

Brady J. Hall (ISB No. 7873)

brady@melawfirm.net

Marisa S. Crecelius (ISB No. 8011)

marisa@melawfirm.net

Moore Elia Kraft & Hall, LLP

Post Office Box 6756

Boise, Idaho 83707

Telephone: (208) 336-6900

Facsimile: (208) 336-7031

Attorneys for Defendants Idaho Department of Corrections, Henry Atencio, Jeff Zmuda, Howard Keith Yordy, Richard Craig, and Rona Siegert

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

ADREE EDMO,

Plaintiffs,

vs.

IDAHO DEPARTMENT OF
CORRECTION; HENRY ATENCIO, in
his official capacity; JEFF ZMUDA, in
his official capacity; HOWARD KEITH
YORDY, in his official and individual
capacities; CORIZON, INC.; SCOTT
ELIASON; MURRAY YOUNG;
RICHARD CRAIG; RONA SIEGERT;
CATHERINE WHINNERY; AND
DOES 1-15;

Defendants.

) Case No. 1:17-cv-151-BLW

)

) **REPLY BRIEF IN SUPPORT OF IDOC**

) **DEFENDANTS' FIRST MOTION FOR**

) **DISPOSITIVE RELIEF (Dkt. 39)**

)

)

)

)

)

)

)

)

)

)

)

)

)

)

COME NOW Defendants Idaho Department of Correction (IDOC), Henry Atencio, Jeff Zmuda, Howard Keith Yordy, Richard Craig and Rona Siegert (collectively referred to as the “IDOC Defendants”), by and through their counsel of record, Moore Elia Kraft & Hall, LLP, and pursuant to District Local Rule Civ. 7.1(b)(3), hereby submit this brief in reply to *Plaintiff’s Response to IDOC Defendants’ First Motion for Dispositive Relief* (hereinafter “*Plaintiff’s Response*”) (Dkt. 44) and in support of the *IDOC Defendants’ Initial Motion for Dispositive Relief* (Dkt. 39).

1. It is undisputed Ms. Edmo failed to exhaust the Grievance Process as to several of her claims raised in this lawsuit.

Despite Plaintiff’s conclusory suggestions to the contrary (see, e.g., *Plaintiff’s Response*, pp. 6-10), the IDOC Defendants have met their burden of proving that an *available* administrative remedy existed and that Ms. Edmo *failed to exhaust* the remedy as to the following claims: (1) Claim for damages Ms. Edmo sustained as a result of her September 29, 2015 self-castration attempt; (2) Claim for damages Ms. Edmo sustained as a result of her December 31, 2016 self-castration attempt; (3) Claim for damages and/or equitable relief related to policy prohibiting Ms. Edmo from wearing women’s makeup in a male prison; (4) Claim for damages and/or equitable relief related to Ms. Edmo’s inability to legally change her name while incarcerated; and (5) Claim for damages and/or equitable relief related to the alleged failure to transfer Ms. Edmo to a women’s correctional facility. The IDOC Defendants met their burden through the *Declaration of Dana Maybon* (“*Maybon Decl.*”). (Dkt. 41, ¶¶ 3-4, 11-15 and Exhs. C and D); *Brown v. Valoff*, 422 F.3d 926, 936 (9th Cir. 2005) (setting forth the elements of a defendant’s initial burden under the failure to exhaust defense).

Having met their initial burden, the burden shifted to Ms. Edmo to bring forth evidence to the contrary. *Albino v. Baca*, 747 F.3d 1162, 1170-71 (9th Cir. 2014). However, Ms. Edmo has

come forward with no affidavits or other evidence in support of her opposition argument. To the contrary, Ms. Edmo merely suggests (without evidence) that the IDOC Grievance Process may be too general and difficult to understand, and that it may not have been available to her at times. (Dkt. 44-1, p. 2 (disputing Ms. Maybon's testimony that the Grievance Process consists of three "easy steps), p. 6 (suggesting that the Grievance Process "provides very little guidance as to the level of detail required to complete a proper grievance form.")).

Ms. Maybon's testimony regarding the availability and ease of the IDOC Grievance Process remains uncontradicted. Likewise, this Court has very recently recognized that "IDOC's [grievance] process is simple and easy to understand." *Daniels v. Blades*, 2017 WL 874567, * 2 (B. Lynn Winmill, CJ) (D. Idaho March 3, 2017). Moreover, that the Grievance Process was available to Ms. Edmo is further evidenced by the fact pointed out by Plaintiff: that "Ms. Edmo filed at least fifty individual grievances between August 12, 2014, and August 29, 2017." (Dkt. 44-1, AF 12, p. 6) (See also, Dkt. 41-3, p. 1-4)

It also remains uncontradicted that Ms. Edmo properly completed the Grievance Process on only eleven occasions between April 6, 2015 and April 6, 2017, and that none of those grievances addressed the claims the IDOC Defendants now seek to have dismissed. (*Maybon Decl.*, Dkt. 41, ¶¶ 11-15 and Exhs. C and D) Further, cases cited by Ms. Edmo in *Plaintiff's Response* (Dkt. 44, pp. 13 and 14 of 28) actually support the conclusion that Ms. Edmo was required to exhaust the Grievance Process prior to seeking claims for damages as to her specific self-harm incidents and challenges to specific IDOC policies. See, e.g., *Houser*, 2014 WL 429873, *7 (holding that plaintiff was required to specifically raise the MRSA treatment issue even though it was related to the broader failure to properly treat his hepatitis C) and *Spaude*, 2011 WL 5038922 *4 (recognizing that plaintiff exhausted the process after grieving the specific

incident of assault and requesting remedies).

Here, it is undisputed that, as to her two attempted castrations, Ms. Edmo never grieved those incidents in any manner such that the “essential purpose” of the Grievance Process could have been achieved prior to filing this lawsuit. *Spaude*, *4. (Dkt. 41, ¶¶ 11-15). Said differently, Ms. Edmo never even attempted to use the Grievance Process to (1) raise the self-castration attempts, (2) connect the self-castration attempts to an alleged failure to provide adequate medical care, and/or (3) request monetary damages or changes in treatment as a result of the self-harm incidents. (Dkt. 41, ¶¶ 13 and 14, and Exhs. C and D) Plaintiff unfairly labels Defendants’ argument as a “bizarre assertion” (Dkt. 44, p. 16 of 28), but such injury incidents are exactly what need to be exhausted pursuant to the PLRA. See, e.g., *Daniels*, *supra*, 2017 WL 874567 *2 (offender’s failure to grieve injuries sustained after an assault was “fatal” to his lawsuit seeking to obtain monetary compensation from IDOC.)

2. Ms. Edmo is precluded from seeking damages (under any of her separate legal cause of action) stemming from events that occurred two years prior to April 6, 2015.

Ms. Edmo’s one paragraph opposition argues that none of her “legal claims” are barred by the statute of limitations (Dkt. 44, p. 17 of 28). However, the IDOC Defendants only seek to have this Court enter an initial order clarifying that Ms. Edmo is precluded from claiming damages for alleged events that occurred two years prior to the filing of this lawsuit consistent with the applicable statute of limitations. (Dkt. 43, pp. 8-9) Ms. Edmo has not opposed Defendants’ request for limited relief, and she concedes that the controlling statute of limitations is two years. (Dkt. 44, p. 17 of 28). Accordingly, Ms. Edmo is barred from seeking damages for events that occurred prior to April 6, 2015 including, but not limited to, the February 2014 suicide attempt and other prior incidents from which she allegedly experienced “severe

symptoms” as referenced in her *Second Amended Complaint* (Dkt. 36, ¶¶ 8, 9, 44-45, 64, 67, 79, 88, 93, 101, 108, and 113).

3. Ms. Edmo’s Claims under the ADA should be dismissed.

Ms. Edmo’s “Fourth Claim for Relief” asserts that Gender Dysphoria is a “disability” within the meaning and scope of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, et seq. (Dkt. 36, ¶ 91). Ms. Edmo alleges that the Defendants discriminated against her based on her disability, which violates the ADA. However the clear language of the ADA and the Rehabilitation Act demonstrate that Ms. Edmo’s condition is specifically excluded from the ADA’s definition of a “disability” under the Act.

Specifically, Section 12211(b)(1) provides:

Under this chapter, the term “disability” shall not include—
 (1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

42. U.S.C. § 12211 (emphasis added).

In her *Complaint* and *First Amended Complaint*, Ms. Edmo describes her alleged disability as Gender Identity Disorder, “now known as Gender Dysphoria, a serious medical condition characterized by (1) a strong cross-gender identification, which is the desire to be, or the insistence that one is of the other gender and (2) a persistent discomfort with ones’ assigned sex or a sense of inappropriateness in the gender role of that sex...” (Dkt. 3, ¶ 1; Dkt. 25, ¶ 1). Ms. Edmo describes her condition similarly in her *Second Amended Complaint*: “Ms. Edmo has been diagnosed by IDOC with gender dysphoria (previously known as Gender Identity Disorder), a serious medical condition characterized by a strong cross-gender identification, and strong and persistent discomfort about one’s sex.” (Dkt. 36, ¶ 1). In fact, it is undisputed that Ms. Edmo’s actual diagnosis is for “gender identity disorder”.

The DSM-IV, published in 2000, previously included an entire section related to the diagnoses for “Gender Identity Disorders.” DSM-IV, p. 535, 576-582. In defining such disorders, the DSM-IV provided:

Gender Identity Disorders are characterized by strong and persistent cross-gender identification accompanied by persistent discomfort with one’s assigned sex. *Gender identity* refers to an individual’s self-perception as male or female. The term *gender dysphoria* denotes strong and persistent feelings of discomfort with one’s assigned sex, the desire to possess the body of the other sex, and the desire to be regarded by others as a member of the other sex...

Id. at p. 535 (emphasis in the original).

In 2013, the DSM-V was published, removing the section on “gender identity disorders” and adding a section on Gender Dysphoria. DSM-V, p. 451-459. Specifically, the DSM-V states, “The current term is more descriptive than the previous DSM-IV term *gender identity disorder* and focuses on dysphoria as the clinical problem, not identity per se.” DSM-V, p. 451 (emphasis in the original). The DSM-V goes on to define Gender Dysphoria as “the distress that may accompany the incongruence between one’s experienced or expressed gender and one’s assigned gender.” DSM-V, p. 451. As described by Ms. Edmo in her three Complaints, she has been diagnosed with and suffers from a condition that falls within the diagnoses of Gender Identity Disorder as it was defined in the DSM-IV. Furthermore, the DSM-IV expressly included Gender Dysphoria as a more specific term within Gender Identity Disorders. Ms. Edmo’s description of her current diagnosis does not demonstrate that her disorder is the result of any “physical impairment.” Rather, her description meets the definition of a gender identity disorder, which is not a “disability” under the ADA and the Rehabilitation Act.

While Ms. Edmo relies upon one decision by the U.S. District Court for the Eastern District of Pennsylvania in support of her argument that Gender Dysphoria is a disability under

the ADA, she has not identified any controlling authority holding that Congress intended to exclude the “more descriptive” term Gender Dysphoria from the gender identity disorders exception. Accordingly, because Ms. Edmo does not have a qualifying disability under the ADA, her ADA claims should be dismissed.

4. Ms. Edmo’s claim under the Affordable Care Act should be dismissed.

Ms. Edmo alleges that Defendants discriminated against her on the basis of sex, which is a proper claim for relief under § 1557 of the Affordable Care Act (ACA). 42 U.S.C. § 18116. The plain language of § 1557 demonstrates that the ACA did not create a new enforcement mechanism, but instead incorporated those “enforcement mechanisms provided for and available under such title VI, title IX, section 504, such Age Discrimination Act,” stating that those statutes “shall apply for purposes of violations of this subsection.” 42 U.S.C. § 18116. When determining statutory meaning, federal courts look first to the plain meaning of the text. *Transwestern Pipeline Co., LLC v. 17.19 Acres of Prop. Located in Maricopa Cty.*, 627 F.3d 1268, 1270 (9th Cir. 2010). Unless otherwise defined, courts will interpret words taking their ordinary, contemporary, common meaning. *Id.*

In support of her argument that the ACA provides an enforcement mechanism for sex discrimination claims, Ms. Edmo relies upon non-controlling U.S. District Court decisions. However, no U.S. Court of Appeals has addressed the meaning of § 1557 of the ACA as an enforcement mechanism for discrimination claims. Furthermore, there is no controlling authority interpreting § 1557 to establish a private right of action. As a result, based on the plain language of § 1557, Ms. Edmo’s claims under the ACA should be dismissed.

5. Ms. Edmo's negligence claims against the IDOC Defendants remain subject to dismissal despite the arguments in *Plaintiff's Response*.

Between Ms. Edmo's failure to comply with § 6-905 of the Idaho Tort Claims Act (ITCA), and her failure to properly set forth any specific factual assertions of negligence against the named IDOC Defendants, Ms. Edmo's "Seventh Claim for Relief" should be dismissed in its entirety as against Director Atencio, Deputy Director Zmuda, and Warden Yordy. There are simply no facts alleged in the *Second Amended Complaint* from which an inference, reasonable or otherwise, can be drawn that any of the three named Defendants had any personal participation in actions that would subject them to liability in negligence. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Nor can Defendants Atencio, Zmuda or Yordy be held liable in respondeat superior for the alleged negligent acts of other unnamed IDOC employees: none of those Defendants is a "governmental entity" as defined in the ITCA. I.C. § 6-902(3).

Further, to the extent Plaintiff seeks to sue Defendants Yordy, Atencio, and Zmuda in their "official capacities" in negligence as expressly alleged in the *Second Amended Complaint* (Dkt. 23 of 61), no such theory exists under Idaho negligence law and, regardless, those Defendants would be immune from suit in such an "official" capacity pursuant to the Eleventh Amendment. See, e.g., *Kessler v. Barowsky*, 129 Idaho 647, 655 (1997) (a suit against a state official acting in an "official capacity" is nothing more than a suit against the state); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70-71 (1989) ("a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office."); and *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100-103 (1984) (The Eleventh Amendment bars a suit against state officials when the "state is the real, substantial party in interest.")

CONCLUSION

For the foregoing reasons, the IDOC Defendants respectfully request that this Court grant the *IDOC Defendants' Initial Motion for Dispositive Relief* (Dkt. 39) and enter an order consistent with the relief requested in the motion.

DATED this 6th day of December, 2017.

Moore Elia Kraft & Hall, LLP

/s/Brady J. Hall

*Attorneys for Defendants Idaho Department of
Correction, Henry Atencio, Jeff Zmuda, Howard
Keith Yordy, Richard Craig, and Rona Siegert*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of December, 2017, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Dylan Eaton
deaton@parsonsbehle.com

J. Kevin West
kwest@parsonsbehle.com

Brady Hall
brady@melawfirm.net

Lori Rifkin
lrifkin@hadsellstormer.com

Dan Stormer
dstormer@hadsellstormer.com

Craig Durham
chd@fergusondurham.com

Deborah Ferguson
daf@fergusondurham.com

Amy Whelan
awhelan@nclrights.org

/s/Brady J. Hall