

Case Nos. 19-35017 and 19-35019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADREE EDMO, AKA MASON EDMO,
Plaintiff-Appellee,
v.
IDAHO DEPARTMENT OF CORRECTION, et al.,
Defendants-Appellants
and
CORIZON, INC., et al.,
Defendants-Appellants

On Appeal from Orders of the United States District Court
For the District of Idaho
(No. 1:17-cv-00151-BLW)

**DEFENDANTS-APPELLANTS' JOINT RESPONSE BRIEF IN
OPPOSITION TO PLAINTIFF-APPELLEE'S EMERGENCY MOTION TO
MODIFY THE STAY ORDER PENDING APPEAL**

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I. Introduction

On March 20, 2019, this Court properly granted a stay of the District Court’s mandatory preliminary injunction that required Defendants to “provide Ms. Edmo gender confirmation surgery as promptly as possible and no later than six months from [December 13, 2018].” Pursuant to Ninth Circuit Rule 27-10, Ms. Edmo has now filed an emergency motion apparently seeking reconsideration and/or a modification¹ of the Court’s stay of the preliminary injunction (hereinafter “Motion to Modify”). However, Ms. Edmo’s Motion does not identify “with particularity the points of law or fact which, in [her] opinion, the Court has overlooked or misunderstood.” See Ninth Circuit Rule 27-10(a)(3). Rather, the arguments in the Motion to Modify were either raised or could have been raised in opposition to Appellants’ Motion to Stay. Instead, Ms. Edmo’s motion is attempting to reargue Appellants’ initial Motion to Stay. Thus, the Court should deny Ms. Edmo’s Motion to Modify.

II. Legal Standard

A motion to modify or reconsider an order should only be granted if the movant identifies with particularity 1) “points of law or fact overlooked by the court”

¹ Ms. Edmo never states that it is a motion for modification and, therefore, the motion should be denied since it does not specifically state the grounds upon which the motion is brought.

or 2) changes in legal or factual circumstances. *Memije v. Gonzales*, 481 F.3d 1163, 1164 (9th Cir. 2007); Ninth Circuit Rule 27-10(a)(3).

II. Argument²

Ms. Edmo's Motion to Modify should be denied for numerous reasons. First, Ms. Edmo's Motion to Modify should be denied because it fails to identify any facts or legal issues overlooked by the Court. In her Motion to Modify, Ms. Edmo argues that this Court should require Appellants to provide Ms. Edmo with a pre-operative consultation with a GCS surgeon while this appeal is pending. Ms. Edmo claims that otherwise surgery might be delayed if the Court ultimately affirms the District Court's preliminary injunction. Such a contention by Ms. Edmo is speculative. Moreover, that argument could have been raised in Ms. Edmo's opposition to Appellants' Motion to Stay, but it was not. Thus, because the Motion to Modify fails to identify any facts or legal issues that were overlooked by the Court, the Motion to Modify should be denied.

Second, Ms. Edmo's requested modification would impose significant costs on Appellants. Appellants have been able to identify only one GCS surgeon in Idaho. It is an approximately 300-mile drive from Idaho State Correctional Center, where

² This response is due at 3 p.m. Pacific Time on March 25, 2019. (Dkt. 23). On the afternoon of March 25, 2019, Ms. Edmo's counsel contacted Defendants' counsel and informed them that the Ninth Circuit Clerk's Office instructed the parties to attempt to resolve this issue on their own. The parties have not been able to come to an agreement regarding this issue at this late hour.

Ms. Edmo is housed, to the GCS surgeon's office in North Idaho. Thus, transporting Ms. Edmo to this pre-operative appointment is no easy task. Rather it will require Appellants, and consequently Idaho taxpayers, to expend significant time and resources related to a medical procedure that may never occur. In addition, providing Ms. Edmo with a surgical consultation will prematurely and unnecessarily uproot Ms. Edmo from her current housing in the Boise area for relocation to North Idaho for a single medical appointment. That expense and the corresponding logistical difficulties will be entirely avoided if Appellants prevail on appeal. Finally, contrary to Ms. Edmo's suggestions, the pre-operative consultation is quite substantive, because the consultation will likely parlay into numerous other labor intensive pre-operative requirements that should not have to be addressed at this time since the surgery has been stayed. "[T]he public interest is a factor to be strongly considered" in these circumstances. *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983).

Third, providing Ms. Edmo with a consultation with a GCS surgeon will create a significant risk that some of the legal issues presented by appellants on appeal will become moot. *See John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989). For example, Appellants contend that the Eighth Amendment does not entitle Ms. Edmo to a consultation with a GCS surgeon given the significant treatment she has already received for GD and the unanimous opinion of her mental health providers that Ms. Edmo does meet the criteria for surgery. As argued in Appellants' Opening Appeal Brief, Appellants are likely to succeed on appeal

regarding this issue, because the District Court applied the incorrect legal standard, failed to address the requirements of the Prison Litigation Reform Act, and ignored the reasoned medical judgment of Ms. Edmo's treating mental health providers. However, if the pre-surgical consultation occurs before the Court issues a decision in this case, these legal issue will likely become moot.

Fourth, Ms. Edmo has failed to demonstrate that she will be irreparably harmed absent a modification of the stay. As pointed out by Appellants multiple times in this case, Ms. Edmo delayed moving for a preliminary injunction for almost two years year after the sex reassignment surgery assessment at issue in this case and then the court allowed many months to pass before rendering a decision on Plaintiff's motion. Additionally, Ms. Edmo's expert conceded that it was absurd to consider GCS an emergent medical treatment. Moreover, Ms. Edmo's claim that without a modification of the stay GCS will be delayed is speculative. The GCS surgeon has so far accommodated the expedited timeline imposed by the District Court's preliminary injunction, despite the surgeon's busy schedule. There is no reason to think the GCS surgeon will not be similarly accommodating in the future if this Court affirms the preliminary injunction.

In conclusion, Ms. Edmo's Motion to Modify should be denied for the reasons stated herein and the record before the court.

This 25th day of March, 2019.

s/ Dylan A. Eaton

Dylan A. Eaton, ISB #7686

s/ Brady J. Hall

Brady J. Hall, ISB #7873

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing DEFENDANTS-' RESPONSE BRIEF IN OPPOSITION TO PLAINTIFF-APPELLEE'S EMERGENCY MOTION TO MODIFY THE STAY ORDER PENDING APPEAL by electronic filing on the date stated below to:

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