

Transgender Inmate in Georgia Prevails

By Fred Cohen

Ashley Diamond is a transgender, former inmate confined in the Georgia prison system. Prior to her release, Diamond filed a broad-based complaint in federal court claiming that denial of treatment responsive to her medical condition, failure to protect her from repeated sexual assaults by inmates, and failure to train staff on gender dysphoria were all due to deliberate indifference.

The complaint is replete with specific detailed accounts of Diamond's repeated and desperate efforts to receive medical care and protection. She, in turn, was ridiculed, advised to take care of herself and to stop pretending to be a woman.

Diamond attempted suicide several times, tried to sever her penis, suffered with depression and felt herself to be in constant danger.

In **Diamond v. Owen**, 131 F. Supp. 3d 1346 (M.D. Ga. 2015) the multiple defendants sought to have Diamond's claim for damages dismissed. In a comprehensive and thoughtful ruling Judge Marc T. Treadwell denied the defendant's motion.

Right to Health Care Claim

Georgia Department of Corrections (GDOC) diagnosed Diamond with gender dysphoria while incarcerated and the defendants do not deny that this is a serious medical need, as is constitutionally required. This satisfies the so-called objective basis of the Estelle formulation of the constitutional right of prisoners to needed health care.

The subjective element is the often more contentious requirement and Diamond must allege three elements: (1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than [gross] negligence. Ultimately, "[t]he facts alleged must do more than contend medical malpractice, misdiagnosis, accidents, and poor exercise of medical judgment." **Simpson v. Holder**, 200 Fed.Appx. 836, 839 (11th Cir.2006) (citing **Estelle**, 429 U.S. at 104-07, 97 S.Ct. 285).

Subjective knowledge requires that a defendant was both aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and must also have drawn the inference. A defendant cannot be held liable for a constitutional violation for failing to alleviate a

significant risk that he should have perceived but did not. However, a factfinder may infer from circumstantial evidence or from 'the very fact that the risk was obvious' that the defendant had subjective knowledge. Without a confession that "I knew," all subjective findings are inferences with the evidentiary base for the inference the variable.

Diamond's factual allegations are comprehensive and, if proved, show a systematic and knowing abuse of her right to responsive care and safety. When she filed her complaint, Ashley Diamond was a "nonviolent" Georgia prison inmate who had been incarcerated after violating probation imposed after a theft conviction. In her

was limited to maintenance, which she calls a "freeze-frame policy."

Only inmates identified as transgender at intake were eligible for treatment. Even if an inmate was classified at intake as transgender, the Transgender SOP limited treatment to maintenance of existing treatments—preventing healthcare personnel from initiating medical treatment that in their judgment is medically required. Pursuant to the Transgender SOP, "inmates who [were] diagnosed with gender dysphoria after their initial diagnostic screening[] or who cannot show a history of treatment" were ineligible for treatments. This policy, described as a "freeze-frame policy,"

A claim of deliberate indifference must satisfy both an objective test—it must be a serious medical condition—and a subjective test, which is often the more contentious one: did defendant have knowledge of risk of serious harm, did defendant disregard the risk, and was the conduct more than just negligence?

verified complaint, Diamond alleges that officials in four different prisons repeatedly violated her constitutional rights by failing to provide her with medical treatment for her gender dysphoria and by failing to protect her from sexual assaults. As a result, she alleges that on many different occasions she attempted suicide, attempted to castrate herself, was raped, and was otherwise sexually assaulted by inmates at the maximum security prisons in which she was housed.

Her complaint attacks, in particular, the Georgia Department of Corrections' Standard Operating Procedure on the Management of Transsexuals (the "Transgender SOP"). Diamond claimed that although the Transgender SOP recognized that gender dysphoria is a serious medical need requiring special medical evaluations and appropriate treatment, the Transgender SOP nevertheless limited treatment to specific inmates, specifically those inmates who had been identified as transgender during their intake screenings, and even then treatment

prevented medical professionals from initiating treatment for gender dysphoria.

Upon her reception into the GDOC, Diamond informed security and healthcare staff of her condition and her desperate need for responsive treatment. If she demanded the surgical procedure as such, I could not locate it in this extensive record.

After her first grievance about medical care, she was placed in solitary confinement.

She attempted self-castration and was hospitalized. Defendants still denied her treatment.

After transfer to another prison, she was told at reception to "guard her booty" and the prison lacked the means to treat or safeguard her. She was sexually assaulted again and no adjustments were made.

Diamond wrote the Commissioner about her plight and asked to be transferred to a medium security prison. This did not happen.

Diamond has obviously alleged facts that would constitute deliberate indifference

See TRANSGENDER, next page

TRANSGENDER, from page 27

to her serious disorder. She established the disorder based on qualified expert opinion and she has also alleged knowledge of her condition and the willful ignoring of her claims to basic treatment as the standard of care. At a minimum this meant hormone treatment and “female gender expression,” both being denied.

Failure to Protect

Clearly, the Eighth Amendment gives inmates the right to a reasonably safe environment including protection from assaults by fellow inmates. The inmates’ right, then, creates a corresponding duty on prison officials to not be deliberately indifferent.

State Prison, by gang members in February 2014, and twice in April 2014; and (7) Dr. Harrison specifically told McCracken that Diamond stood a high risk of sexual assault at Valdosta State Prison given its population.

In her complaint, Diamond has covered the waterfront with her allegations tending to prove subjective awareness of the high degree of risk. She has alleged that a transgender inmate’s vulnerability to assault at a closed-security male facility was obvious to Lewis and McCracken and that PREA and GDOC policies made clear transgender inmates are highly vulnerable to sexual assault. Further, she alleges Lewis and McCracken spoke with her directly about her transgender status and were aware from

housed with violent offenders. Repeatedly, she alleges, they continued to receive notice of her sexual assaults. Clearly, at this stage of the litigation, these facts are sufficient to establish that Lewis and McCracken were subjectively aware of the risk of harm Diamond faced.

Failure to Train

This is a difficult area for plaintiffs to establish their case, Diamond, however, prevails. A supervisor can be held liable for failing to train his or her employees only where the failure to train amounts to deliberate indifference to the rights of persons with whom the officers come into contact. To sufficiently allege that a supervisor violated a plaintiff’s constitutional rights for failing to train subordinates, a plaintiff “must demonstrate that the supervisor had ‘actual or constructive notice that a particular omission in their training program causes [his or her] employees to violate citizens’ constitutional rights,’ and that armed with that knowledge the supervisor chose to retain that training program.” *Id.* (quoting **Connick v. Thompson**, 563 U.S. 51 (2011)).

A plaintiff establishes a supervisor’s notice when the need for more or different training is obvious—such as when there has been a history of widespread abuse by subordinates that has put the supervisor on notice of the need for corrective measures, or when the failure to train is likely to result in a constitutional violation.

Here there are credible claims as to deficient training on healthcare and the duty to protect. As for needed care there are allegations that staff repeatedly ignored the recommendations of medical staff as well as ignoring GDOC policy on hormone therapy and gender identity treatment.

This is a three year period of denial accompanied by derision, ridicule and exposure to serious harm. Lewis repeatedly instructed subordinates to ignore the right to treatment.

Thus, the motions to dismiss are denied.

COMMENT: On February 12, 2016 the AP reported that Georgia agreed to settle the Diamond case. She dismissed her claim about the same time. A Georgia spokesperson indicated the settlement was for \$250,000 while Diamond’s counsel disputed the amount.

Counsel, bound by confidentiality, refused to disclose what he believed to be the proper amount but obviously it was a good deal more than \$250,000. ■

The court noted that Diamond’s allegations paint a picture dramatically different than the typical failure-to-protect claim asserted by inmates. The usual failure-to-protect claim involves a single assault. Diamond suffered repeated assaults, all of which were known to the DOC.

Here, Diamond alleges (1) she was sexually assaulted numerous times at three closed-security facilities which housed violent offenders and had a history of frequent assaults; (2) defendants were aware Diamond, as a non-violent, transgender female inmate, faced a substantial risk of sexual assault at closed-security facilities because the risk was so obvious; (3) defendants were aware from PREA and the Transgender SOP that “transgender inmates face a substantial vulnerability to sexual assault;” (4) Lewis, as Statewide Medical Director, and McCracken, as PREA Coordinator at Valdosta State Prison, were notified after each sexual assault which obligated them to review Diamond’s housing placement pursuant to the Transgender SOP, the Sexual Assault SOPs, and PREA; (5) Lewis was aware from notifications and McCracken was aware from Diamond’s GDOC records that she was repeatedly sexually assaulted at two other closed-security facilities before being transferred to Valdosta State Prison; (6) Lewis and McCracken took no action after Diamond was sexually assaulted by her cellmate the day after intake at Valdosta

notifications and records she was repeatedly sexually assaulted at three different closed-security facilities. Diamond met with McCracken at least three times about her sexual assaults, and Dr. Harrison contacted him directly about Diamond’s vulnerability to assault at Valdosta State Prison given its population of violent offenders.

The court notes that Diamond’s allegations paint a picture dramatically different than the typical failure-to-protect claim asserted by inmates. The usual failure-to-protect claim involves a single assault. Thus, the inmate must allege facts tending to establish the requisite subjective awareness before that single assault occurred. This can be a difficult task. But here Diamond alleges an extended series of assaults. While she does not concede that Lewis and McCracken did not have subjective awareness of the risk of harm before the first assault that occurred on their respective watches, she alleges that certainly after they received notice of that assault, and then the next, and the next, and so on, they clearly had subjective awareness of the risk of harm she faced as a transgender inmate



Authorized Electronic Copy

This electronic copy was prepared for and is authorized solely for the use of the purchaser/subscriber. This material may not be photocopied, e-mailed, or otherwise reproduced or distributed without permission, and any such reproduction or redistribution is a violation of copyright law.

For permissions, contact the **Copyright Clearance Center** at
<http://www.copyright.com/>

You may also fax your request to 1-978-646-8700 or contact CCC with your permission request via email at info@copyright.com. If you have any questions or concerns about this process you can reach a customer relations representative at 1-978-646-2600 from the hours of 8:00 - 5:30 eastern time.