# Legal Developments

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***Gender Identity Disorder***

Two federal circuit courts have recently addressed issues relating to the legal requirements for treatment of gender identity disorder (GID), which is characterized by feeling trapped in a body of the wrong gender. In **Titlow v. Correctional Medical Services, Inc.**, 2012 U.S. App. LEXIS 25406 (6th Cir. Dec. 7, 2012), the U.S. Court of Appeals for the Sixth Circuit looked at the denial of a surgical consultation to address severe, recurring breast pain resulting from silicon injections received before incarceration. In **De'Lonta v. Johnson**, 708 F.3d 520 (4th Cir. 2013), the U.S. Court of Appeals for the Fourth Circuit considered a complaint alleging that, in light of prison officials' awareness of an ongoing risk of self-mutilation, the denial of consideration for sex reassignment surgery was a violation of the Eighth Amendment.

Vonlee Nicole Titlow, an inmate in the custody of the Michigan Department of Corrections (MDOC), suffers from gender identity disorder and, although born male, considers herself to be female. Titlow began receiving injections of silicon to increase her breast size and began taking Premarin, a female hormone, before she was incarcerated. In 2004, she reported breast pain to a prison doctor, and he requested a surgical consultation after finding hard tissue, edema, and scarring. However, the consultation was denied by the provider, Correctional Medical Services (CMS), as the procedure was considered cosmetic.

In accordance with the review process, a second-step appeal was made to the MDOC Medical Services Advisory Committee, which consists of physicians and health care personnel who are responsible for overseeing the authorization of medical procedures for prison inmates. The committee considers an inmate's complete medical file, discusses the appeal, and attempts to reach a consensus (absent a consensus, the committee's chief medical officer makes the decision). In this case, the committee, with defendant Dr. Naylor sitting as Chief Medical Officer, upheld the decision to refuse the surgical consultation and, instead, recommended to the prison doctor that Titlow stop taking Premarin, which could cause breast tenderness.

Titlow continued to seek treatment for the persistent breast pain for the next three years. At least four requests for a surgical consultation were denied by CMS administrators. None of the doctors filed a second-step appeal.

Titlow filed a complaint in federal court in May 2007, alleging that the committee's denials of surgery constituted deliberate indifference to her serious medical need in violation of the Eighth Amendment's prohibition of cruel and unusual punishment. Subsequently, in 2008, a prison doctor did appeal the denial to the committee, but the appeal, termed a request for "general surgery," was unsuccessful. The committee, with defendant Dr. Stieve sitting as acting chief medical officer, offered no explanation or suggestions for alternative treatment.

Early in 2008, Titlow was treated for pain and bloody discharge from her right breast, and the expert Titlow had retained for her lawsuit reported that she needed a surgical consultation and bilateral mastectomies. After considering Titlow's second appeal, the committee approved the surgical consultation and mastectomies. Dr. Stieve was then sitting as chief medical officer, and defendant Dr. Pandya also participated as MDOC Region II medical officer. The committee noted, "DR. H. PANDYA to document approval and stress nonapproval of plastic reconstruction." After successful surgery, Titlow's medical condition "improved tremendously."

Titlow's lawsuit also named Officer Craig Withrow as a defendant, alleging that his failure to summon medical assistance for her constituted deliberate indifference to her serious medical need. She claimed that on one occasion in 2006, when she asked Withrow to call the prison hospital because she was in a great deal of pain, he "snickered" and "responded in a mocking tone, that he would try to call, but doubted [the hospital] would see [Titlow]." In fact, he did not call for medical care, did not make note of Titlow's medical condition in the guards' log book, and did not check on her any further. She was able to obtain medical attention only after Withrow's shift had ended. Titlow also claimed that this was "not the first time that Withrow [was] aware of [Titlow's] pain."

After Titlow filed a grievance, the prison warden advised her in writing that, "[w]hile it appears [Officer Withrow] had a reasonable expectation that the nurse would be is [sic] the unit in a short period following your request; based on the language in [the applicable policy], Health Care should have been called and allowed to make a determination on whether you should be seen." Furthermore, the warden undertook to ensure that "all staff are aware of the provision in [MDOC] policy to call medical staff" and stated that he would address the staff involved.

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### Summary Judgment

The U.S. District Court for the Eastern District of Michigan, in response to defendants' motions for summary judgment, held that Titlow suffered from a serious medical need and that she had raised "a genuine issue of material fact with respect to whether Defendants, *in the aggregate,* reached a contrary

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administrative as opposed to medical conclusion based on [Titlow's] unique condition." It found that the three doctors had each been involved in the committee process in which the request for surgical consultation was denied "despite a medical record which provided objective indications of [Titlow's] condition." This established a genuine issue of fact as to whether they had been deliberately indifferent to her condition. The doctors were not entitled to qualified immunity because of their direct involvement in the denials. It was also found that the allegations regarding Officer Withrow's behavior, "if true, [were] sufficient to demonstrate deliberate indifference."

The defendants conceded that Titlow's condition was sufficiently serious, leaving the question of whether they deliberately had disregarded the risk to her health as the only issue on appeal. Titlow was required to "allege facts which, if true, would show that each official (1) subjectively perceived facts from which to infer substantial risk to her, (2) inferred the risk, and then (3) consciously disregarded the risk." Before discussing the particular facts, it noted that "[t]hough 'federal courts are generally reluctant to second guess medical judgments' . . . it is possible for medical treatment to be 'so woefully inadequate as to amount to no treatment at all.'"

With regard to Dr. Pandya, the appellate court found that, as regional medical officer, he had no authority to authorize the surgical and there was no evidence that he had otherwise acted with deliberate indifference. Therefore, he was entitled to qualified immunity from liability. Dr. Naylor's only involvement was with the 2005 denial, and, since "it was plausible for the MSAC to conclude that conservative treatment options should first be explored or that more information was necessary to make an informed decision," the committee decision did not evidence a deliberate indifference to the risk to Titlow's health. He was also entitled to qualified immunity.

### Appellate Decision

The appellate court reached a different conclusion regarding the liability of Dr. Stieve, the chief medical officer for the committee's 2008 denial. At that time, he knew the extent of Titlow's medical issues and, by his own admission, he understood that "the medical needs of prisoners with Gender Identity Disorder 'are not to be taken lightly.'" The committee had access to the records of all the previous first- and second-stage appeals. Furthermore, the renewed appeal after four years indicated that the suggested alternative treatment had been unsuccessful. This was enough to establish genuine issues as to whether Stieve, first, subjectively perceived facts from which a substantial risk to Titlow's health could be inferred and, second, did infer that risk. The committee's denial of Titlow's 2008 claim without explanation or comment—in contrast to the 2005 denial, which suggested alternative treatment, and the 2009 approval, which "reflected the Committee's deliberation by expressing the non-approval of plastic reconstruction,"—was then sufficient to raise the question of whether the chief medical officer consciously disregarded the risk to Titlow's health. A reasonable jury could find that this defendant acted with "deliberateness tantamount to an intent to punish" by denying the surgical consultation in 2008. As to whether Stieve violated a "clearly established" constitutional right, the appellate court noted that "in the light of pre-existing law the unlawfulness must be apparent." Here, the jury could find that Titlow had a clearly established "right not to have [her] serious medical needs disregarded by [her] doctors."

***"Where the circumstances are clearly sufficient to indicate the need of medical attention for injury or illness, the denial of such aid constitutes the denial of constitutional due process."***

There was no difficulty in concluding that Officer Withrow was not entitled to qualified immunity. Titlow's allegations, supported by the warden's written response to her grievance, were enough to raise a genuine issue of material fact for the jury as to whether Withrow had acted with deliberate indifference. Furthermore, the appellate court noted that, "where the circumstances are clearly sufficient to indicate the need of medical attention for injury or illness, the denial of such aid constitutes the denial of constitutional due process." Withrow violated a clearly established right when he disregarded the fact that Titlow was suffering obvious pain. The Sixth Circuit reversed the district court's denial of qualified immunity for Dr. Pandya and Dr. Naylor, and it affirmed the denial of such protection for Dr. Stieve and Officer Withrow.

### Self-Mutilation

The case of **De'Lonta v. Johnson** involved the serious risk of self-mutilation. The plaintiff, Ophelia Azriel De'Lonta, (who was born Michael A. Stokes) had attempted to castrate herself on several occasions in response to an overwhelming compulsion to "perform[ ] [her] own makeshift sex reassignment surgery." De'Lonta, a preoperative transsexual, has been serving her 73-year sentence for bank robbery since 1983 in the custody of the Virginia Department of Corrections (VDOC).

In 1999, De'Lonta initiated an Eighth Amendment action, claiming that VDOC policy violated her constitutional rights by wrongfully prohibited her from receiving GID treatment. After the U.S. District Court for the Western District of Virginia dismissed her complaint, the Fourth Circuit appellate court reversed the decision and remanded the case. It found that "De'Lonta's need for protection against continued self-mutilation constituted an objectively serious medical need under the Eighth Amendment and that De'Lonta had sufficiently alleged VDOC's deliberate indifference to that need." In a subsequent settlement, VDOC acknowledged that De'Lonta had a serious medical need and agreed to treat her condition.

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In accordance with that settlement, De'Lonta has been receiving ongoing psychological counseling and hormone therapy since 2004 and is allowed to dress and live as a woman as far as VDOC policy permits. Nevertheless, although she experienced "growth and stability," her symptoms persisted. She was still subject to a strong urge to castrate herself and was, in fact, hospitalized after again attempting self-castration in 2010. Since that time, she has repeatedly requested sex reassignment surgery pursuant to generally accepted GID treatment guidelines established by the World Professional Association for Transgender Health. Its "triadic treatment sequence" consists of hormone therapy, experience living the identified gender role, and sex reassignment surgery. If the first two treatments fail to provide sufficient relief after at least a year, sex reassignment surgery may be required.

In 2011, De'Lonta brought an action against VDOC administrators and members of her care team, alleging that, given the awareness of her ongoing risk of self-mutilation, their continued denial of her requests for sex reassignment surgery constitutes deliberate indifference in violation of her constitutional rights. The district court dismissed her complaint for failure to state a claim upon which relief could be granted. It found that she had failed to allege sufficient facts to support her claim of deliberate indifference and, in fact, that she had acknowledged that she had been receiving ongoing psychological counseling and hormone therapy and had been allowed to dress and live as a woman as far as VDOC policy permits. It found that, "[s]ince De'Lonta ha[d] not presented 'a situation where there is a total failure to give medical attention or a policy prohibiting her treatment for GID, . . . her current dissatisfaction with the progress or choice of treatment' [was] insufficient to support an Eighth Amendment claim."

The appellate court pointed out that the defendant had, "at all relevant times, been aware of De'Lonta's GID and its debilitating effects on her" and that the accepted standards of care did "indicate that sex reassignment surgery may be necessary for individuals who continue to present with severe GID after one year of hormone therapy and dressing as a woman." De'Lonta was never

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## Appeal

On appeal, the defendants conceded that the need to protect De'Lonta from her urge to castrate herself was serious medical need but argued that sex reassignment surgery could not be considered a serious medical need because it had never been prescribed for De'Lonta and there is no constitutional right to preferred—as opposed to necessary—treatment. However, the appellate court held that the district court's dismissal was in error. First, as the court had previously stated, "prison officials have a duty to protect prisoners from self-destruction or self-injury." Secondly, the allegations in De'Lonta's complaint were sufficient to establish deliberate indifference to her serious medical need.

The court found these allegations were sufficient to establish a plausible claim. It rejected the idea that providing some treatment in response to De'Lonta's urge to self-mutilate was sufficient to satisfy constitutional requirements. It stated "just because [the defendants]

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have provided De'Lonta with *some* treatment consistent with the GID Standards of Care, it does not follow that they have necessarily provided her with *constitutionally adequate* treatment."

The appellate court also rejected the argument that the previous settlement precluded any further Eighth Amendment claims. It stressed that "[t]he mere fact that VDOC has previously acknowledged De'Lonta's condition and agreed to provide treatment in no way forecloses the possibility that its performance under that agreement later became constitutionally deficient." The district court's dismissal of De'Lonta's Eighth Amendment claim was reversed, and the case was remanded for further proceedings.

***The Federal Rules of Civil Procedure provide that summary judgment is appropriate in cases in which "there is no genuine dispute as to any material fact" and there is sufficient basis for judgment as a matter of law.***

**Comment: To read more about GID and its treatment, see *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law,* United Nations Office of the High Commissioner for Human Rights (2012), http://nicic.gov/Library/026552 and Gender Identity Disorder, Don Lewis, U.S. Bureau of Prisons (2012), http://nicic.gov/Library/025870.**

***The Limits of Qualified Immunity***

Martinique Stoudemire was incarcerated at the Huron Valley Women's Correctional Facility in Ypsilanti, Michigan, in July 2002, at age twenty-three, at which time she was already suffering from serious autoimmune and kidney conditions. Specifically, she had suffered from systemic lupus erythematosus and related hypercoagulapathy since she was a youth. Without proper medical treatment, these conditions can lead to heart attacks, kidney and liver damage, amputations, and chronic pain. Stoudemire's health quickly deteriorated during the five years she spent at Huron, and she endured a heart attack, liver failure, and several life-threatening embolisms. She also underwent three amputations and eventually lost both of her legs below the knee. By the time she was paroled she was also suffering from chronic depression, posttraumatic stress disorder, and conditions brought on by the medications she received while incarcerated.

Stoudemire brought an action in federal court against the Michigan Department of Corrections (MDOC) and its associated officers, doctors, and nurses, based on alleged violations of her constitutional rights, the Americans with Disabilities Act (ADA) and Michigan law. She claimed that her serious medical complications resulted from inadequate health care. Specifically, she noted that, after her third amputation in December 2006, the stump of her leg and her buttocks became infected with Methicillin-Resistant Staphylococcus Aureas (MRSA). She was then quarantined in Huron's segregation unit, which lacked accommodations for disabled persons, and was subjected to a strip search for no legitimate penological reason.

At the outset of the case, U.S. District Court for the Eastern District of Michigan denied the motions of Susan Davis, the warden who allegedly authorized the segregation placement, and Ariel N. Dunagan, the corrections officer who conducted the strip search, for summary judgment based upon a claim of qualified immunity. Davis and Dunagan appealed that order.

The Federal Rules of Civil Procedure provide that summary judgment is appropriate in cases in which "there is no genuine dispute as to any material fact" and there is sufficient basis for judgment as a matter of law. Thus, it would not be appropriate if the evidence could allow a reasonable jury to find in favor of Stoudemire. The U.S. Supreme Court has held "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." The two-prong test determines whether (1) the facts alleged or proven by the plaintiff establish a violation of a constitutional right and (2) that right was "clearly established" at the time of the act in question.

Stoudemire claimed that the conditions of confinement during the time she was quarantined in the segregation unit, as authorized by Warden Davis, violated her Eighth Amendment right to be free from cruel and unusual punishment. In **Stoudemire v. Michigan Department of Corrections**, 705 F.3d 560 (6th Cir. Jan. 31, 2013), the Sixth Circuit began its analysis by citing the Supreme Court's explanation that the Eighth Amendment protects inmates by "impos[ing] duties on [prison] officials, who must provide humane conditions of confinement" and "adequate food, clothing, shelter, and medical care and . . . 'take reasonable measures to guarantee the safety of the inmates.'" At the same time, there can be no liability "unless the [prison] official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw that inference." The district court had determined that Stoudemire had a medical condition (double amputation and MRSA infection) that had not been reasonably accommodated by provision of assistive facilities, personal-care training, and other aids for meeting her health and safety needs. However, Warden Davis argued that it was error to deny qualified immunity because of the failure to establish that the warden was deliberately indifferent to Stoudemire's medical needs.

The appellate court agreed, noting that "clearly there was no discussion of the subjective element of the claim: whether Davis, the warden, had 'a sufficiently culpable state of mind in denying

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[Stoudemire] medical care.'" The order denying summary judgment for Davis was vacated, and the case was remanded to the district court for proper evaluation of Davis's qualified immunity defense.

Stoudemire also alleged that the strip search conducted by Corrections Officer Dunagan was "undertaken to harass or humiliate" and served no legitimate penological purpose. In denying Dunagan's motion for summary judgment, the district court had stated that "Dunagan should have been on notice that [the strip search] would have been unreasonable under the circumstances and not based on a reasonable penological interest of security and order." It was acknowledged that review of the issue needed to be conducted "under a standard that affords deference to the judgments of correctional officers, 'who must have substantial discretion to devise reasonable solutions to the problems they face.'" However, prison inmates do retain some rights regarding personal privacy that must be balanced against the need for particular searches. Reasonableness depends upon "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted."

In this case, when Dunagan performed the search "it was clearly established that suspicionless strip searches were permissible as a matter of constitutional law, but only so long as they were reasonable under the circumstances and performed pursuant to a legitimate penological justification." It was shown that this strip search was made even more invasive by Dunagan's failure to block the cell window, allowing people in the hall to see Stoudemire naked and without her prosthetic legs. Furthermore, there were no exigent circumstances making the strip search necessary.

Without underestimating the need to minimize contraband in prisons, the appellate court held that "the excessively invasive nature of the search outweighed any need to conduct it in such a fashion." Therefore, it affirmed the district court's denial of summary judgment based on qualified immunity with respect to Stoudemire's strip search claim against Dunagan.

**Comment: Prison health care was provided by Correctional Medical Services during the time Stoudemire was incarcerated. However, in 2009, Michigan decided not to renew the contract with the organization. Although Michigan had accepted bids to privatize prison health care in an attempt to cut costs, it has ultimately decided to keep the provision of such services in house.** ■