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FILED
DISTRICT OF WYOMING
CASPERS

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CLERK
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING
CASPER DIVISION

MIKI ANN DIMARCO,

On behalf of herself
and all other persons
similarly situated,

Plaintiff,

v.

WYOMING DEPARTMENT OF CORRECTIONS,
DIVISION OF PRISONS, WYOMING WOMEN'S
CENTER; JUDY UPHOFF, individually and as Director,
Wyoming Department of Corrections; NOLA
BLACKBURN, individually and as Warden of Wyoming
Women's Center; EMPLOYEES & DOES, I - X;
BLACK & WHITE CORPORATIONS, A-J; AND
RED & YELLOW STATE AGENCIES, 1 - 10,

Defendants,

03CV1006B

VERIFIED COMPLAINT

COMES NOW, the Plaintiff, MIKI ANN DIMARCO, by and through her attorney, Tom Sedar, and as and for complaint against Defendants, complains, alleges and avers as follows:

Jurisdiction and Venue

1. This Court has jurisdiction over this subject matter pursuant to 28 U.S.C. § 1331, 1343 (a), and 1367 because the claims arise under the constitution and law of the United States, because

Receipt # 298526
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there are claim brought to redress the deprivation, under color of state law, the privileges and immunities secured by the constitution of the United States, and because of the supplemental jurisdiction of the court.

2. Venue is proper in this district pursuant to 28 U.S.C. § 1391(a)(1), (b)(2) and (c).

3. Pursuant to 28 U.S.C. § 1367, this Court has supplemental jurisdiction over any claims arising under Wyoming law.

4. The requirements of the "Wyoming Governmental Claims Act, "WY ST. § 1-39-113, have been fulfilled.

Parties

5. Plaintiff, MIKI ANN DIMARCO, resides in Douglas, Converse County, Wyoming.

6. Upon information and belief, the STATE OF WYOMING, DEPARTMENT OF CORRECTIONS, DIVISION OF PRISONS have general supervision, control and custody of all penal institutions in the State of Wyoming, including the WYOMING WOMEN'S CENTER. The STATE OF WYOMING, DEPARTMENT OF CORRECTIONS, DIVISION OF PRISONS, WYOMING WOMEN'S CENTER, (collectively, "DEPARTMENT OF CORRECTIONS") is a governmental agency which has general supervision and control of, and provides care and maintenance for women inmates in Lusk, Wyoming.

7. Defendant JUDITH UPHOFF is sued individually and in her official capacity as Director of the State of Wyoming, Department of Corrections and as the chief administrative officer of the Wyoming Department of Corrections. Upon information and belief, at all times relevant Defendant UPHOFF resided in Cheyenne, Wyoming.

8. Defendant NOLA BLACKBURN is sued individually and in her capacity as Warden of Wyoming Women's Center. Upon information and belief, at all times relevant Defendant BLACKBURN resided in Lusk, Wyoming.

9. The true names or capacities, whether individual, corporate, associate or otherwise of the Defendants sued fictitiously herein are unknown to Plaintiff, who is informed, believes and thereon alleges that each of the fictitiously named Defendants is in some way liable to Plaintiff on the causes of action below and are therefor sued by such fictitious names; Plaintiff will move to amend this complaint and insert the true names and capacities of said fictitiously named Defendants when the same have been ascertained.

10. Plaintiff is informed and believes, and thereon alleges, that at all times herein mentioned, each actually and fictitiously named Defendant was the principal, agent, co-venturer, partner, surety, guarantor, officer, director, and/or employee of each co-defendant and in doing the things herein alleged, was acting within the scope of authority and with the permission of each co-defendant or took some part in the acts and commissions hereinafter set forth, and by reason thereof, each of said defendants are liable to plaintiff for the relief prayed herein

11. At all times relevant herein, the Defendants, and each of them, were acting under color of state law.

12. On or about February 2, 2002, Plaintiff caused a governmental claim and again on or about June 21, 2002, Plaintiff caused a supplemental governmental claim, all pursuant to the "Wyoming Governmental Claims Act," to be delivered to the following individuals and entities: (a) Michael E. Able, Administrator, Wyoming Division of General Services, Department of Administration; (b) Director Judith Uphoff, Wyoming Department of Corrections; (c) Warden Nola Blackburn, Wyoming Women's Center ; and (d) the Hon. Gay Woodhouse, Wyoming Attorney General. Plaintiff has complied with the provisions of the Wyoming Governmental Claims Act.

13. Plaintiff is informed and believes, and thereon alleges, that at all times herein mentioned, each actually named Defendant was the principal, agent, co-venturer, partner, surety,

guarantor, officer, director, and/or employee of each co-defendant and in doing the things herein alleged, was acting within the scope of authority and with the permission of each co-defendant or took some part in the acts and commissions hereinafter set forth, and by reason thereof, each of said defendants are liable to plaintiff for the relief prayed herein.

Facts

14. The Plaintiff, **MIKI ANN DIMARCO**, is a former inmate at WYOMING WOMEN'S CENTER and was incarcerated there from on or about May 3, 2000 to on or about July 11, 2001. Plaintiff was born intersexed¹, and had undergone hormonal treatment for several years prior to and up to her incarceration at WYOMING WOMEN'S CENTER

15. From the date of her original confinement until the date of her release, Plaintiff was placed in segregated confinement in the maximum security wing away from the general WYOMING WOMEN'S CENTER prison population.

16. Upon information and belief, Plaintiff was placed in segregated confinement and denied most of the privileges granted other inmates in the custody of the DEPARTMENT OF CORRECTIONS, solely because of Plaintiff's physical condition and for no other reason despite repeated requests to receive accommodation for her physical condition.

17. Segregated inmates do not have the same privileges as other inmates. For example, among other things: (a) inmates in segregated confinement are not permitted to watch television, listen to a radio, or smoke, while inmates in the general population have easy access to television, radio and smoking; (b) inmates in segregated confinement are not permitted to visit the law library while inmates in the general population can do so regularly; (c) inmates in segregated confinement are not permitted to visit the general library, while inmates in the general population can do so

¹Medically, a hermaphrodite, a term that the Intersex Society of North America terms stigmatizing and misleading. <http://www.isna.org/faq/language.html>.

regularly; (d) inmates in segregated confinement are not permitted visitors on a regular basis, while inmates in the general population can have visits on a regular basis; (e) inmates in segregated confinement do not have access to the institution's canteen, while inmates in the general population have daily access; (f) inmates in segregated confinement cannot attend religious services or otherwise participate in group religious activities, while inmates in the general population have a wide range of religious activities available to them; (g) inmates in segregated confinement are permitted to use the telephone only in emergencies or to contact their attorneys about pending matters, while inmates in the general population have daily access to the telephone; and (h) inmates in segregated confinement do not have daily social contact and communication with other inmates, while inmates in the general population have a wide range of daily social contacts and conversations.

18. At all times relevant hereto, Plaintiff MIKI ANN DIMARCO requested she be transferred out of segregated and into the general prison population, which requests were callously, arbitrarily, capriciously, unreasonably, and with deliberate indifference, ignored.

19. Plaintiff is informed and believes, and on that basis alleges, that Defendants have no policy in place with regard to the placement or treatment of incarcerated prisoners of intersexual gender.

20. By each of the acts and omissions made by Defendants, the Defendants recklessly, wilfully, wantonly, callously, negligently, wrongfully and with deliberate indifference violated Plaintiff MIKE ANN DIMARCO's rights as guaranteed by federal and Wyoming law.

Class Allegations

21. This action is brought and may properly be maintained as a class action pursuant to Rules 23(a) and 23(b)(2). Plaintiffs seek certification of the following class: all true hermaphrodites or intersexed persons (hereinafter "the class").

22. The exact number of Plaintiff class members is not known, nor may it ever be known with accuracy. Intersexed persons, for reason of severe sexual social stigma due to their “supposed strangeness”² in Western culture, do not advertise their physical condition. However, it is estimated that one in one hundred persons are born with bodies which “differ from standard male or female” bodies and one in 1,666 are not XX or XY.³

23. Questions of fact and law are common with respect to each class member. Common Questions of fact and law include:

- a. Whether Defendants have treated other intersexed prisoners similarly;
- b. Whether Defendants have or should have a policy in place with regard to intersexed prisoners;
- c. Whether isolationary segregation of intersexed prisoners without hearing is a violation of due process cruel and unusual punishment;
- d. Whether isolationary segregation of intersexed prisoners is without hearing is cruel and unusual punishment;
- e. Whether isolationary segregation of intersexed prisoners is discriminatory; and
- f. Whether or not an injunction should issue restraining and enjoining Defendants from continuing to violate the rights of intersexed prisoners.

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²Dreger, Alice, *Hermaphrodites and the Medical Invention of Sex*, Harvard University Press (1998).

³Blackless, Melanie, Anthony Charuvastra, Amanda Derryck, Anne Fausto-Sterling, Karl Lauzanne, and Ellen Lee. *How sexually dimorphic are we? Review and synthesis. American Journal of Human Biology* 12:151-166 (2000). (The figures are approximations.)

FIRST CLAIM FOR RELIEF

VIOLATION OF THE EIGHTH AMENDMENT

23. The Plaintiff, MIKI ANN DIMARCO, re-alleges and incorporates, by this reference, paragraphs one through 22 herein.

24. State law as well as general principles of human decency prohibit treatment of individuals confined in jail with unnecessary rigor and requires the humane treatment of all prisoners.

25. Despite several requests over a period of several months, the Defendants, and each of them, deliberately, intentionally, unlawfully, willfully and wantonly continued to segregate, isolate and stigmatize Plaintiff, and Plaintiff is informed and believes and on that basis alleges, the class, and prohibit companionship and communication with the general prison population and otherwise deprive Plaintiff and the class from the normal functions and privileges commonly made available to inmates during terms of incarceration at WYOMING WOMEN'S CENTER.

26. The Eighth Amendment to the United States Constitution and Article 97-1-014 of the Wyoming Constitution guarantee the right of incarcerated inmates to be free from cruel and unusual punishment.

27. The placement of Plaintiff and the class in isolated, segregated confinement was an unjustifiable, unreasonable exercise in bad faith and is a violation of the Eighth Amendment prohibition against cruel and unusual punishment.

28. As a direct and proximate cause of the unjustified placement of Plaintiff and the class in segregated confinement during her entire period of incarceration, Plaintiff and the class have suffered physical and mental damages.

29. The Plaintiff and other intersexed prisoners are entitled to special, compensatory, and emotional distress damages caused by the Defendants as a result of their unjustified placement of

the Plaintiff and the class in segregated incarceration and violation of the Plaintiff's federally protected rights under the Eighth Amendment of the United States Constitution as made actionable under 42 U.S.C. §1983.

30. Plaintiff is entitled to a preliminary and a permanent injunction enjoining Defendants henceforth from continuing to isolate, segregate or otherwise ignore or sweep under the rug intersexual prisoners such as Plaintiff herein

31. Plaintiff is entitled to attorney's fees, court costs and the costs of expert witnesses pursuant to 42 U.S.C. §1988.

SECOND CLAIM FOR RELIEF

FOURTEENTH AMENDMENT

32. The Plaintiff, **MIKI ANN DIMARCO**, re-alleges and incorporates, by this reference, paragraphs one through 31 herein.

33. Wyoming state law as well as general principles of human decency prohibit treatment of a persons confined in jail with unnecessary rigor, requires the humane treatment of all prisoners and provides inmates with a protected liberty interest.

34. Despite Plaintiff's several requests for more humane treatment over a period of several months, the Defendants, and each of them, deliberately, intentionally, unlawfully, willfully and wantonly continued to segregate and isolate Plaintiff and keep her from the privileges, rights, companionship of and communication with the general prison population during her enter period of incarceration at WYOMING WOMEN'S CENTER.

35. The Fourteenth Amendment to the United States Constitution guarantees the right of incarcerated inmates to protected from loss of a liberty interest without procedural due process, pursuant to 42 U.S.C. § 1983.

36. As a direct and proximate result of Defendants' deliberate indifference to Plaintiff's and other prisoners' intersexuality, Plaintiff and all similarly situated intersexed prisoners were deprived of liberty without due process of law in violation of the Fourteenth Amendment to the constitution of the United states by virtue of arbitrary and unreasonable segregated and isolated confinement during her term of incarceration resulting in substantial harm. The unjustified placement of Plaintiff and the class in segregated confinement is a deprivation of due process and a violation of the Fourteenth Amendment.

37. As a direct and proximate cause of the unjustified placement of Plaintiff and the class in segregated confinement during her entire period of incarceration, Plaintiff and other intersexual prisoners have suffered physical and mental damages.

38. The Plaintiff and the class are entitled to special, compensatory, and emotional distress damages caused by the Defendants as a result of their unjustified, permanent placement of the Plaintiff and the class in segregated incarceration and violation of the Plaintiff's and the class's federally protected rights under the Fourteenth Amendment of the United States Constitution as made actionable under 42 U.S.C. §1983.

39. Plaintiff is entitled to a preliminary and a permanent injunction enjoining Defendants henceforth from continuing to isolate, segregate or otherwise ignore or sweep under the rug intersexual prisoners such as Plaintiff herein.

40. Plaintiff is entitled to attorney's fees, court costs and the costs of expert witnesses pursuant to 42 U.S.C. §1988.

THIRD CLAIM FOR RELIEF

AMERICANS WITH DISABILITIES ACT

41. The Plaintiff, **MIKI ANN DIMARCO**, re-alleges and incorporates, by this reference, paragraphs one through 40 herein.

42. Plaintiff and the class have or are regarded as having a physical impairment that substantially limits one or more of their major life activities.

43. No qualified individual with a disability may, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

44. While incarcerated Plaintiff and the class were excluded from and denied the benefits of the services, programs or activities of the general prison population due to their physical impairment.

45. As a direct and proximate cause of the arbitrary, capricious, unreasonable and unjustified placement of Plaintiff and the class in segregated confinement during their entire period of incarceration, Plaintiff and the class have suffered physical and mental damages.

46. Plaintiff is entitled to a preliminary and a permanent injunction enjoining Defendants henceforth from continuing to isolate, segregate or otherwise ignore or sweep under the rug intersexual prisoners such as Plaintiff herein.

47. Plaintiff is entitled to attorney's fees, court costs and the costs of expert witnesses pursuant to 42 U.S.C. §1988 and 42. U.S.C. § 12205.

FOURTH CLAIM FOR RELIEF

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

48. The Plaintiff, **MIKI ANN DIMARCO**, re-alleges and incorporates, by this reference, paragraphs one through 47 herein.

49. Defendants, and each of them, had a duty of due care with regard to the care and treatment of Plaintiff and the class at all relevant times herein.

50. In arbitrarily, capriciously, and unreasonably isolating and segregating Plaintiff and the class without regard for their physical and emotional well-being, Defendants breached their duty of due care.

51. As a proximate result of Defendants' acts or omissions to act, Plaintiff and the class have suffered emotional and physical damages.

52. As a further proximate result Defendants' acts or omissions to act, Plaintiff and the class have suffered severe humiliation, mental anguish, and emotional and physical distress.

FIFTH CLAIM FOR RELIEF

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

53. The Plaintiff, **MIKI ANN DIMARCO**, re-alleges and incorporates, by this reference, paragraphs one through 52 herein.

54. Defendants, and each of them, had a duty of due care with regard to the care and treatment of Plaintiff and the class at all relevant times herein.

55. Defendants knew or should have known that their failure to exercise due care in the performance of there duty to act with due regard for the physical and emotional well-being of Plaintiff and the class would cause Plaintiff and the class several emotional distress.

56. As a proximate result of Defendants' acts or omissions to act, Plaintiff and the class have suffered emotional and physical damages.

57. As a further proximate result Defendants' acts or omissions to act, Plaintiff and the class have suffered severe emotional distress and mental suffering.

WHEREFORE, the Plaintiff, **MIKI ANN DIMARCO**, prays for a judgment against the Defendants, on all claims for relief as follows:

1. For an order certifying the plaintiff class alleged herein;
2. For special and compensatory damages to be determined at trial;

3. Special and compensatory damages for present physical and emotional distress to be determined at trial;

4. Special and compensatory damages for future physical emotional distress in excess of \$75,000.00 to be determined at trial; and

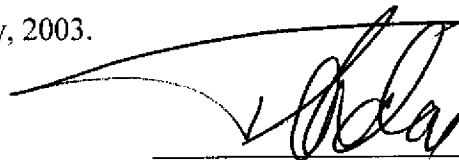
5. A preliminary and permanent injunction enjoining Defendants from continuing to isolate or segregate intersexual prisoners and from failing, neglecting or refusing to deal with the intersexual as fellow human beings;

6. An award of attorney's fees, court costs, and the costs of expert witnesses;

7. Pre-judgment and post-judgment interest as allowed by law; and

8 For any and all other relief deemed just and equitable by the Court.

DATED this 20 day of January, 2003.




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307-265-1924

STATE OF WYOMING)
) ss.
COUNTY OF NATRONA)

MIKI ANN DIMARCO, of lawful age and being first duly sworn upon hers oath, deposes and says: That she has read the foregoing Verified Complaint by her subscribed; and that the matters stated therein are true; that as to the matters alleged on information and belief, she believes the same to be true.


MIKI ANN DIMARCO

Subscribed, sworn, and acknowledged to before me by Miki Ann Dimarco this 10th day of January, 2003.


Notary Public

