
Nos. 19-35017 and 19-35019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADREE EDMO (a/k/a MASON EDMO),
Plaintiff-Appellee,

vs.

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
Case No. 1:17-cv-00151-BLW

PLAINTIFF-APPELLEE'S OPPOSITION TO DEFENDANTS-APPELLANTS' JOINT MOTION TO VACATE DISTRICT COURT'S ORDER

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Federal Cases

United States Constitution

Federal Statutes

Federal Rules

INTRODUCTION

On December 13, 2018, the District Court entered an order granting Plaintiff-Appellee ("Plaintiff") Adree Edmo preliminary injunctive relief and directing Idaho Department of Correction and Corizon Defendants-Appellants ("Defendants") to take all actions reasonably necessary to provide her gender confirmation surgery as promptly as possible and no later than six months from the date of the order. D.Ct. Dkt. 149 at 45. Defendants appealed the District Court's order on January 9, 2019, filed their opening brief on March 6, 2019, and moved this Court to stay the District Court's order on March 8, 2019. Defendants have consistently taken the position in their appellate briefing that the District Court's order constituted a permanent injunction and was a final adjudication on the merits of Plaintiff's Eighth Amendment claim for failure to provide adequate medical treatment.

On April 3, 2019, Defendants moved this Court to vacate the District Court's order and dismiss the appeal as moot, contending for the first time that the District Court's December 13, 2018 order was not "final" and has expired pursuant to the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626(a)(2). Defendants also repeated the argument in their opening brief that the District Court did not making the findings required by the PLRA that the prospective relief it ordered was narrowly drawn, extends no further than necessary to correct the

harm, and is the least intrusive means necessary to correct the harm.

The District Court's December 13, 2018 Order fully comports with and satisfies the PLRA requirements for prospective relief. Defendants appealed the order as a final injunctive relief order, divesting the District Court of jurisdiction to further substantively adjudicate the core issues Defendants appealed. The District Court's order for preliminary injunctive relief remains in effect (although stayed by this Court). This Court should deny Defendants' motion to vacate and affirm the District Court's well-founded preliminary injunction order.

RELEVANT PROCEDURAL BACKGROUND

The District Court entered its order for preliminary injunctive relief on December 13, 2018. D.Ct. Dkt. 149. Defendants filed their notices of appeal on January 9, 2019, and their opening merits brief on March 6, 2019. D.Ct. Dkt. 154, 155; Dkt. 13-1. On March 8, 2019, Defendants filed an "urgent" motion in this Court requesting a stay of the District Court's order, certifying that, unless this Court stayed the District Court's order, Defendants would be irreparably harmed because they would have to comply with the District Court's order to provide Ms. Edmo gender confirmation surgery on or before June 13, 2019, without a ruling on the merits of their appeal by this Court. Dkt. 15 at v. On March 18, Defendants filed their reply in support of their stay motion, again arguing that without a stay from this Court, Defendants would be required to comply with the District Court's

order to provide Ms. Edmo gender confirmation surgery. Dkt. 18 at 1, 4-5. After this Court granted a stay of the District Court's order on March 20, 2019, Dkt. 19, Plaintiff moved for a modification of the stay. Dkt. 22. Defendants filed their opposition to Plaintiff's motion for modification on March 25, 2019. Dkt. 24. This Court granted the modification on March 29, 2019. Dkt. 30.

Defendants did not raise the issue of the purported expiration of the District Court's December 13, 2018 order in any of these briefs, even those filed after 90 days had passed from entry of that order (March 13, 2019). Rather, Defendants consistently took positions that directly contradict their new contention that the District Court's order expired on March 13, 2019.

ARGUMENT

I. The District Court's Preliminary Injunctive Relief Order Complies With the PLRA Needs-Narrowness-Intrusiveness Requirements

The District Court's order for preliminary injunctive relief satisfies the PLRA requirements that "a court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3636(a)(1)(A). As Plaintiff explained in her answering brief, the District Court specifically recognized and set forth the PLRA needs-narrowness-intrusiveness

requirements for injunctive relief in its order, D.Ct. Dkt. 149 at 31, ¶ 7, and then made extensive findings reflecting its consideration of those factors. *See* Dkt. 32-1 at 55-59.

In interpreting the PLRA requirements for ordering injunctive relief, the Ninth Circuit has focused on whether the substance of the District Court's findings reflect consideration and satisfaction of the elements set forth in the PLRA. *See Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1070 (9th Cir. 2010) ("[W]e understand the statutory language to mean that the courts must do what they have always done when determining the appropriateness of the relief ordered: consider the order as a whole."); *Gilmore v. Cal.*, 220 F.3d 987, 1008 n. 25 (9th Cir. 2000) ("We do not read this to mean that explicit findings must have been made, so long as the record, the court's decision ordering prospective relief, and relevant caselaw fairly disclose that the relief actually meets the § 3626(b)(2) narrow tailoring standard."); *accord Alloway v. Hodge*, 72 F. App'x 812, 816-17 (10th Cir. 2003) (noting that "the fundamental purpose of the PLRA sections relevant to this case is to ensure that prospective relief, in fact, is narrowly drawn, extends no further than necessary, and is the least intrusive means necessary to correct the harm, not merely to ensure that the district court uses these particular words," and that an "explicit reference" to the § 3626(a)(1)(A)'s requirements would suggest that the district court made the requisite findings). Defendants have not cited any

controlling Ninth Circuit authority interpreting the PLRA to require that a District Court use the exact "needs-narrowness-intrusiveness" words where the District Court has otherwise reflected its consideration of the PLRA standard.

In direct contrast to the instant case, the Eleventh Circuit case Defendants rely on, *United States v. Sec'y, Fla. Dep't of Corr.* ("*FDOC*"), 778 F.3d 1223, 1229 (11th Cir. 2015), considered the PLRA injunctive relief requirements where "the parties did not mention the PLRA in any of their briefs or during the hearing on the motion. And the district court did not mention the statute in its order entering the preliminary injunction or any of its later orders regarding the scope of that injunction." Based on those specific facts, the Eleventh Circuit determined that the PLRA requirements were not satisfied. Here, the District Court expressly enumerated the applicable PLRA requirements for preliminary injunctive relief when setting forth the legal standards governing its consideration of Plaintiff's motion for a preliminary injunction, and made findings that the relief ordered satisfies the PLRA requirements.

Moreover, out of an abundance of caution due to the urgency of Ms. Edmo's medical need, Plaintiff moved the District Court for an indicative ruling under Federal Rule of Civil Procedure 62.1 that the Court would modify its preliminary injunction to make the express finding that the relief satisfies the requirements of the PLRA. D.Ct. Dkt. 185. On April 9, 2019, after briefing and a hearing on

Plaintiff's motion, the District Court denied Plaintiff's motion "as unnecessary given [its] prior Memorandum Decision and Order," because the Court had, in that order, "fully considered and made findings in accordance with the applicable provision in the PLRA." Ex. A. (D.Ct. Dkt. 193, April 9, 2019 Memorandum Decision and Order) at 1, 3. The District Court cited its findings that the injunction was narrowly tailored and extended no further than necessary because it applies only to Ms. Edmo based on the particular circumstances of her case and should not be read to apply generally to all prisoners with gender dysphoria. *Id.* at 4. The Court also reiterated its determination that surgery is the least intrusive means of curing the constitutional violation because it is the only effective treatment for Ms. Edmo's gender dysphoria, and its consideration of public safety and the impact on the operations of the criminal justice system in crafting the preliminary injunction. *Id*. Consequently, the District Court's order satisfied the PLRA needs-narrowness-intrusiveness standard under Ninth Circuit law, and "went further and made findings which addressed each requirement of the statute." *Id.* at 3.

II. The District Court's Order for Preliminary Injunctive Relief Has Not Expired and Is Still in Effect

The PLRA requires that "[p]reliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection [18 U.S.C. § 3626](a)(1) for the entry of prospective

relief and makes the order final before the expiration of the 90-day period." 18 U.S.C. § 3626(a)(2). The PLRA does not define the term "final," nor specify any actions the District Court must take to make its decision final other than making the needs-narrowness-intrusiveness findings required for prospective relief.

The District Court's preliminary injunction order was final, in that it was made after an evidentiary hearing and the Court's review of extensive evidence; the Court made the requisite PLRA findings; and the Court set a date certain by which the relief ordered must be completed. *See Porter v. Wegman,* 2013 WL 3863925, *4 (E.D. Cal., July 24, 2013), *report and recommendation adopted*, 2013 WL 4815435 (E.D. Cal., Sept. 6, 2013) (finding that where PLRA findings were made, and a 90-day injunction would be insufficient to prevent the violation, and final judgment would not be entered within 90 days, court may specify longer timeframe for the injunction). The District Court also indicated in its order that Plaintiff had satisfied not only the standard for mandatory preliminary injunctive relief, but, also, for permanent injunctive relief. D.Ct. Dkt. 149 at 31, ¶ 7 n.1.

Defendants provided no explanation in their motion of what more was purportedly necessary to "finalize" the District Court's order, nor do they cite any authority for their proposition that the Court had to expressly "indicate in its December 13 Order or in any subsequent order that the December 13 Order was

final."[1] *See* Dkt. 188 at 5. To the extent that the PLRA requirement of finality could be construed to refer to entrance of a permanent injunction to replace the preliminary injunction, Defendants' argument that the District Court's order expired would also fail. First, Defendants have repeatedly taken the position in this Court that the District Court *did* enter a permanent injunction and finally adjudicate the merits of Plaintiff's Eighth Amendment claim for failure to provide medical treatment. *See* Dkt. 13-1 at 2 (framing issue on appeal as whether the district court erred "in converting the abbreviated preliminary injunction hearing to a full and final trial on the merits"); *id.* at 24 (arguing that the district court ordered "permanent and mandatory relief"); *id.* at 25-26 & 61-65 (claiming district court converted the evidentiary hearing to a final trial on the merits); *id.* at 29-30 (arguing district court issued permanent injunction and Court of Appeal should review injunction under legal standard for permanent injunction); Dkt 15 at 9 (arguing that the district court granted a permanent injunction); *id.* at 12 & 16 (claiming "district court erroneously converted the evidentiary hearing on Ms. Edmo's preliminary injunction to final trial on the merits"). This Court should

[1] In *FDOC*, the Court of Appeal noted that the district court "did not issue an order finalizing its [preliminary injunction] order," but did not address or determine in what ways a district court must make an order "final" other than by making the needs-narrowness-intrusiveness findings, which it concluded the district court in that case had not done. *See* 778 F.3d at 1228.

reject any attempt by Defendants to take one legal position in their briefing on the merits of the appeal, and then completely reverse that legal position mid-stream in the same appeal in an attempt to gain litigation advantage.[2]

Second, Defendants' filing their notices of appeal divested the District Court of jurisdiction to enter a permanent injunction regarding the same relief its preliminary injunction order addressed, and thus tolled any applicable expiration period. Once an appeal is filed, a district court does not have jurisdiction to take further substantive steps with respect to its order. *City of L.A. v. Santa Monica BayKeeper*, 254 F.3d 882, 886 (9th Cir. 2001) ("[T]he filing of a notice of interlocutory appeal divests the district court of jurisdiction over the particular issues involved in that appeal."). Accordingly, while a preliminary injunction is pending on appeal, the district court "lacks jurisdiction to modify the injunction in such manner as to 'finally adjudicate substantial rights directly involved in the appeal.'" *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1099 (9th Cir. 2002) (quoting *Newton v. Consolidated Gas Co.*, 258 U.S. 165, 177 (1922)); *see also Neary v. Padilla (In re Padilla)*, 222 F.3d 1184, 1190 (9th Cir. 2000) (voiding lower court order that "amounted to a final adjudication of the substantial rights directly involved in the appeal" because court lacked jurisdiction during pendency

[2] Defendants waited until April 3, 2019, the same date Plaintiff's answering brief was due—21 days after the purported "expiration date" of the District Court's preliminary injunction order—to raise this argument for the first time. Dkt. 31.

of appeal); *accord Petuskey v. Rampton*, 431 F.2d 378, 381 (10th Cir. 1970) (setting aside and dissolving permanent injunction entered by district court after notice of appeal filed "because of the absence of jurisdiction"). A permanent injunction is a final decision on the merits of a claim. *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 396 (1981) (in contrast to a preliminary injunction, entry of permanent injunction implies that "the parties will already have had their trial on the merits" and the court has rendered a final decision); *Kimbrough v. California*, 609 F.3d 1027, 1032 (9th Cir. 2009) (distinguishing between preliminary relief and permanent injunction, which finally adjudicates merits of claim); *Andreiu v. Ashcroft*, 253 F.3d 477, 487 (9th Cir. 2001) (Beezer, J., concurring) ("[P]reliminary injunctions are granted without a full adjudication on the merits while permanent injunctions only take effect as part of a final judgment.").

By appealing the District Court's December 13, 2018 order, Defendants stopped the clock on any applicable expiration period because they divested the District Court of jurisdiction to further adjudicate the core issues of the preliminary injunctive relief they appealed. Defendants may not use their appeal as both sword and shield to prevent the District Court from taking further action, and "then demand to be free of the injunction by virtue thereof." *Mayweathers v. Terhune*, 136 F. Supp. 2d 1152, 1154 (E.D. Cal. 2001).

/ / /

III. Even if the Preliminary Injunction Had Expired, This Court's Review of the District Court's Order Would Not Be Moot

Even if the preliminary injunction ordered by the District Court had expired under the PLRA's 90-day provision—which it has not—this would not moot Defendants' appeal or require the Court of Appeal to vacate the District Court's order. Rather, the Court of Appeal may still affirm the District Court's entry of preliminary injunctive relief. *See Mayweathers v. Newland*, 258 F.3d 930 (9th Cir. 2001) (affirming district court's granting and renewal of preliminary injunctions even after such injunctions expired pursuant to 18 U.S.C. § 3626(a)(2)). In *Mayweathers*, the Court of Appeal reviewed and affirmed the district court's entry of preliminary injunctive relief, despite expiration of the 90-day period during the pendency of the appeal.

CONCLUSION

The District Court's December 13, 2018 order fully comported with the PLRA requirements for granting preliminary injunctive relief. That order was a final preliminary injunction mandating compliance as soon as possible, and no later than six months from its issuance. The December 13, 2018 order is still in effect, albeit stayed by this Court. Defendants' arguments to the contrary are contradicted by the District Court's December 13, 2018 order, the District Court's April 9, 2019 order, and their own actions and positions on appeal. This Court

should deny Defendants' motion to vacate.

DATED: April 15, 2019

Respectfully submitted,
NATIONAL CENTER FOR
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Ex. A

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

ADREE EDMO, Plaintiff, v. IDAHO DEPARTMENT OF CORRECTION, et al., Defendants.	Case No. 1:17-cv-00151-BLW MEMORANDUM DECISION AND ORDER

INTRODUCTION

Before me is Plaintiff's Motion for Indicative Ruling Under Federal Rules of Civil Procedure 62.1 and 60(a). Dkt. 185. Plaintiff's Motion is DENIED as unnecessary given my prior Memorandum Decision and Order.

BACKGROUND

This case is currently on appeal before the United States Court of Appeals for the Ninth Circuit. Dkts. 163, 164. Plaintiff filed a motion for an indicative ruling pursuant of Federal Rules of Civil Procedure 62.1 and 60(a), asking me to make explicit findings that:

> the injunctive relief ordered … [in the Court's prior memorandum decision and order in this case] is narrowly drawn, extends no further than necessary to correct the violation of the federal right, is the least intrusive means necessary to correct the violation of the Federal right, and that there is no evidence that granting this relief will have any adverse impact on public safety or the operation of the criminal justice system.

Dkt. 185 at 2.

ANALYSIS

The Prison Litigation Reform Act ("PLRA"), as codified at 18 U.S.C. § 3626(a)(1), provides:

> In any civil action with respect to prison conditions, to the extent otherwise authorized by law, the court may enter a temporary restraining order or an order for preliminary injunctive relief. Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief.

Plaintiff, through her motion, asks me to make explicit findings indicating that the preliminary injunction I issued complies with the PLRA. Conversely, Defendants maintain that I cannot issue an indicative ruling because (1) my Memorandum Decision and Order has expired (Dkt. 188 at 4-5); (2) Plaintiff failed to properly sequence her motions (*id.* at 5-7); and (3) Plaintiff is not entitled to the relief she seeks under Rule 60(a) (*id.* at 7-11).

Having reviewed the arguments set forth by the Parties, I find that the proper course is to deny Plaintiff's motion, but not for any of the reasons urged by Defendants. Rather, denial is appropriate because my initial Memorandum Decision and Order (Dkt. 149) fully complies with the requirements of 18 U.S.C. § 3626(a)(1).

While I did not make explicit findings on the need-narrowness-intrusiveness requirement which parroted the language of the statute, nothing in its text suggests that the precise language in the statute must be employed in the decision. The Ninth Circuit so indicated in *Gilmore v. People of the State of California*, 220 F.3d 987, 1008 (9th Cir. 2000):

> We do not read this to mean that explicit findings must have been made, so long as the record, the court's decision ordering prospective relief, and relevant caselaw fairly disclose that the relief actually meets the § 3626(b)(2) narrow tailoring standard. [1]

See also Armstrong v. Schwarzenegger, 622 F.3d 1058, 1070 (9th Cir. 2010); *Pierce v. Cty. of Orange*, 761 F. Supp. 2d 915, 947 (C.D. Cal. 2011). Here, I went further than is required under the *Gilmore* standard. Rather than leave it to the appellate court to determine whether the injunction met the statute's requirements, I made explicit findings which clearly indicate that I considered and applied the narrow tailoring standard of the statute.

I began my Memorandum Decision and Order by quoting the applicable section of the PLRA in the "INJUNCTION STANDARD" section. Dkt. 149 at 31. Thus, I fully considered and made findings in accordance with the applicable provision in the PLRA. But again, I went further and made findings which addressed each requirement of the statute.

[1] Although § 3626(b)(2) is a different subsection of the PLRA, the need-narrowness-intrusiveness language is almost identical to § 3626(a)(1) and nothing in the *Gilmore* Court's decision suggests that its reasoning does not apply with equal force to § 3626(a)(1).

First, I carefully indicated that the preliminary injunction was narrowly drawn and would have no application outside of the case before me. I made clear that the injunction applies solely to Plaintiff, noting that "[the Court's] decision … [was] based upon, and limited to, the unique facts and circumstances presented by Ms. Edmo's case." *Id.* at 4. Thus, my decision could not have been more narrowly drawn, given that it applies solely to one person.

Second, the relief ordered extends no further than necessary to correct the constitutional injury Plaintiff is suffering. Again, I noted that my decision "was not intended, and should not be construed, as a general finding that all inmates suffering from gender dysphoria are entitled to gender confirmation surgery." *Id.*

Third, I found that gender confirmation surgery was the least intrusive, and in this case the *only* effective, method to treat Plaintiff's gender dysphoria. *Id.* at 25-29. I concluded "[i]f she is not provided with surgery, Ms. Edmo has indicated that she will try self-surgery again to deal with her extreme episodes of gender dysphoria." *Id.* at 28-29.

Finally, I gave full consideration to Defendants' repeated arguments that prison authorities were entitled to withhold gender confirmation surgery from Plaintiff because providing her with the surgery could create challenges in managing the prison system in Idaho. While I fully considered and appreciated that concern, I ultimately concluded that those considerations must give way to the Defendants' constitutional obligation to provide Plaintiff with the care mandated by the Eighth Amendment. Thus, I considered public safety and the impact on the operations of the criminal justice system in crafting the preliminary injunction in this case.

In short, in issuing my decision, I fully considered and applied the narrowing legal standards of 18 U.S.C. § 3626(a)(1). I see no need to offer an indicative ruling that would employ some talismanic language[2] which adds nothing to the clarity and certainty of my decision.

ORDER

IT IS HEREBY ORDERED:

1. Plaintiff's Motion for Indicative Ruling Under Federal Rules of Civil Procedure 62.1 and 60(a) (Dkt. 185) is **DENIED** as unnecessary.[3]

DATED: April 9, 2019

B. Lynn Winmill
U.S. District Court Judge

[2] I do not mean to suggest here that use of the exact words of the statute is sufficient, in and of itself, to satisfy the requirements of the PLRA. *Balla v. Idaho State Board of Corrections*, 1:81-cv-001165-BLW (D. Idaho March 20, 2019) (Dkt. 1262 at 7). Indeed, the teaching of my decisions in this case and in *Balla* is that using the exact language of the statute is neither necessary **nor** sufficient to satisfy the PLRA.

[3] I would note that if the Ninth Circuit finds that I am required to use the precise language used in the PLRA, I would have no hesitancy in following their order to do so. An amended decision including the talismanic language would be fully consistent with my intent when I issued the original Memorandum Decision and Order, and would be issued immediately upon remand if that is deemed necessary by the appellate court.