

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

MARK A. CAMPBELL,
also known as NICOLE ROSE CAMPBELL,

Plaintiff,

v.

KEVIN KALLAS, RYAN HOLZMACHER,
JAMES GREER, GARY ANKARLO, JEFF ANDERS,
MARY MUSE, MARK WEISGERBER,
ROBERT HABLE, CATHY A. JESS, and
CINDY O'DONNELL,

Defendants.

OPINION and ORDER

16-cv-261-jdp

Plaintiff Nicole Rose Campbell, born Mark A. Campbell, now identifies as a woman. She is incarcerated at Racine Correctional Institution, a male prison, where she is serving a long sentence for a sex crime against a child. Campbell suffers from severe, unremitting gender dysphoria, which causes her severe anguish and puts her at risk of self-harm. She has received some treatment for gender dysphoria while incarcerated, including counselling and cross-gender hormone therapy. She filed this lawsuit so that she could complete her transition with sex reassignment surgery, which defendants have declined to provide. Campbell contends that in refusing to provide the surgery, Wisconsin Department of Corrections officials have violated her Eighth Amendment right to necessary medical care.

Campbell originally sought both damages and injunctive relief. But the court of appeals held that the defendant officials in this case are entitled to qualified immunity. *See Campbell v. Kallas*, 936 F.3d 536 (7th Cir. 2019). The court of appeals reasoned that any right that Campbell has to sex reassignment surgery is not yet clearly established because, at the time defendants denied Campbell the surgery, no prison in the United States had ever provided sex

reassignment surgery to an inmate. As a result, Campbell is not entitled to damages; her only available remedy is injunctive relief against the DOC.

Many of the material facts were established as undisputed at summary judgment. All agree that severe gender dysphoria is a serious medical need, that Campbell suffers from it, and that sex reassignment surgery can in some cases effectively treat it. But two facts were disputed: whether sex reassignment surgery was medically necessary for Campbell, and whether defendants were deliberately indifferent to Campbell's serious medical need in refusing to provide the surgery. Those questions were tried to the court over three days in March 2020.¹ This opinion sets out the court's findings of fact and conclusions of law as required under Federal Rule of Civil Procedure 52.

PRELIMINARY MATTERS

The court begins with final rulings on the parties' motions in limine.

A. Campbell's motions in limine

Campbell filed five motions in limine.

First, Campbell moved to limit the testimony of defendant Kevin Kallas, the DOC's director of mental health, on the treatment of gender dysphoria because he acknowledges that he is not an expert in that subject, and he did not disclose an expert report. Dkt. 122. I'll grant the motion, but at trial Kallas did not give opinions about what specific treatments are appropriate for gender dysphoria. I will admit and consider Kallas's testimony about how the

¹ Campbell has been ably represented in this litigation by pro bono counsel Ilana Vladimirova, Joseph Diedrich, Natalia Kruse, and Thomas Patrick Heneghan, of Husch Blackwell, LLP. The court thanks them for their work.

DOC provides treatment to transgender inmates and the problems that providing that treatment pose in a correctional facility.

Second, Campbell moved to limit evidence of her criminal history. Dkt. 123. I'll deny the motion. To be clear: an inmate's criminal history is irrelevant to whether she has a right to necessary medical treatment. Because the matter was tried to the court, Campbell faces no unfair prejudice from the discussion of her criminal history. Campbell is convicted of a sex crime against a child, which the DOC reasonably considered in evaluating Campbell's request for sex reassignment surgery because Campbell will be placed in the state's women's prison if she has the surgery. Criminal history is an appropriate consideration in determining prison placement. And Cynthia Osborne, the consultant engaged by the DOC to evaluate Campbell, considered Campbell's criminal history, but ultimately it did not affect Osborne's conclusions about the appropriateness of sex reassignment surgery.

Third, Campbell moved to limit defense witnesses from providing expert testimony not disclosed in a Rule 26(a) report. Dkt. 124. The court will grant the motion, and the ruling applies to both sides. At trial, the court allowed some witnesses to testify on topics not disclosed in expert reports, particularly Felicia Levine, one of Campbell's witnesses, and Cindy Osborne, a defense witness. But for purposes of its decision, the court will consider only testimony that was at least generally disclosed in the expert's report. The court will thus disregard Osborne's undisclosed testimony about autogynephilia, which Osborne offered in response to the court's question about any potential link between gender dysphoria and crime. That testimony was also speculative and ultimately irrelevant.

Fourth, Campbell moved to exclude certain opinions from the DOC's retained expert, Dr. Chester Schmidt, as unreliable. Dkt. 125, at 3–10. The DOC withdrew Schmidt as a witness, so the court will grant Campbell's motion as unopposed.

Fifth, Campbell moved to exclude the testimony of the DOC's security chief, Larry Fuchs. Dkt. 126. Defendants originally named Fuchs' predecessor, Mark Weisgerber, as their expert on prison security. They disclosed Fuchs less than two months before trial. Defendants' late disclosure of Fuchs was justified because Weisgerber retired after defendants made their original expert disclosures. The court denied Campbell's motion before trial, but it restricted Fuchs's testimony to what was disclosed in the Weisgerber report and allowed Campbell to use Weisgerber's deposition testimony for impeachment. (As it turned out, there was no significant conflict between the Weisgerber report and Fuchs's testimony.)

B. Defendants' motions in limine

Defendants filed two motions in limine.

First, defendants sought to exclude deposition designations of certain individual defendants, members of the transgender committee, which Campbell had offered to show their lack of experience and knowledge of transgender issues. Defendants did not present any testimony from these individuals, and defendants contend that their lack of knowledge about transgender care is irrelevant. I'll grant the motion. Defendants concede that some members of the transgender committee are not well-informed about the treatment of gender dysphoria. The purpose of the committee is to evaluate requests for treatment for gender dysphoria and accommodations for transgender inmates. It includes members who provide psychological counseling and treatment to inmates as well as members responsible for prison security. Most of its members would disavow being experts in the treatment gender dysphoria, and the DOC

relies on expert consultants to address specific cases. So whether members of the committee are themselves well-informed about the treatment gender dysphoria is ultimately irrelevant to the issues before the court.

Second, defendants moved to exclude testimony about the medical necessity of breast augmentation, electrolysis, and voice therapy. Dkt. 120. Defendants are correct: neither of Campbell's experts offered opinions about the medical necessity of breast augmentation, electrolysis, and voice therapy in their reports. *See* Dkt. 63-1 (Levine report) and Dkt. 65-1 (Oriol report). At trial, Levine testified that these interventions can be necessary for some transgender women and are necessary for Campbell. But because this opinion was not disclosed in her report, the court will not consider that testimony. *See* Fed. R. Civ. P. 37(c)(1). As a result of this ruling, Campbell has no admissible evidence that these interventions are medically necessary for Campbell's gender dysphoria, so the court will deny Campbell's request that the DOC be ordered to provide them.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A detailed factual background is in the court's summary judgment order, Dkt. 96, so a succinct summary is sufficient here. Campbell has been a prisoner in the custody of the DOC since 2008. She is currently housed at the Racine Correctional Institution (RCI). Her anticipated release date is in 2041. Campbell requested treatment for gender dysphoria, and she began hormone therapy in 2013. She responded well to hormone therapy, but her gender dysphoria still left her in anguish. She has requested sex reassignment surgery since 2013.

The DOC has a formal policy addressing treatment for gender dysphoria and for accommodating transgender inmates, Division of Adult Institutions Policy 500.70.27. The

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