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*KOSILEK V. SPENCER: GENDER IDENTITY
DISORDER IN PRISON: WHAT CONSTITUTES AN
EIGHTH AMENDMENT VIOLATION WHEN IT
COMES TO MEDICAL AND MENTAL
HEALTH TREATMENT OF INMATES*

Andrea Chiz Plyler¹

I. INTRODUCTION

What medical rights are prisoners, in the United States of America, entitled to under the Eighth Amendment? When security is compromised or public and political backlash is imminent, are constitutionally protected medical rights and treatments altered or diminished?

In *Kosilek v. Spencer*,² a Massachusetts District Court Judge entered an order requiring that the Massachusetts Department of Corrections provide “necessary” and “adequate” medical treatment to an inmate suffering from Gender Identity Disorder and that the failure to do so is a violation of the inmate’s Eighth Amendment right prohibiting cruel and unusual punishment.³ An appeal from the Commissioner of the Massachusetts Department of Corrections is anticipated in the near future.⁴

Transgender medical issues in United States prisons have been on the rise in the last decade; however, the Massachusetts District Court is the first court in the country to rule in favor of an inmate demanding a gender-reassignment procedure, while incarcerated, for the purpose of treating a severe mental illness.⁵ The decision in *Kosilek* contains an in-depth analysis of the Eighth Amendment of the United States Constitution and examines what constitutes “ade-

1. B.A., Pfeiffer University, Political Science 2009; J.D. candidate at North Carolina Central University School of Law, 2013 and a staff editor of the *Biotechnology and Pharmaceutical Law Review*.

2. *Kosilek v. Spencer*, 2012 WL 3799660 (D. Mass. Sept. 4, 2012).

3. *Id.*

4. *Id.*

5. Martha Neil, *In Landmark Ruling, Federal Judge Says Sex-Change Surgery for Murder Inmate is Medically Necessary*, ABA JOURNAL (Sept. 4, 2012), http://www.abajournal.com/news/article/in_landmark_ruling_federal_judge_says_sex-change_surgery_for_murder_inmate/.

quate care” in terms of medical needs of imprisoned persons.⁶ The *Kosilek* decision further explores whether Gender Identity Disorder, based on the severity of the diagnosis, can be treated through gender-reassignment surgery alone, as opposed to psychotherapy and hormone treatments.⁷ *Kosilek* raises the issue of how much deference and discretion is, and should be, allotted to the Department of Corrections in determining the course of action for its inmates based on security, safety, funds, and public policy.

This note will focus on the potential legal, political, and policy issues affected by the *Kosilek* decision as well as the long-term effects and consequences that the decision will have on our modern legal system. This note will also provide a factual background of the case over the past twelve years and include a historical roadmap of similar cases across the country that have ruled on transgender medical issues in the prison system. Finally, this note will explore the risks involved, benefits that could be gained, the potential impact, and possible upheaval that the *Kosilek* decision could create if it withstands its anticipated appeal. Is the *Kosilek* decision the beginning of a shift in our legal system, or does it serve merely as an outlier?

II. THE CASE

Michelle Kosilek (Kosilek), born Robert Kosilek, is an inmate and the plaintiff in this matter who brought an unprecedented suit against the Commissioner of the Massachusetts Department of Corrections (“DOC”)⁸ by seeking a government provided sex-reassignment surgery.⁹ Kosilek brought the action on the grounds that a denial of such medical treatment, to treat his mental illness of severe gender identity disorder, is a violation of his Eighth Amendment right against cruel and unusual punishment.¹⁰

Kosilek is currently serving out a life sentence, without the possibility of parole, in a Massachusetts correctional facility for the mur-

6. *Id.* at *2.

7. *Id.* at *6.

8. *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 159, 164 (2002) (Kosilek was transferred to the DOC in 1993 following his murder conviction in 1992. The original action brought by Kosilek against the Bristol County Sheriff was amended at that time to include the DOC.).

9. *Id.* at 160.

10. *Id.*

der of his wife.¹¹ Kosilek was diagnosed with Gender Identity Disorder (GID), and the DOC was provided with a report of the diagnosing doctor's findings in March of 2000.¹² Due to this diagnosed mental illness, Kosilek is suffering from "mental anguish," which has resulted in two failed suicide attempts and an attempted castration while in prison.¹³

Legal action began in 1993 when Kosilek filed a *pro se* lawsuit (*Kosilek I*) alleging that he was being "denied adequate medical care for his serious medical need in violation of the Eighth Amendment of the United States Constitution."¹⁴ In 2002, the court eventually found that "there [was a] high risk that Kosilek [would] harm himself if he [did] not receive adequate treatment for his severe mental illness."¹⁵ However, the court concluded that Kosilek failed to prove that the Commissioner of the DOC had been "deliberately indifferent" to his "serious medical need" and, thus, failed to hold that an Eighth Amendment violation had occurred.¹⁶ The court reasoned that the lack of medical treatment that Kosilek was demanding was "rooted in sincere security concerns, and in a fear of public and political criticism as well."¹⁷

Following the court's ruling in *Kosilek I*, the Massachusetts DOC began taking limited steps in recognizing and treating Kosilek's GID.¹⁸ However, in 2006, another trial (*Kosilek II*) commenced after a series of affidavits and depositions¹⁹ of medical professionals recommending treatment for Kosilek was neither followed nor adhered to by the DOC.²⁰ The issues raised in *Kosilek II* were purely based on the Eighth Amendment: (1) whether Kosilek's GID is considered a serious medical need; and (2) is a sex-reassignment procedure medically necessary as the only adequate medical treatment?

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*; See also 42 U.S.C. § 1983 (1996) (Kosilek's *pro se* action was brought pursuant to this statute.).

15. Kosilek, 221 F. Supp. 2d at 165.

16. *Id.* at 195.

17. *Id.* at 162.

18. 17 Kosilek, 2012 WL 3799660 at *22.

19. See Seil Aff., Feb. 23, 2003; Appelbaum Dep., Dec. 1, 2005; Schmidt Aff., Nov. 23, 2005; Ettner Aff., Nov. 14, 2005; Forstein Aff., Oct. 31, 2005; Brown Aff., Oct. 12, 2005; Kaufman & Kapila Aff., Oct. 7, 2005.

20. 19 Kosilek, 2012 WL 3799660 at *53.

2013]

KOSILEK V. SPENCER

59

In 2010, the DOC created a GID Treatment Committee and enacted a policy to regulate GID inmates and handle security concerns pursuant to the Commissioner's guidance.²¹ The newly-created committee "is responsible 'for reviewing the overall treatment of all GID diagnosed inmates . . . on a quarterly basis[.]'"²² The policy states:

The Treatment Plan for inmates diagnosed with GID shall not contain provisions for services that are not medically necessary for the treatment of GID within the Department. These elective or cosmetic services generally include but are not limited to:

- a. Feminization or masculinization procedures such as laser hair removal and/or electrolysis for permanent facial, chest or other body hair removal . . .
- b. Plastic surgery, including . . . rhinoplasty, tracheal shaving, facial feminization/masculinization, mastectomy . . . (FTM), and breast augmentation (MTF) . . .
- c. Genital sex reassignment surgery is prohibited as it presents overwhelming safety and security concerns in a correctional environment.²³

The policy went one step further to require a full "security review" by the GID Management and Security Committee, and requires that the final and binding decision within the DOC be made by the Commissioner.²⁴

Presiding United States District Judge, Mark L. Wolf, ruled in favor of Kosilek, holding that the Commissioner of the DOC "shall take forthwith all of the actions reasonably necessary to provide Kosilek sex reassignment surgery as promptly as possible."²⁵

III. BACKGROUND

1. Gender Identity Disorder: Treatments, Eligibility, and Potential Reclassification

"Gender identity disorder is a conflict between a person's physical gender and the gender he or she identifies as. . . Identity conflicts need to continue over time to be a gender identity disorder."²⁶ GID is defined and classified by the "Diagnostic and Statistical Manual of

21. *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 240 (2012).

22. *Id.*

23. *Id.*

24. *Id.*

25. Kosilek, 2012 WL 3799660 at *53.

26. U.S. National Library of Medicine, *Gender Identity Disorder: Transsexualism; Transgender*, A.D.A.M. MEDICAL ENCYCLOPEDIA (Feb. 13, 2012), <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0002495/>.

Mental Disorders, 4th Edition, Text Revised” (also referred to as “DSM IV TR”).²⁷ The World Professional Association for Transgender Health (“WPATH”), formally known as the Harry Benjamin International Gender Dysphoria Association, is the leader in developing the course of clinical treatment for health care professionals who treat GID through the promulgation of the “Standards of Care” (“SOC”).²⁸ There are three major “areas of therapy,” as designated by the SOC, which include “(1) hormone therapy; (2) a real-life experience living as a member of the opposite sex; and (3) sex reassignment surgery.”²⁹ There are eligibility requirements that must be fulfilled in order to begin each particular stage of therapy.³⁰

The unanswered issues that arise out of the SOC are: what constitutes a real-life experience in prison and what are the long term benefits of a sex-reassignment surgery? In *Soneeya v. Spencer*, a strikingly similar action was brought against the Commissioner of the Massachusetts DOC, alleging Eighth Amendment violations in regard to a failure to provide a sex-reassignment procedure.³¹ The Commissioner’s expert witness, Dr. Stephen Levine,³² brought an opposing opinion as to real life experience in prison.³³ Dr. Levine suggested that a sex-reassignment may never actually be “medically appropriate for a patient who has not undergone the real life experience as a free person” based on the requisite criteria needed under the SOC.³⁴ Dr. Levine further suggested that data from long-term studies is not available, and there is no data showing “positive outcomes for GID patients who have undergone sex reassignment surgery[,]” which is likely due to the fact that the majority of patients cannot be relocated

27. *Soneeya*, 851 F. Supp. 2d at 228, 231.

28. *Id.*; *See generally* World Professional Association for Transgender Health, <http://www.wpath.org>.

29. *Soneeya*, 851 F. Supp. 2d at 232; *See also* E. Coleman et al., 13 *Int’l J. Transgenderism* 165, 165-232 (2011).

30. *Soneeya*, 851 F. Supp. 2d at 232.

31. *Id.* at 235.

32. *Id.* (“Dr. Stephen Levine is a practicing clinical psychiatrist who specializes in sexuality. He is also a professor of psychiatry at Case Western Reserve University, and has written a number of scholarly articles and publications in the field of psychiatry and human sexuality. He was the chairman of the writing group that was commissioned to write the fifth version of the Harry Benjamin Standards of Care . . . [and] co-founded the Case Western Reserve University Gender Identity Clinic.”).

33. *Id.*

34. *Id.*

years after the surgery is completed.³⁵ However, Dr. Randi Kaufman of the Fenway Community Health Center of Massachusetts³⁶ followed the same position as taken by the SOC, “which indicate[s] that the evidence available shows generally positive outcomes for most patients who have sex-reassignment surgery.”³⁷

Finally, it has recently been suggested that GID, which is currently classified as DSM-IV, could be demoted to Gender Dysphoria – a condition that is no longer classified as a “disorder” under mental health, but rather a “medical diagnosis.”³⁸ The result of demoting GID to Gender Dysphoria would be to de-stigmatize and “treat it as any other medical condition involving an anatomical abnormality that can be corrected by surgery.”³⁹

2. The Eighth Amendment: The Applicable Standards

The Eighth Amendment of the United States Constitution prohibits cruel and unusual punishment.⁴⁰ The Kosilek case raises the question of what medical treatment or lack of medical treatment for inmates within the prison system implicates the Eighth Amendment? “The Constitution ‘does not mandate comfortable prisons,’⁴¹ but neither does it permit inhumane ones, and it is now settled that ‘the treatment a prisoner receives in prison . . . [is] subject to scrutiny under the Eighth Amendment.’”⁴² The United States Supreme Court further held in *Farmer v. Brennan*, that the Eighth Amendment “imposes duties on these [prison] officials, . . . [who] must ensure that inmates receive adequate food, clothing shelter, and medical care.”⁴³

In order to bring a claim for a violation of the Eighth Amendment, “a prisoner must allege acts or omissions sufficiently harmful

35. *Id.*

36. Kosilek, 2012 WL 3799660 at *24. (The Fenway Clinic is the “foremost referral center in New England for individuals with gender identity disorders.”).

37. *Soneeya*, 851 F. Supp. 2d at 235.

38. James Phillips, *Gender Identity Disorder in Prison: Depending on a Diagnosis that is Soon to Disappear?*, PSYCHIATRIC TIMES (Sept. 28, 2012), <http://www.psychiatristimes.com/gender-disorders/content/article/10168/2105073>.

39. *Id.*

40. U.S. CONST. amend. VIII.

41. *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981).

42. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 339 (1981); *Helling v. McKinney*, 509 U.S. 25, 31 (1993)).

43. *Id.*

to evidence deliberate indifference to serious medical needs.”⁴⁴ There is both a subjective and an objective prong that must be established in an Eighth Amendment claim.⁴⁵ The objective prong requires an inmate to demonstrate that “he is incarcerated under conditions posing a substantial risk of serious harm,” and the subjective prong requires that the substantial risk of harm be known by the prison official.⁴⁶ However, when prison officials refuse to render certain medical care or treatments “based on reasonable, good faith judgments balancing the inmate’s medical needs with other legitimate, penological considerations[,]” no violation will occur, regardless of whether the two prongs are met.⁴⁷

3. The Eighth Amendment: Medically Necessary and Adequate Care

The court determined that Kosilek had a serious medical need, making the requested sex-reassignment surgery medically necessary.⁴⁸ Kosilek had been diagnosed by doctors who specialize in GID—a diagnosis recognized by the medical community as well as the courts.⁴⁹ The court further held that “Kosilek is now suffering from a degree of mental anguish and that itself constitutes a serious harm that requires adequate treatment.”⁵⁰

Over the long course of this ongoing legal controversy, there have been courts across the country making parallel rulings that could have an effect on rulings to come in the *Kosilek* case.⁵¹ In 2010, the United States Tax Court made changes to what medical procedures may be classified as “cosmetic” in stating that “the evidence establishes that cross-gender hormone therapy and sex reassignment surgery are well-recognized and accepted treatments for severe GID.”⁵² The court held that GID is a disease and therefore does not fall under definition of “cosmetic surgery” as defined by the Internal Revenue

44. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

45. *Farmer*, 511 U.S. at 834, 836.

46. *Id.*

47. *Kosilek*, 2012 WL 3799660 at *11.

48. *Id.* at *33.

49. *Id.*; *See, e.g., Fields v. Smith*, 653 F.3d 550, 559 (7th Cir., 2011); *O’Donnabhain v. Comm’r.*, 134 T.C. 34, 38-40 (2010).

50. *Id.*

51. *See O’Donnabhain v. Comm’r.*, 134 T.C. 34, (2010); *Fields v. Smith*, 653 F.3d 550 (7th Cir., 2011).

52. *O’Donnabhain v. Comm’r.*, 134 T.C. 34, 70 (2010).

Code.⁵³ In determining whether GID was a ‘serious medical need,’ the court in *Kosilek* relied heavily on the 2010 United States Tax Court’s decision that stated: “Seven of the U.S. Courts of Appeals that have considered the question have concluded that severe GID or transexualism constitutes a ‘serious medical need’ for purposes of the Eighth Amendment.”⁵⁴

The SOC provides the “care acceptable to prudent professionals who treat individuals suffering from [GID].”⁵⁵ Adequate treatment and care is not required to be ideal treatment or care but must be “services that reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards.”⁵⁶ In regard to the reasonable treatment for *Kosilek*, expert witnesses at the second trial had opposing views.⁵⁷ Dr. George Brown, employed by the DOC, as well as all the doctors that testified with the exception of one, “opined that sex reassignment surgery, together with hormones and psychotherapy, is necessary to provide *Kosilek* with ‘minimally adequate and medically necessary’ care.”⁵⁸ A psychiatrist from John Hopkins University School of Medicine, Dr. Schmidt, opined that “instead of sex reassignment surgery, *Kosilek* should be provided psychotherapy and antidepressants, and be put on a ‘suicide watch’ to keep him from succeeding in killing himself.”⁵⁹ The court was ultimately persuaded by the opinions of the majority of medical professionals who testified at trial and found that adequate care of a sex-reassignment surgery was medically necessary.⁶⁰

4. Security and Safety Concerns

In *Kosilek I*, the court recognized that if there was a legitimate security concern, then the court can take such concern into considera-

53. *Id.*; *See also* 26 U.S.C. §213 (d)(9)(B) (2005).

54. *Id.* at 62; *See also* *De’Lonta v. Angelone*, 330 F.3d 630, 634 (4th Cir. 2003); *Allard v. Gomez*, 9 Fed. Appx. 793, 794 (9th Cir. 2001); *Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2nd Cir. 2000); *Brown v. Zavaras*, 63 F.3d 967, 970 (10th Cir. 1995); *Phillips v. Michigan Dept. of Corr.*, 932 F.2d 969 (6th Cir. 1991); *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988); *Meriwether v. Faulkner*, 821 F.2d 408, 411-13 (7th Cir. 1987).

55. *Kosilek*, 2012 WL 3799660 at *35.

56. *U.S. v. DeCologero*, 821 F.2d 39, 43 (1st Cir. 1987).

57. *Id.* at 37.

58. *Id.*

59. *Id.* at 38.

60. *Id.* at 41.

tion when there is a potential Eighth Amendment violation alleged.⁶¹ The court further held that “political or public criticism” is not enough to disregard a constitutional right and to rely on such would constitute a violation of the Eighth Amendment.⁶² The First Circuit Court of Appeals dealt with a similar situation regarding serious security concerns in a 2011 case, *Battista v. Clarke*.⁶³ In *Battista*, the DOC gathered and relied upon statistical data from the ‘Prison Rape Elimination Act of 2003’⁶⁴ (“PREA”), in which they argued “that the risk of sexual assault was higher . . .” causing a security breach within the prison.⁶⁵ In the present action before the court, the Commissioner of the DOC argued that “security considerations preclude providing the treatment DOC doctors have prescribed Kosilek[;]”⁶⁶ however, the court determined that the delay in Kosilek’s treatment was “pretextual” and not made in good faith.⁶⁷ DOC officials who testified at trial stated that they could maintain the safety of Kosilek by placing Kosilek in a segregated unit as a type of “protective custody.”⁶⁸

IV. ANALYSIS

The decision in the *Kosilek* case has the potential to transform the law and future decisions in a radical way. Being a pioneer in the area of GID, this ongoing legal controversy is ultimately setting the stage for the nation. Other states will be awaiting the final determination in *Kosilek* in order to anticipate similar situations arising within their own courts.

The court in *Kosilek* made many determinations regarding the necessary treatment Kosilek was entitled to receive by the DOC, and the majority of those determinations were based on the opinions of medical professionals specializing in GID or similar areas. As was noted in the *Kosilek* cases, the testimony and opinions of medical

61. *Kosilek v. Maloney*, 221 F. Supp. 2d at 162.

62. *Id.* at 157

63. *Battista v. Clarke*, 645 F.3d 449, 450 (1st Cir. 2011) (where an anatomically male prisoner brought action against officials of the Massachusetts DOC for “deliberate indifference to his medical needs” for GID).

64. National Prison Rape Statistics, Data and Research, 42 U.S.C. §15603 (2005).

65. *Battista*, 645 F.3d at 451.

66. *Kosilek*, 2012 WL 3799660 at *43.

67. *Id.* at *44.

68. *Id.* at *48.

professionals can be found to fit both sides of the argument, leaving the judge to determine not only the legal implications regarding the “adequate treatment” required, but the medical implications as well. The issue that then presents itself is: how much power and discretion, in the hands of one judge, is too much?

It is also difficult to base a decision, which has far-reaching ramifications, on changing and unstable medical classifications—classifications with potentially little statistical data. It is suggested that the medical community may demote the Diagnostic Statistical Manual’s classification of GID from a mental health disorder to the medical diagnosis of Gender Dysphoria.⁶⁹ If demoted to the classification of Gender Dysphoria, GID would no longer be considered a mental illness in the realm of psychiatry, which would likely alter the entire recommended course of treatment of GID or how it is dealt with medically.⁷⁰ An article in the *Psychiatric Times* gives an example how this diagnosis could turn into a “slippery slope:”

[Imagine] [t]he prisoner is now someone suffering from Body Dysmorphic Disorder who is convinced that his breasts are too large and make him feel like a women. He is distressed to the point of feeling suicidal over his ability to correct this defect surgically. Will we as psychiatrists testify that such surgery is the appropriate and necessary treatment for his condition? Or will we argue that such surgery is not medically necessary and qualifies merely as “cosmetic” surgery?⁷¹

In this example, Body Dysmorphic Disorder (BDD) is classified as a disorder, meaning that if GID is demoted and no longer classified as a disorder, BDD will have a “higher status as a ‘major mental illness’” as opposed to GID.⁷² With this anticipated transformation of classifications, it is essential to have more statistical data to determine the benefits and success rates of gender reassignment surgeries and treatments before courts can begin making such medical decisions.

Anticipating an appeal, the key aspect of the *Kosilek* case will be whether the DOC can present real, present, and relevant security concerns that are legitimate. At this point in *Kosilek*, the DOC has yet to present a meaningful and legitimate security concern that jeopardizes or could potentially jeopardize the safety and well-being of

69. Phillips, *supra* note 37.

70. *Id.*

71. *Id.*

72. *Id.*

the inmates and those employed by the DOC. It could be projected that an appeal may have a completely different outcome if it is found that the DOC was not “deliberately indifferent” to the medical needs of Kosilek. However, alternatively, the decision could also be affirmed without a showing of legitimate safety/security concerns on the part of the DOC.

The DOC will need to focus on the security risks that will arise before and after gender reassignment surgery; including living arrangements, escape risks, and medical risks. Once the surgery is completed, the DOC will have to determine whether to house the inmate in the male or female facility. If housed in the male prison, the question becomes: will the risk of sexual assault be an issue, more so than living in the male prison prior to surgery? Will security be breached? Would the threat of escape rise if a female inmate is allowed to reside in a male prison? Finally, with the medical attention and medication needed prior to, as well as, following the procedure, will there be a breach in the security and safety in the medical wing or within the general population? It is essential that each of these concerns is analyzed, current security measures are tested, and risks are anticipated. Upon appeal, the DOC will need to present thorough information, statistics, and collected data in order to have even the slightest chance of overturning the current decision.

V. CONCLUSION

As a shift in legal precedent begins to occur and mental health disorders and diagnoses are becoming more acceptable in the legal community, more cases similar to *Kosilek* are likely to present themselves across the country. It is essential to have a consistent and accurate basis in which to approach each of these legal controversies. This will require the medical community to have a dependable model and classification system in place upon which courts may rely. The issue at hand is only the beginning; *Kosilek* will likely set the bar for determining and approaching mental health and medical treatment within the United States prison system when treating patients suffering from GID.