison and then provide out-patient counseling when he left.″ *Id.*

According to the May 15, 1992 note, which apparently would be admissible pursuant to Fed. R. Evid. 803(4) and/or (6), the plaintiff stated that this would be acceptable and that she preferred to see Dr. Strapko, a psychotherapist, for the evaluation. *Id.* The plaintiff expressly desired to be treated in accordance with the ″Standards of Care″ for gender identity disorder, **[*23]** established by an international group. *See* Standards of Care, Ex. 1 to the Second Amended Complaint; *see also* Kosilek Dep. at 89-90. Those standards called for a four-step treatment process: (1) an initial evaluation to determine whether an individual has a gender identity disorder; (2) counseling for up to a year; (3) hormones for up to three years; and finally, (4) sex reassignment surgery. *Id.* Plaintiff wished to begin this process with an initial evaluation by Dr. Strapko. *See* Kosilek Dep. at 91-92, 108. Dr. Strapko was a specialist in the field of gender identity disorders, and Kosilek discussed her preference for seeing Dr. Strapko with Dr. Karlin. *Id.* at 93, 108. Dr. Karlin was encouraging. *Id. at 95*. The plaintiff was permitted to have the doctor of her choice, although at her expense. *See* Kosilek Dep. at 94-95.

In July, 1992, plaintiff's counsel sent a letter to the County requesting that the plaintiff be allowed to have an

evaluation by Dr. Strapko. *See* Murray At f. at P 6; July 20, 1992 Borders Letter to Murray, Ex. G to Nelson's Motion for Summary Judgment. In August, 1992, the County approved Dr. Strapko as a visitor on the plaintiff's **[*24]** list. *See* August 12, 1992 Borders Letter to Murray, Ex. H to Nelson's Motion for Summary Judgment; October 8, 1992 Murray Letter to Borders. In October, 1992, the plaintiff met with Dr. Strapko for an initial evaluation. *See* Kosilek Dep. at 94-95, 97-98. This took place over two days for several hours each day. *Id. at 98*. The sessions with Dr. Strapko addressed the first step in the Standards of Care in the treatment plan that the plaintiff had requested. *Id. at 95*.

Dr. Strapko issued a report dated December 3, 1992. *See* December 3, 1992 Report of Dr. Strapko (the "Dr. Strapko Report"), Ex. J to Nelson's Motion for Summary Judgment; Kosilek Dep. at 98. In that report, Dr. Strapko recommended that Kosilek proceed with counseling, the next step in the Standards of Care. *Id.* Dr. Strapko did not recommend that the plaintiff then receive hormones or sex reassignment surgery. *See* Dr. Strapko Report at 2-3; Kosilek Dep. at 98-99.

There was not an effective opportunity for the County to act on Dr. Strapko's recommendation. On December 3, 1992, independent of Dr. Strapko's report of that date, Dr. Karlin saw Kosilek and perceived that she was depressed and suicidal. **[*25]** *See* Murray Aff. at P 7; Request for Commitment for Observation. Dr. Karlin requested that Kosilek be transferred to Bridgewater State Hospital for observation. *See* Request for Commitment for Observation; Kosilek Dep. at 99. That request was approved by the district court. *See* Murray Aff. at P 7; Kosilek Dep. at 99; Order of Commitment for Observation, Ex. L to Nelson's Motion for Summary Judgment; Administrative Chronology of Kosilek's Movements ("Administrative Chronology"), Ex. M to Nelson's Motion for Summary Judgment. The plaintiff was transferred to Bridgewater State Hospital on December 3, 1992. *Id.*

On January 12, 1993, Kosilek was transferred back to the custody of Bristol County. *See* Murray Aff. at P 7; Administrative Chronology. The next day, the plaintiff began her criminal trial in Superior Court. *Id.* The plaintiff spent about the next two weeks in Superior Court. *See* Murray Aft. at P 8; Kosilek Dep. at 105; Administrative Chronology. On January 25, 1993, the plaintiff was convicted and transferred from the custody of Bristol County to a state prison. *Id.*

In these circumstances, a reasonable factfinder could not conclude that Nelson or **[*26]** Bristol County were deliberately indifferent to the plaintiff's known serious medical needs.

In addition, with regard to the claims against him individually, Nelson is entitled to summary judgment under the doctrine of qualified immunity. *See* *Bilida, 211 F.3d at 174*; *Soto, 103 F.3d at 1064*. The law, while more favorable to the plaintiff in the period 1990 to 1993 than in the period following 1996, was then still in flux. *See, e.g.,* *Supre, 792 F.2d at 963*; *Meriwether, 821 F.2d at 413*; *White, 849 F.2d at 325-28*. Even assuming, without finding, that the law was clearly established in 1990 to 1993, and that transsexualism constituted serious a medical need that required some response, a reasonable person in Nelson's position would not know that his conduct, as demonstrated by the previously described facts that are not genuinely in dispute, violated the Eighth Amendment. *See, e.g.,* *Supre, 792 F.2d at 963* (***HN16*** federal law does not require prison officials to administer estrogen to a transsexual inmate, so long as there was not "a total failure to give medical attention."); *Meriwether, 821 F.2d at 413* **[*27]** ("***HN17*** Given the wide variety of options available for the treatment of gender dysphoria and the highly controversial nature of some of those options, a federal court should defer to the informed judgment of prison officials as to the appropriate form of medical treatment."); *White, 849 F.2d at 325-28* (holding that the prison medical examiner was not deliberately indifferent merely because the plaintiff's experts rendered a different diagnosis). Moreover, ***HN18*** in view of the current state of the law, the court does not find that there was a clearly established right to any therapy or treatment in the period of 1990 to 1993. *See, e.g.,* *Long, 86 F.3d at 765 n.3*; *Maggert, 131 F.3d at 671*; *Farmer v. Moritsugu, 163 F.3d at 614-15*.

Therefore, Nelson's motion for summary judgment is being allowed. The case will be dismissed regarding Nelson in both his official and individual capacities.

III. ORDER

For the foregoing reasons, it is hereby ORDERED that:

1. Maloney's motion to dismiss the claims for damages against him in his individual capacity (Docket No. 161) is ALLOWED.

2. Nelson's motion for summary judgment (Docket No. **[*28]** 133) is ALLOWED.

Mark L. Wolf

United States District Court