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United States District Court, S.D. New York.

John Andrew CUOCO, Plaintiff,
v.
J. Michael QUINLAN, Kenneth Moritsugu, M.D., G.L. Hershberger, Don Moore, R. Barraco, M.D., M. Malik, M.D. and M. Salamack, M.D., Defendants.

No. 91 Civ. 7279 (LMM).
|
Nov. 16, 1992.

MEMORANDUM AND ORDER

McKENNA, District Judge.

***1** By this Order, the Court decides an application by plaintiff John Andrew Cuoco ("Plaintiff" or "Cuoco") to have access to books and other legal materials maintained at the law library at the Federal Correctional Institution in Otisville, New York ("FCI Otisville") and to possess a pen within Plaintiff's cell in the Special Housing Unit at FCI Otisville. The Court also decides a motion by defendants J. Michael Quinlan ("Quinlan"), Kenneth Moritsugu, M.D. ("Moritsugu"), Gregory L. Hershberger ("Hershberger"), Donald Moore ("Moore"), Robert D. Barraco, M.D. ("Barraco"), Muhammad Malik, M.D. ("Malik") and Martin Salamack, Ph.D. ("Salamack") (collectively "Defendants") to dismiss the Amended Complaint, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, or, in the alternative, for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiff has not submitted any opposition to Defendants' motion. For the reasons set forth below, Plaintiff's motion is denied and Defendants' motion is granted in part and denied in part.

Background

Plaintiff is a preoperative male to female transsexual.[1] At the time of the occurrence of the matters alleged in the Amended Complaint, Plaintiff was a pretrial detainee housed at FCI Otisville. Plaintiff alleges that, until her arrest,[2] she received female hormone treatments under the supervision of a physician (Am.Compl. ¶ 4.), for the treatment of gender identity dysphoria or transsexualism. Upon her arrival at FCI Otisville on September 5, 1991, a physicians' assistant allegedly conducted an initial screening and medical interview of Plaintiff. (*Id.* ¶ 12.) Plaintiff allegedly had developed female secondary sexual characteristics. (Defs.' Mem. at 7.) Out of concern for her safety, Plaintiff was kept in administrative segregation. (Nesbit–Veltri Aff. ¶ 3; Barraco Aff. ¶ 4.)

Plaintiff contends that she informed the physicians' assistant that her dosage of Estinyl, a synthetic estrogen hormone, had been one milligram per day for the past two years. The dosage was to "be lowered in December after plaintiff was to undergo surgery to remove her testicles (castration)." (Am.Compl. ¶ 13.) The physicians' assistant allegedly told Plaintiff that her prescription for Estinyl would be renewed. On September 10, 1991, Plaintiff met with Dr. Robert Barraco, chief medical officer at FCI Otisville. Barraco allegedly asked the officer escorting Plaintiff whether he had brought the he/she. (*Id.* ¶ 17.) Barraco allegedly agreed to renew Plaintiff's prescription but at a reduced dosage. On September 17, 1991, Barraco allegedly visited Plaintiff in administrative segregation and stated that he would not renew Plaintiff's prescription "because he felt that plaintiff was not a 'true or genuine transsexual.' " (*Id.* ¶ 21.)

As a result of Barraco's statement, Plaintiff allegedly became depressed and threatened to commit suicide. Salamack, chief psychologist at FCI Otisville, was allegedly summoned. Salamack allegedly stated that "[t]here is nothing I can do about your medication, it's up to the medical dept., I'm in the psychology dept." (*Id.* ¶ 26.) Plaintiff asserts that she experienced psychological and physical withdrawal and was unable to eat for approximately four days. In addition, Plaintiff contends that "despite numerous requests ... for some sort of medical treatment, she received none." (*Id.* ¶ 29.)

On September 20, 1991, Barraco allegedly contacted Moritsugu, medical director and assistant bureau director of the Federal Bureau of Prisons, and requested

authorization "to deny plaintiff's request for female hormone maintenance." (*Id.* ¶ 31.) Further, on September 23, 1991, Plaintiff allegedly "sent defendant Moore [health services administrator at FCI Otisville] an inmate request form in which she stated that she was being denied her prescribed medication, that it was causing her psychological and physical pain and that the prolonged denial of this medication would cause permanent damage." (*Id.* ¶ 35.) On September 24, 1991, Plaintiff allegedly talked with Barraco who informed Plaintiff that Moore and Hershberger, warden of FCI Otisville, had been apprised of Plaintiff's medical situation. (*Id.* ¶ 37.) While touring the segregation unit, Hershberger allegedly told Plaintiff that she "should act like a man the way God intended." (*Id.* ¶ 39.) Plaintiff also alleges that during her brief appointments with Malik, a private psychologist under contract with the Federal Bureau of Prisons, Malik refused to discuss Plaintiff's gender dysphoria. (*Id.* ¶ 43.)

***2** Defendants dispute Plaintiff's version of the events leading to the denial of her request for continued hormone treatments. According to Barraco, "Mr. Cuoco stated that he was a homosexual who had been taking estrogen for the last two years in order to 'improve his appearance' by making himself look more feminine." (Barraco Aff. ¶ 5.) Staff psychologist Nesbit–Veltri, who treated Plaintiff on several occasions, alleges that "Mr. Cuoco stated to me that he was taking female hormones, but only for 'cosmetic' purposes." (Nesbit–Veltri Aff. ¶ 5.) Further, Salamack states that "as psychologists, [Dr. Nesbit–Veltri and I] do not prescribe medication. Nor is it our practice to second-guess a decision made by the treating physician as to whether, and how, to medicate a patient." (Salamack Aff. ¶ 5.) Malik, who claims to have treated Plaintiff on at least ten separate occasions, (Malik Aff. ¶ 3), also supports the conclusion that Plaintiff was not a transsexual.

Discussion

As well as bringing the Amended Complaint, Plaintiff has brought an "omnibus motion." Plaintiff's motion seeks an order of the Court granting Plaintiff access to the main law library at FCI Otisville and allowing her to possess a ballpoint or felt tip pen within her cell at the Special Housing Unit at FCI Otisville. Plaintiff's omnibus motion is denied as moot because Plaintiff has been transferred to the Federal Correctional Institution in Fairton, New Jersey. Accordingly, the Court need not address Defendants' argument that Plaintiff failed to exhaust her administrative remedies.

Rule 12(b)(6) of the Federal Rules of Civil Procedure entitles a defendant to a judgment of dismissal where a complaint fails to state a claim upon which relief can be granted. The standard of review on a motion to dismiss is heavily weighted in favor of a plaintiff. Rule 8(a)(2) of the Federal Rules of Civil Procedure demands only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). The Court is required to read a complaint generously, drawing all reasonable inferences from the complainant's allegations. *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 515 (1972). "In ruling on a motion to dismiss for failure to state a claim upon which relief may be granted, the court is required to accept the material facts alleged in the complaint as true." *Frasier v. General Electric Co.,* 930 F.2d 1004, 1007 (2d Cir.1991). A defendant is entitled to dismissal pursuant to Rule 12(b)(6) only when the Court finds that "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45–46 (1957).

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment should be granted only where "there is no genuine issue as to any material fact" and a party is "entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). Summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex Corp. v. Catrett,* 477 U.S. 321, 322 (1986). The nonmoving party's "evidence ... is to be believed, and all justifiable inferences are to be drawn in [its] favor." *Eastman Kodak Co. v. Image Technical Services, Inc.,* 504 U.S. 451, 112 S.Ct. 2072, 2076 (1992) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986)). A summary judgment motion must be denied if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson,* 477 U.S. at 248.

***3** As a preliminary matter, Defendants contend that the Court lacks personal jurisdiction over defendants Quinlan and Moritsugu because they live and work outside of the State of New York. Moritsugu acknowledges that he was served with the summons and a copy of the Complaint on February 19, 1992 by United States mail. (Moritsugu Aff. ¶ 3.) Quinlan, on the other hand, denies receiving a summons or copy of the Complaint. (Quinlan Aff. ¶ 3.) Despite Quinlan's affidavit, for the purposes of

determination of this motion, the Court deems Quinlan to have been personally served with the summons and a copy of the Complaint. The Court has before it a United States Marshals Service Process Receipt and Return form that indicates that Quinlan was served at his business address by certified mail on February 14, 1992. If Quinlan desires, the Court is willing to hold, at a later date, an evidentiary hearing regarding service of process.

The question whether the Court may exercise personal jurisdiction over Quinlan and Moritsugu is a question of due process. According to the Supreme Court, Quinlan and Moritsugu must "have certain minimum contacts" with the State of New York "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945) (citation omitted). The "constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State." *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 474 (1985) (citation omitted).

Foreseeability rather than physical presence is key to this due process analysis. Quinlan's and Moritsugu's "conduct and connection with the forum State are such that [they] should reasonably anticipate being haled into court there." *World–Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980). The minimum contacts requirement is satisfied if there is some act by which Quinlan and Moritsugu purposefully avail themselves of the privilege of conducting activities within the State of New York.

Based on the foregoing analysis, the Court concludes that subjecting Quinlan and Moritsugu to jurisdiction does not offend due process. Quinlan, whose office is located in Washington, D.C., is the director of the Federal Bureau of Prisons. As director of the Federal Bureau of Prisons, Quinlan necessarily has supervisory authority over activities occurring at FCI Otisville. Quinlan bears responsibility for the management of the federal prison system, and is consequently, to that extent, implicated in the alleged denial of Plaintiff's treatment. Similarly, as medical director and assistant bureau director of the Federal Bureau of Prisons, Moritsugu bears responsibility for "the overall direction and administration of the medical programs for the [Federal Bureau of Prisons]." (Moritsugu Aff. ¶ 1.) Additionally, section 6803 of the Bureau of Prisons' Health Services Manual provides that:

> ***4** It is the policy of Bureau of Prisons to maintain the transsexual inmate at the level of change existing upon admission to the Bureau. Should responsible medical staff determine that either progressive or regressive treatment changes are indicated, these changes must be approved by the Medical Director prior to implementation.

(Defs.' Mem. at 8–9.) Accordingly, both Quinlan, having supervisory authority over the entire federal prisons system, and Moritsugu, having responsibility for monitoring the medical services provided within the federal prisons system, could foresee being haled into court with respect to the decision not to treat Plaintiff's gender dysphoria.

Plaintiff seeks damages and injunctive relief against Defendants, all of whom are federal employees, in both their individual and official capacities. Allegations contained in a *pro se* complaint and pleadings must be liberally construed. *Haines v. Kerner,* 404 U.S. 519, 520 (1972); *see also Platsky v. Central Intelligence Agency,* 953 F.2d 26, 28 (2d Cir.1991) ("the Supreme Court has instructed the district courts to construe pro se complaints liberally and to apply a more flexible standard in determining the sufficiency of a pro se complaint"). The Court construes Plaintiff's *pro se* Amended Complaint as a claim for damages under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), instead of a claim brought pursuant to section 1983. "[A] prerequisite for relief under § 1983, which concerns the deprivation of rights, privileges, and immunities secured by the Constitution and federal laws, is that the defendant acted under color of state law." *Kingsley v. Bureau of Prisons,* 937 F.2d 26, 30 n. 4 (2d Cir.1991). "An action brought pursuant to 42 U.S.C. § 1983 cannot lie against federal officers." *Id.; see also Ramirez v. Obermaier,* No. 91–7120, 1992 WL 320985, at *4, 1992 U.S.Dist. LEXIS 16563, at *10 (S.D.N.Y. Oct. 28, 1992) (section 1983 "does not allow claims against federal officers acting under color of federal law").

Plaintiff alleges, *inter alia,* that Defendants violated her Eighth Amendment constitutional right to be free from cruel and unusual punishment. In order to survive a motion to dismiss, a plaintiff bringing a *Bivens* action

must plead specific facts demonstrating the federal officials' improper conduct. "It is incumbent on a plaintiff to state more than conclusory allegations to avoid dismissal of a claim predicted on a conspiracy to deprive him of his constitutional rights." *Polur v. Raffe,* 912 F.2d 52, 56 (2d Cir.1990), *cert. denied,* 499 U.S. 937, 111 S.Ct. 1389 (1991). "Diffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct." *Ostrer v. Aronwald,* 567 F.2d 551, 553 (2d Cir.1977); *see also Dukes v. New York,* 743 F.Supp. 1037, 1043 (S.D.N.Y.1990) ("the Second Circuit has repeatedly held that complaints containing only 'conclusory,' 'vague,' or 'general allegations' of a conspiracy to deprive a person of constitutional rights will be dismissed") (citation omitted). Further, a plaintiff must demonstrate that the federal officials personally participated in the alleged constitutional violation. *Barbera v. Smith,* 836 F.2d 96, 99 (2d Cir.1987), *cert. denied,* 489 U.S. 1065 (1989).

***5** Setting aside for the moment Plaintiff's allegations against defendants Quinlan, Moritsugu and Barraco, the Court finds that Plaintiff has failed to adequately state a claim against the remaining defendants. Plaintiff's allegations are nothing more than conclusory statements. Cuoco's allegations fail to specify in detail the factual basis for her claim. Defendants Hershberger, Malik, Moore and Salamack appear in the Amended Complaint only passingly. Plaintiff fails to attribute any conduct to these individuals in connection with the decision to deny her treatment. The statements attributed to defendants Hershberger and Salamack, even if true, do not rise to the level of constitutional violations. Further, no injury is alleged from these statements or from Salamack's alleged decision not to place Plaintiff on suicide watch.

The absence of a factual predicate for the allegations against defendants Hershberger and Moore leads to the conclusion that these defendants are named in the action solely because of their supervisory positions. In a *Bivens* action, such a *respondeat superior* theory will not suffice. "[P]laintiff [must] allege the defendant's direct and personal responsibility for the purportedly unlawful conduct." *Black v. United States,* 534 F.2d 524, 527 (2d Cir.1976). "It is settled, however, that a federal supervisory employee cannot be held responsible for the acts of his subordinates under a theory of respondeat superior." *Morton v. Granite,* Nos. 88–9020, 89–1356, 1991 U.S.Dist. LEXIS 2454, at *31 (S.D.N.Y. Mar. 5, 1991). Insofar as the Amended Complaint is silent with respect to a factual basis for Plaintiff's claim, it is fatally defective. This *respondeat superior* analysis, which guards FCI Otisville's warden and other supervisory employees against judicial interference with genuine penal concerns, has no bearing on Plaintiff's claim against Quinlan. Quinlan, as the federal prisons' policy maker, does not come within the reach of this inquiry. Consequently, the motion by defendants Hershberger, Malik, Moore and Salamack is granted.

Claims asserted against an officer of the United States in his or her official capacity are, in essence, a suit against the United States. *Kentucky v. Graham,* 473 U.S. 159, 166 (1985). The United States may assert its sovereign immunity from suits "save as it consents to be sued ..., and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Mitchell,* 445 U.S. 535, 538 (1980) (citation omitted). The United States has not waived its sovereign immunity for damages arising from constitutional violations. *Keene Corp. v. United States,* 700 F.2d 836, 845 n. 13 (2d Cir.) (citation omitted), *cert. denied,* 464 U.S. 864 (1983). Accordingly, Plaintiff may not maintain her action against Quinlan, Moritsugu and Barraco in their official capacities.

However, a *Bivens* actions based upon an alleged federal constitutional violation may be brought against a federal employee in his or her individual capacity. The Court notes that "Congress has not *required* exhaustion of a federal prisoner's *Bivens* claim." *McCarthy v. Madigan,* 503 U.S. 140, 112 S.Ct. 1081, 1090 (1992). In addition, contrary to Defendants' contention, a *Bivens* remedy is available to a plaintiff even though the allegations could also support a suit against the United States under the Federal Tort Claims Act, 42 U.S.C. § 233(a), if the complained of conduct does not relate to medical malpractice. Section 233(a) "protects Public Health Service officers or employees from suits that sound in medical malpractice." *Mendez v. Belton,* 739 F.2d 15, 19 (1st Cir.1984). Plaintiff's claims against defendants Moritsugu and Barraco, both Public Health Service employees, may not properly be dismissed on the basis of section 233(a) immunity because Plaintiff has not brought medical malpractice claims, but rather a claim alleging violation of her constitutional rights.

***6** Defendants correctly observe that Plaintiff was a pretrial detainee at the time of the acts alleged in the Amended Complaint. Defendants also point to *Ingraham v. Wright,* 430 U.S. 651, 671–72 (1977), which they contend stands for the proposition that the Eighth Amendment prohibition on cruel and unusual punishment applies only to those prisoners convicted of crimes. "Yet

it would be absurd to hold that a pre-trial detainee has less constitutional protection against acts of prison guards then one who has been convicted." *Johnson v. Glick,* 481 F.2d 1028, 1032 (2d Cir.), *cert. denied,* 414 U.S. 1033 (1973). In *Ingraham,* the Supreme Court observed that where punishment is imposed without adjudication, "the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment." 430 U.S. at 672. "[T]he Due Process Clause affords ... no greater protection than does the Cruel and Unusual Punishment Clause." *Whitley v. Albers,* 475 U.S. 312, 327 (1986). "[C]ases dealing with pretrial detention are more appropriately analyzed under the Due Process Clause of the Fourteenth Amendment than under the Cruel and Unusual Punishments Clause of the Eighth Amendment." *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 112 S.Ct. 748, 754 n. 1 (1992). "[A]part from the protection against cruel and unusual punishment provided by the Eighth Amendment, ... the Due Process Clause of its own force requires that conditions of confinement satisfy certain minimal standards for pretrial detainees." *Collins v. City of Harker Heights,* 503 U.S. 115, 112 S.Ct. 1061, 1069–70 (1992); *see also Bryant v. Maffucci,* 923 F.2d 979, 983 (2d Cir.) ("pretrial detainee['s] ... constitutional claims are properly analyzed under the Due Process Clause of the Fourteenth Amendment"), *cert. denied,* 502 U.S. 849, 112 S.Ct. 152 (1991). Therefore, the Eighth Amendment's prohibition against cruel and unusual punishment is coextensive with any substantive rights afforded under the Due Process Clause.

Plaintiff contends that Defendants' failure to provide any medical treatment for her gender dysphoria constitutes a violation of her Eighth Amendment right to adequate medical care. Recovery under the Eighth Amendment is limited to those cases in which a prisoner can establish "deliberate indifference to serious medical needs." *Estelle v. Gamble,* 429 U.S. 97, 104 (1976). This "deliberate indifference test is applied in cases alleging prison officials' failure to attend to an inmate's medical needs." *Hendricks v. Coughlin,* 942 F.2d 109, 112 (2d Cir.1991). Negligence on the part of a diagnosing or treating physician will not state a valid Eighth Amendment claim. *Estelle,* 429 U.S. at 106. A similar showing of deliberate indifference is required in order to sustain a claim based on the Due Process Clause.

"Transsexualism has been recognized as a serious psychiatric disorder." *Meriwether v. Faulkner,* 821 F.2d 408, 411 (7th Cir.), *cert. denied,* 484 U.S. 935 (1987). Other courts have recognized transsexualism as a serious medical and psychological problem. *See, e.g., White v. Farrier,* 849 F.2d 322, 325 (8th Cir.1988) ("transsexualism is a serious medical need"); *Madera v. Correctional Medical Systems,* No. 90–1657, 1990 WL 132382, at *4 n. 5, 1990 U.S.Dist. LEXIS 11878, at *10 n. 5 (E.D.Pa. Sept. 5, 1990) ("This court takes note that gender dysphoria is a recognized psychiatric condition"); *Phillips v. Michigan Department of Corrections,* 731 F.Supp. 792, 800 (W.D.Mich.1990) ("transsexualism and GIDAANT are serious psychiatric disorders"), *aff'd,* 932 F.2d 969 (6th Cir.1991). Courts have repeatedly held that treatment of psychiatric or psychological conditions may present a serious medical need within the meaning of *Estelle. See, e.g., Kruitbosch v. Van de Veire,* No. 91–4200, 1992 WL 313121, at *1, 1992 U.S.App. LEXIS 28565, at *5 (10th Cir. Oct. 23, 1992) (the *Estelle* "obligation includes psychological or psychiatric care"); *Gordon v. Kidd,* 971 F.2d 1087, 1094 (4th Cir.1992) ("we have applied the standard of 'deliberate indifference' to serious psychological conditions of prisoners"); *White,* 849 F.2d at 325 ("psychological disorders may constitute a serious medical need"); *Phillips,* 731 F.Supp. at 800 ("gender dysphoria—may present a serious medical need under the *Estelle* formulation").

***7** Despite Defendants' suggestions, all justifiable inferences must be drawn in the nonmoving party's favor. *Eastman Kodak,* 112 S.Ct. at 2076. For the purposes of this motion, the Court accepts as true Plaintiff's allegations that Defendants' denied her treatment, in any form, for her transsexualism. Defendants' real argument appears to be that Plaintiff is, in fact, not a transsexual, but rather a homosexual who took estrogen for cosmetic purposes. The Court is unwilling to make the determination, on the affidavit evidence provided by the parties, whether Plaintiff is indeed a transsexual and whether treatment, be it hormone therapy or psychological counseling, was denied. Contrary to Defendants' contention, more appears to be at issue than a disagreement between a patient and a doctor regarding the patient's choice of medical treatment.

Given the existence of genuine issues of material fact, and without the benefit of further evidence that may be revealed during discovery, it would be premature for the Court to grant the motion by defendants Quinlan, Moritsugu and Barraco. Plaintiff has stated a claim under the Eighth Amendment or, in the alternative, the Due Process Clause, entitling her to some kind of medical care for her alleged transsexualism. Accordingly, Defendants' motion is denied with leave to renew upon the completion of discovery.

Plaintiff's privacy, equal protection and Sixth Amendment claims are without merit. A prisoner's expectation of privacy is extremely limited in light of the overriding need to maintain institutional order and security. *Bell v. Wolfish,* 441 U.S. 520, 537 (1979). Prison officials must be accorded wide latitude in matters of internal order and security. Consequently, Plaintiff's fourth, fifth and six causes of action are dismissed.

Summary
For all the foregoing reasons, Plaintiff's omnibus motion is denied as moot and the motion of defendants Hershberger, Malik, Moore and Salamack is granted and the Amended Complaint, as against them, is dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The motion of defendants Quinlan, Moritsugu and Barraco is denied, with leave to renew upon completion of discovery, pursuant to Rule 12(b)(6) or Rule 56 of the Federal Rules of Civil Procedure.

The parties will complete discovery by July 30, 1993.

SO ORDERED.

All Citations

Not Reported in F.Supp., 1992 WL 350755

Footnotes

[1] Because in reviewing the parties' motions the Court must accept Plaintiff's factual allegations as true, the Court will herein use feminine pronouns when referring to Plaintiff. In so doing, the Court expresses no view as to the factual merits of Plaintiff's claims.

[2] According to Defendants, Plaintiff has been convicted of four counts of robbery and has been sentenced to 168 months imprisonment. Plaintiff has been transferred to the Federal Correctional Institution in Fairton, New Jersey. (Defs.' Mem. at 1 n. 1.)