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

JEANNE MARIE DRULEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. CIV-13-1191-D**
	)	
JUSTIN JONES, In his Individual and Official Capacities; DON SUTTMILLER, In his Individual and Official Capacities; MICHAEL ADDISON, In his Individual and Official Capacities; BUDDY HONAKER, In his Individual and Official Capacities; JAMES KEITHLEY, In his Individual and Official Capacities; and JOEL B. MCCURDY, In his Individual and Official Capacities,	)	
	)	
	)	
Defendants.	)	

REPORT AND RECOMMENDATION

Plaintiff, a state prisoner appearing *pro se*, brings this action pursuant to 42 U.S.C. § 1983, alleging violations of her constitutional rights. United States District Judge Timothy D. DeGiusti has referred the matter to the undersigned magistrate judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B)-(C). The following motions are pending before the Court. All defendants have filed an alternative Motion to Dismiss or Motion for Summary Judgment, (ECF No. 30), as well as a court-ordered Special Report. (ECF No. 29) (SR). Plaintiff has responded to defendants' motion. (ECF No. 43). Plaintiff has filed three motions for entry of default judgment against Defendant Keithley, (ECF No. 45); Defendant Addison, (ECF No. 47); and Defendant

Patton, (ECF No. 49). Finally, Attorney Wilson D. McGarry has moved to withdraw as co-counsel for defendants. (ECF No. 52).

It is recommended that Defendants' Motion to Dismiss/Motion for Summary Judgment, **(ECF No. 30),** be **GRANTED**, as set forth more particularly below. It is further recommended that Plaintiff's Motions for Entry of Default Judgment, **(ECF Nos. 45, 47, and 49)**, be **DENIED.** Finally, it is recommended that Wilson D. McGarry's Motion to Withdraw as Counsel, **(ECF No. 52)**, be **GRANTED**.

I. BACKGROUND

Plaintiff identifies herself as having Gender Identity Disorder (GID), and states she has undergone two of three surgeries necessary to complete her transformation from male to female.[1] She claims in general that the medical staff of ODOC lacks experience with the treatment of her disorder and in particular has failed to provide her the proper level of hormone treatment or the final surgery she desires. (ECF No. 1, at 4) (Complaint). Plaintiff claims she was on hormone treatment while incarcerated at Oklahoma State Reformatory from 1987 to 1988, but thereafter the treatment was discontinued until either 2011 or 2012. (Complaint, at 5). She claims that although she is now being prescribed female hormones, her medical regime does not conform to the protocol she believes appropriate for the treatment of GID. (Complaint, at 5).

[1] Plaintiff states she had a bi-lateral orchiectomy and bi-lateral mammoplasty in 1980 and 1984, respectively. Plaintiff was incarcerated in 1986, after these surgical procedures had been performed. Plaintiff has not had the final surgical procedures to complete her transformation—surgery to remove her penis and to complete vaginoplasty.

II. DEFENDANTS' RECITATION OF UNDISPUTED MATERIAL FACTS

Plaintiff was taken into custody by ODOC on April 15, 1986, and she is currently housed in Joseph Harp Correctional Facility (JHCC), an all-male facility. (SR 29-1). On January 7, 2011, Plaintiff filed a Request to Staff (RTS) to Defendant McCurdy, the physician at JHCC. (SR 29-3, at 2, 4). Plaintiff requested a prescription for a stronger estrogen supplement than she had been prescribed. She also requested a prescription for progesterone. Dr. McCurdy answered the RTS on January 11, 2011, informing Plaintiff that increasing the dosage of her hormone medication would also increase her risk of stroke and heart attack. (*Id.*).

But Dr. McCurdy did prescribe 2mg of Estradiol, the generic name for the brand name female hormone, Estrace, to be taken twice per day. When Plaintiff requested a refill, however, Dr. McCurdy lowered the dosage of Estradiol to 2mg per day. On September 23, 2011, Plaintiff filed another RTS asking why Dr. McCurdy had lowered her dosage of Estradiol from 4mg per day to 2mg per day. (SR 29-3, at 6). Dr. McCurdy answered the RTS on September 26, 2011, stating, "Will not exceed max dose (my error before)." (*Id.*).

Plaintiff filed a third RTS to Dr. McCurdy on June 27, 2013, requesting an increase in dosage of both Estradiol, and Spironolactone. She also requested vaginoplasty surgery. (SR 29-3, at 7). Dr. McCurdy replied, again stating that 2mg is the

maximum daily dosage of Estradiol. He also informed Plaintiff her kidneys could not withstand additional hormones, and her lungs would prevent any elective surgery. (*Id.*).

Plaintiff filed a grievance with Defendant Mike Addison, the Warden of JHCC, on July 16, 2013, appealing Dr. McCurdy's refusal to prescribe Plaintiff's desired medications and denying her request for elective surgery. (SR 29-3 at 8). As the reviewing authority at JHCC, Warden Addison denied Plaintiff's grievance on July 18, 2013, stating he had reviewed Plaintiff's medical records and grounds for relief and had denied Plaintiff's grievance based on Dr. McCurdy's explanation of treatment decisions. (SR 29-3 at 9). Plaintiff appealed the denial of her grievance to the Administrative Review Authority, in this case, Genese McCoy, the Medical Services Administrator of the ODOC. She denied Plaintiff's grievance appeal on August 23, 2013 (SR 29-3 at 15).

Plaintiff's Response is couched in terms of disputed material facts. She does not, however, dispute any facts set forth by defendants and supported by their Special Report. Rather, she insists Dr. McCurdy's failure to refer her to a specialist constitutes deliberate indifference to her serious medical needs. (Response at 2). Plaintiff further contends that, had she been allowed to pursue discovery, she would have been able to generate genuine issues of material fact. (*Id.*). Plaintiff has failed to allege what those facts might be.

III. ISSUES AND REQUESTED RELIEF

In Count I, Plaintiff contends her Eighth Amendment right to be free of cruel and unusual punishment has been violated because she has been provided "inadequate medical care." (Complaint, at 5). In support of her claims, Plaintiff states Dr. McCurdy first ordered 2mg of the hormone Estrace (Estradiol) to be administered to Plaintiff twice per day. (*Id.* at 5-6). According to Plaintiff, her dosage should have been increased every thirty days until she reached the maximum dosage of 8mg per day. (*Id.*). Plaintiff received 4mg of Estrace, for sixty days. After the first sixty days, Defendant McCurdy lowered the dosage to 2mg per day. Plaintiff contends that in addition to the 4mg of Estrace per day, she should also receive at least 50mg of Spironolactone, the dosage being raised gradually increased to the maximum dose of 100mg. She also states that she needs 200mg of Progesterone per day. She attributes Defendant McCurdy's "inadequate medical care" to his "lack of knowledge about treating transsexual and transgender offenders." (*Id.* at 5).

In Count II, Plaintiff alleges her Fourteenth Amendment rights have been violated by unidentified defendants "keeping [her] housed in an all-male facility when [she] has already been [castrated] and has a 'D'- size breast." (*Id.* at 6). Plaintiff contends her placement in an all-male facility prevents her from having the "real life" experience of living as a woman. (*Id.* at 7).

Plaintiff requests the following relief:

1. To be seen by a qualified transgender specialist, who can properly treat her condition;

2. To have hormone therapy dosages raised to coincide with transgender specialist recommendations;

3. To be allowed to purchase female undergarments, such as bras and panties;

4. To have the "real life" experience, which entails living life as a woman full time, and is required before sex reassignment surgery. She adds that because women can possess bras and panties, she should be allowed to possess these items also;

5. To have "Lacon Hair removal" or be allowed to buy a "NO NO" machine similar to an electric razor;

6. To be provided with tracheal shave surgery;

7. To be awarded compensatory damages in the amount of $500,000 from each defendant;

8. To be awarded $500,000 in punitive damages;

9. To be afforded one-on-one counseling for her transgender issues;

10. To be provided vaginoplasty surgery; and

11. To be transferred to a female facility.

IV. CLAIMS SUBJECT TO DISMISSAL

A. Official Capacity Claims

Plaintiff has sued all defendants in both their individual and official capacities.[2] To the extent Plaintiff seeks monetary damages from defendants in their official capacities, her claims must be dismissed in that they are barred by Eleventh Amendment immunity. "To state a claim under [42 U.S.C.] § 1983 a plaintiff must

[2] Robert Patton, the current director of the Oklahoma Department of Corrections, (ODOC) is hereby substituted as Defendant for purposes of adjudicating Plaintiff's official capacity claims against Justin Jones, the former Director of the ODOC.

allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988). Neither a state, a state agency, nor an official of the State acting in his or her official capacity, is a "person" for purposes of § 1983. *See Will v. Michigan Dep't. of State Police*, 491 U.S. 58, 64, 71 (1989). *See also Branson School District RE-82 v. Romer*, 161 F.3d 619, 631 (10th Cir. 1998) (when suit is brought against a state official in his official capacity, the real party in interest is the state). Thus, Eleventh Amendment sovereign immunity precludes suits against states, state agencies and state officials sued in their official capacities.

Unlike other jurisdictional issues, a State may waive the defense of sovereign immunity. The State of Oklahoma has not, however, waived its sovereign immunity defense against § 1983 claims brought in federal district court cases. *See Ramirez v. Oklahoma Dep't of Mental Health*, 41 F.3d 584, 589 (10th Cir. 1994). It is therefore recommended that all official capacity claims against all defendants be dismissed.

B. Other Claims Subject to Dismissal

1. Standard of Review

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is

liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556); *see also Gee v. Pacheco*, 627 F.3d 1178, 1184 (10th Cir. 2010). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991).

Additionally, to state a claim in a case brought pursuant to 42 U.S.C. § 1983, a plaintiff must plead sufficient facts to demonstrate "each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Iqbal*, 556 U.S. 662 at 677. Well-established Tenth Circuit law comports with the holding in *Iqbal*. "Individual liability under § 1983 must be based on personal involvement in the alleged constitutional violation." *Foote v. Spiegel*, 118 F.3d 1416, 1423 (10th Cir. 1997); *see also Jenkins v. Wood*, 81 F.3d 988, 994-995 (10th Cir. 1996) ("[P]laintiff must show the defendant personally participated in the alleged violation, and conclusory allegations are not sufficient to state a constitutional violation.") (internal citation omitted); *Pahls v. Thomas*, 718 F.3d 1210, 1225 (10th Cir. 2013)(§ 1983 liability must be predicated on an official's personal involvement in the constitutional violation). As for supervisory liability, "[g]overnment officials may not be

held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*." *Iqbal*, 556 U.S. at 676; *accord Pahls*, 718 F.3d at 1225.

2. Individual Capacity Claims Subject to Dismissal

In this case, Plaintiff has named six defendants in their individual capacities, but with regard to four of these defendants, she has neglected to allege sufficient facts to demonstrate their personal participation in any constitutional violation.

Defendant Justin Jones was formerly the Director of the ODOC. Plaintiff has alleged, "Justin Jones is legally responsible [under Oklahoma law] for the operations of each institution of the ODOC." Defendant Don Suttmiller is identified as the Chief Medical Officer of ODOC. Plaintiff states Defendant Suttmiller is "legally responsible for the overall supervision and of operations of Medical Department [of] each institution." (Complaint at 1). Defendant Buddy (William) Honaker is identified as the Correctional Health Service Administrator at JHCC. Plaintiff states Defendant Honaker is responsible for supervision of all employees in the medical and mental health services at JHCC. (Complaint at 2). These three defendants are not mentioned again in Plaintiff's Complaint, and the allegations against them are based solely on their supervisory positions. Plaintiff has not demonstrated personal participation on the part of Defendant Jones, Defendant Suttmiller or Defendant Honaker, and her claims against them in their individual capacities should be dismissed.

Defendant Mike Addison is identified as the Warden of JHCC. Plaintiff states generally that Defendant Addison is responsible for the supervision of all employees.

Additionally, Plaintiff notes Defendant Addison is responsible for administrative grievance reviews. (Complaint, at 2). As with Defendants Jones, Suttmiller, and Honaker, Defendant Addison's supervisory duties do not amount to personal participation. Moreover, the handling or denial of a grievance does not affirmatively link a defendant with the matter being grieved. *Blaurock v. Kansas Dep't of Corr.*, 526 F. App'x 809, 814 (10th Cir. 2013) (citing *Gallagher v. Shelton*, 587 F.3d 1063, 1069 (10th Cir. 2009) (holding that "a denial of a grievance, by itself without any connection to the violation of constitutional rights alleged by plaintiff, does not establish personal participation under § 1983").

Plaintiff alleges that Defendant Keithley was deliberately indifferent to his mental health needs in that Defendant Keithley "is responsible for [ascertaining] that [sufficient] staff is hired to provide the mental health needs for all 1450 offenders here at JHCC, and that his failure to do so constitutes '[deliberate] indifference' to the mental health needs of the Plaintiff." (Complaint at 3). Defendant Keithley is not mentioned again in the Complaint. The law regarding Eighth Amendment claims based on deliberate indifference to serious medical needs is discussed in further detail below. To state a claim of deliberate indifference to a prisoner's serious medical needs, a plaintiff must allege sufficient facts to demonstrate a plausible conclusion that his or her medical needs were objectively serious and that the defendant possessed the requisite subjective state of mine in denying treatment. Plaintiff's conclusory allegation against Defendant Keithley is insufficient to state a claim of deliberate indifference to her

serious medical needs. The individual capacity claims against Defendant Keithley should also be dismissed.

3. Plaintiff's Fourteenth Amendment Equal Protection Claim

In Count II of her Complaint, Plaintiff alleges, "My Fourteenth Amendment Rights to equal protection has been violated, by keeping me housed in an all-male facility when I have [already] been [castrated] and [have] a "D" size breast." (Complaint, at 6).

In § 1983 actions involving multiple defendants, "[i]t is particularly important that plaintiff[ ] make clear exactly who is alleged to have done what to whom, ... as distinguished from collective allegations." *Pahls*, 718 F.3d at 1225-1226 (quotation and citation omitted). Plaintiff does not identify any of the named defendants, or anyone else, as being responsible for this alleged equal rights violation. Where, as here, there are multiple defendants, "the plaintiff's facile, passive-voice showing that his rights 'were violated' will not suffice." *Id.*

Moreover, the records included in the Special Report demonstrate Plaintiff has not properly exhausted her administrative remedies on this claim. Such exhaustion is required by the Prison Litigation Reform Act (PLRA) 42 U.S.C. § 1997e(a) ("No action shall be brought with respect to prison conditions under § 1983 or any other Federal law, by a prisoner confined in jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."). To properly exhaust an issue,

the prisoner must comply "with an agency's deadlines and other critical procedural rules[.]" *Woodford v. Ngo*, 548 U.S. 81, 90 (2006).

In this case, Plaintiff properly exhausted her administrative claims with respect to the issues set forth in Count I, demonstrating that Plaintiff was well aware of the exhaustion procedures set forth in OP-090124, the ODOC's "Offender Grievance Process." (SR 29-9). But Plaintiff did not comply with the time limitations in the grievance process. Plaintiff filed an RTS on May 15, 2003, seeking to have her gender amended to female on all prison records. (SR 29-8 at 12). The request was denied on May 15, 2013. (*Id.*). But Plaintiff did not file her grievance until June 5, 2013, outside the 15-day time period during which a prisoner must file a grievance, if one is to be filed. (SR 29-8 at 24). Having failed to timely exhaust her administrative remedies, her grievance was ultimately returned to her unanswered at the direction of the Administrative Review Authority for the ODOC. (SR 29-8 at 24). Plaintiff's claim in Count II should be dismissed as failure to state a claim upon which relief may be granted.

V. Defendant McCurdy's Motion for Summary Judgment

A. Standard of Review

Summary judgment shall be granted where the movant "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In considering a motion for summary judgment, the court views the evidence and the inferences drawn from the record in the light most

favorable to the nonmoving party. *Calhoun v. Gaines*, 982 F.2d 1470, 1472 (10th Cir. 1992); *Manders v. Oklahoma*, 875 F.2d 263, 264 (10th Cir. 1989). A dispute is "genuine," when viewed in this light, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). "Material facts" are "facts that might affect the outcome of the suit under the governing law." *Id.* After the movant has fulfilled his initial burden of showing an absence of a genuine issue of material fact and entitlement to judgment as a matter of law, the burden shifts to the nonmoving party to demonstrate that there is a genuine issue of material fact. *Whitesel v. Sengenberger*, 222 F.3d 861, 867 (10th Cir. 2000). The nonmoving party "may not rest upon mere allegations" in his pleading to satisfy this requirement. *Anderson*, 477 U.S. at 256. Rather, Federal Rule of Civil Procedure 56 "requires the nonmoving party to go beyond the pleadings and by … affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate "'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (quoting Fed. R. Civ. P. 56).

B. Deliberate Indifference to Serious Medical Needs

It has long been settled that prison officials' deliberate indifference to a serious medical need of an inmate violates the Eight Amendment. "A prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment." *See Farmer v. Brennan*, 511 U.S. 825, 828 (1994). "The analysis [of an

Eighth Amendment claim] should not be based on 'a court's idea of how best to operate a detention facility,'" but should reflect "the evolving standards of decency that mark the progress of a maturing society," which the Tenth Circuit has characterized as a "lofty standard." *DeSpain v. Uphoff*, 264 F.3d 965, 973-74 (10th Cir. 2001) (citing *Rhodes v. Chapman*, 452 U.S. 337, 351, (1981)).

To prevail on her claim that Dr. McCurdy violated her Eighth Amendment, rights by being deliberately indifferent to her serious medical needs, Plaintiff must demonstrate: (1) objectively, the harm she complains of is sufficiently "serious" to merit constitutional protection and (2) Defendant McCurdy was subjectively aware of a substantial risk to plaintiff's health or safety and acted in purposeful disregard of that risk. *See Martinez v. Beggs*, 563 F.3d 1082, 1088 (10th Cir. 2009). For purposes of this analysis, the Court will assume Plaintiff's medical needs meet the first prong of the test.

Plaintiff's claim that Dr. McCurdy was deliberately indifferent to her serious medical needs is based solely on her disagreement with his treatment of her gender identity disorder. A prisoner who merely disagrees with a diagnosis or a prescribed course of treatment does not state a constitutional violation. *Perkins v. Kansas Dep't of Corr.*, 165 F.3d 803, 811 (10th Cir. 1999).

Moreover, Dr. McCurdy's denial of Plaintiff's requests for more or different medication, was based on Plaintiff's risk of stroke. Plaintiff attached a "Summary of Pertinent Medical Information" to her Complaint (ECF No. 1-1). In this document,

Plaintiff states she suffered a stroke on September 22, 1990. (Complaint, Ex. 1, at 2). The medical records from JHCC document Plaintiff's visit to the medical unit on July 18, 2013, complaining of slurred speech and memory loss, both of which Plaintiff stated she had experienced before her 1990 stroke. (SR 29-3 at 30). Dr. McCurdy's denial of Plaintiff's request for more or different hormone treatment is the antithesis of deliberate indifference.

Dr. McCurdy denied Plaintiff's request for elective vaginoplasty because he believed Plaintiff's lungs would not be able to withstand the stress of the surgery. Dr. McCurdy's assessment is substantiated by a medical record generated by Dan Fox, P.A., dated February 4, 2013, which notes that Plaintiff has a history of end-stage Chronic Obstructive Pulmonary Disease (COPD). (SR 29-3, at 25). Given these facts, Plaintiff cannot demonstrate that Dr. McCurdy possessed the requisite state of mind to have been deliberately indifferent to her serious medical needs. Accordingly, it is recommended that summary judgment be granted to Defendant McCurdy.

VI. Plaintiff's Motions for Default Judgment

Plaintiff has requested entry of default judgment against Defendants Keithley [ECF No. 45], Addison [ECF No. 47], and Patton [ECF No. 49]. Plaintiff's basis for her motions is that these defendants failed "to plead or otherwise defend." Plaintiff is mistaken. The Motion to Dismiss/Motion for Summary Judgment [ECF No. 30] was filed on behalf of all six named defendants, including Defendant Patton who was substituted

as a defendant for his predecessor, Justin Jones, for official capacity claims against Jones. It is therefore recommended that Plaintiff's motions for default be denied.

VII. Motion to Withdraw as Counsel

Wilson D. McGarry, one of the two attorneys representing the defendants, has filed an uncontested motion to withdraw as attorney for the defendants. (ECF No. 52) For good cause shown, it is recommended that Mr. McGarry's motion be granted.

RECOMMENDATION

After careful consideration of the issues in this action, it is recommended that Defendant's Motion to Dismiss/Motion for Summary Judgment, **(ECF No. 30)** be **GRANTED**. It is further recommended that Plaintiff's Motions for Entry of Default Judgment, **(ECF Nos. 45, 47, and 49)**, be **DENIED.** Finally, it is recommended that Wilson D. McGarry's unopposed Motion to Withdraw as Counsel **(ECF No. 52)** be **GRANTED**.

NOTICE OF RIGHT TO OBJECT

Plaintiff is hereby advised of her right to file an objection to this Report and Recommendation with the Clerk of this Court by **February 9, 2015** in accordance with 28 U.S.C. § 636 and Federal Rule of Civil Procedure 72. Plaintiff is further advised that failure to make a timely objection to this Report and Recommendation waives her right to appellate review of both factual and legal questions contained herein. *Casanova v. Ulibarri*, 595 F.3d 1120, 1123 (10th Cir. 2010).

STATUS OF THE REFERRAL

This Report and Recommendation **disposes of all issues** referred to the undersigned magistrate judge in the captioned matter.

ENTERED on January 21, 2015.

Shon T. Erwin

SHON T. ERWIN
UNITED STATES MAGISTRATE JUDGE