

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals**For the Seventh Circuit****Chicago, Illinois 60604**

Submitted July 24, 2023*

Decided July 25, 2023

BeforeILANA DIAMOND ROVNER, *Circuit Judge*MICHAEL Y. SCUDDER, *Circuit Judge*JOHN Z. LEE, *Circuit Judge*

No. 22-3307

JOHN H. BALSEWICZ, a.k.a. MELISSA
BALSEWICZ*Plaintiff-Appellant,**v.*KEVIN KALLAS, M.D. and CYNTHIA
OSBORNE,*Defendants-Appellees.*Appeal from the United States District
Court for the Western District of
Wisconsin.

No. 19-cv-806-wmc

William M. Conley,
*Judge.***ORDER**

Melissa Balsewicz, whose legal name is John Balsewicz, is a transgender prisoner in Wisconsin. She sued prison psychologists and officials from the Wisconsin Department of Corrections under 42 U.S.C. § 1983, alleging that they violated her First

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

and Eighth Amendment rights when they delayed her receipt of hormone therapy. The district court entered summary judgment for the defendants, and we affirm.

We review the record in the light most favorable to Balsewicz, drawing reasonable inferences in her favor. *Munson v. Newbold*, 46 F.4th 678, 681 (7th Cir. 2022). During the relevant times, Balsewicz was housed at either Waupun Correctional Institution or Wisconsin Resource Center, which is a specialized mental health facility. In 2016, Balsewicz requested hormone therapy and, after a psychological assessment, received a provisional diagnosis of gender dysphoria. Dr. Kevin Kallas, the Mental Health Director at the Department of Corrections, decided on a cautious treatment plan because of Balsewicz's unstable recent mental-health history but noted that Balsewicz should be housed in a facility appropriate for prisoners with gender dysphoria. Dr. Kallas also referred Balsewicz for consultation with a transgender expert, Cynthia Osborne.

Osborne met with Balsewicz in February 2017, and confirmed the diagnosis of gender dysphoria. Osborne reviewed Balsewicz's mental health records dated from 2012 to 2017, which described failed attempts at dialectical behavioral therapy (DBT). Because of Balsewicz's ongoing psychiatric instability, including three suicide attempts in December 2016, Osborne recommended delaying hormone therapy until Balsewicz demonstrated sustained cooperation with psychological treatment. In her report, Osborne suggested re-evaluating the suitability of hormone therapy in a year.

Osborne reviewed Balsewicz's psychiatric treatment records in early 2018 to determine if she should schedule another consultation. Since their previous meeting, Balsewicz had seen mental health providers on 13 occasions and had no further incidents of self-harm. Osborne emailed Dr. Kallas for his input and noted that Balsewicz had apparently not received regular treatment because of staffing issues, not a failure to cooperate. Osborne also mentioned that the clinical notes suggested that Balsewicz might have "filed some lawsuits," which did not "create a great context for treatment." Dr. Kallas responded that he would place Balsewicz on the list for re-evaluation.

Osborne re-evaluated Balsewicz in April 2018. In her summary of that meeting, she reported that Balsewicz had taken her recommendations seriously but noted that Balsewicz just recently had a physical fight with a peer and made threats towards staff. Osborne also noted that Balsewicz had filed two civil suits against prison officials. Osborne concluded that it would be reasonable to begin hormone treatment for Balsewicz but stated that her cooperation with treatment providers was critical to her

treatment. Based on Osborne's report, Dr. Kallas conditionally approved hormone therapy but decided to reassess Balsewicz's cooperation in a few months. After consulting psychiatric staff, Dr. Kallas approved hormone therapy for Balsewicz in September 2018.

Balsewicz sued Dr. Kallas, Osborne, and some psychological clinicians, alleging that they intentionally delayed and interfered with the hormone therapy needed to treat her gender dysphoria, at least in part to punish her for lawsuits against prison officials. The district court screened her complaint, *see* 28 U.S.C. § 1915A, and dismissed the claims against anyone who lacked the authority to approve or begin her hormone therapy. The court allowed Balsewicz to proceed with a First Amendment retaliation claim against Dr. Kallas, and an Eighth Amendment deliberate indifference claim against Osborne and Dr. Kallas. It did not recognize any pattern-or-practice or *Monell* claim in Balsewicz's allegations. *See generally Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691–92 (1978).

The parties filed cross motions for summary judgment. Balsewicz argued that the World Professional Association for Transgender Health (WPATH) Standards of Care allowed for immediate hormone treatment despite coexisting mental health concerns. Osborne responded that the standards provide that coexisting mental health concerns may not preclude hormone therapy, but they must be "reasonably well controlled" before or concurrently with gender dysphoria treatment. Dr. Kallas, in turn, argued that as an administrator, he often accepted recommendations from Osborne, a specialist.

The court entered summary judgment for the defendants and denied Balsewicz's cross-motion. The court explained that a reasonable jury could not find that Dr. Kallas and Osborne were deliberately indifferent to Balsewicz's serious medical needs or that Dr. Kallas had based his treatment decisions on his knowledge of Balsewicz's lawsuits against other prison officials. The court also noted that Balsewicz inserted a potential *Monell* claim into her briefing by asserting that the Department has a de facto policy of delaying or denying treatment for transgender prisoners. But because "it [was] far too late to introduce those claims now," the court did not address the supposed policy.

On appeal, Balsewicz contends that she raised a genuine issue of material fact about whether Dr. Kallas and Osborne inappropriately withheld hormone therapy for non-medical reasons, including her threatening of staff, fighting with peers, and specific to Dr. Kallas, filing other lawsuits. We review the summary judgment decision de novo. *Munson*, 46 F.4th at 681.

Beginning with the Eighth Amendment claims, the parties agree that Balsewicz's gender dysphoria is a serious medical condition; therefore, for her claims to survive summary judgment, she needed evidence that the defendants knew she faced a substantial risk of serious harm and disregarded it by failing to take reasonable measures to abate it. *Farmer v. Brennan*, 511 U.S. 825, 847 (1994); *Munson*, 46 F.4th at 681. Here, Balsewicz lacked evidence of either defendant's deliberate indifference.

First, Balsewicz did not raise a dispute about Osborne's state of mind in waiting to recommend hormone therapy. She argues that Osborne's recommendation that she achieve psychiatric stability before receiving hormone treatment goes against the WPATH Standards of Care, which outline criteria for hormone therapy eligibility. *See Campbell v. Kallas*, 936 F.3d 536, 538–39 (7th Cir. 2019). But, to the extent those standards matter for the purpose of an Eighth Amendment claim, Osborne acted in line with their suggestion that other significant mental health concerns be reasonably well controlled before hormone therapy begins. Balsewicz had attempted suicide three times just two months before Osborne's first evaluation of her. Osborne specifically linked the delay in hormone therapy to a need to address this urgent issue, and Balsewicz did not come forward with any evidence of a different motivation for the decision. Therefore, a reasonable jury could not conclude that Osborne acted with deliberate indifference when she recommended delay based on Balsewicz's mental health status. *Id.* at 549.

Likewise, Dr. Kallas's decision to follow Osborne's recommendation to wait a year to approve hormone therapy does not amount to deliberate indifference. There is not yet a "typical length" of time for initiating such treatment for a prisoner. *See Mitchell v. Kallas*, 895 F.3d 492, 500 (7th Cir. 2018). Much of Balsewicz's evidence for what she considers undue delay is the inconsistency of her DBT sessions, which were meant to stabilize her conditions to ready her for hormone treatment. Nothing in the record suggests that Dr. Kallas was responsible for the delayed DBT treatment sessions or otherwise ignored a known risk to Balsewicz's health. *See Munson*, 46 F.4th at 681. In any event, the missed DBT sessions did not prevent Dr. Kallas from authorizing a second consultation with Osborne. Dr. Kallas also followed up with staff members about Balsewicz's treatment, and he eventually approved hormone therapy for her, basing his final decision on her improved cooperation. On this record, no reasonable jury could find that Dr. Kallas acted with deliberate indifference. *See Wilson v. Adams*, 901 F.3d 816, 821 (7th Cir. 2018).

Next, Balsewicz's contention that Dr. Kallas delayed her treatment in retaliation for filing lawsuits against other prison officials is unsupported by the record. For her

First Amendment claim to withstand summary judgment, Balsewicz had to furnish evidence that her lawsuits were a motivating factor for Dr. Kallas's decision to defer hormone treatment. *See Manuel v. Nalley*, 966 F.3d 678, 681 (7th Cir. 2020). The only evidence that Balsewicz offers is what she considers "suspicious timing": Dr. Kallas did not approve hormone therapy after Osborne mentioned Balsewicz's legal history in both her assessments and also noted to Dr. Kallas that Balsewicz had "filed some lawsuits." This establishes Dr. Kallas's knowledge of the lawsuits, but it says nothing of his motivation. Suspicious timing alone is rarely enough to establish a retaliatory motive. *Id.* Balsewicz also had to provide evidence that she suffered a deprivation severe enough to deter future protected activity. *See Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009). Despite Osborne's references to lawsuits, Dr. Kallas instructed her to schedule a second evaluation, and he then approved the hormone therapy. Balsewicz has not shown, therefore, that Dr. Kallas deprived her of treatment or otherwise committed a retaliatory act.

In her last challenge to the summary judgment decision, Balsewicz states that, because she did not have access to an expert witness, the court unfairly determined that she could not refute medical evidence with her own opinions about her medical needs. Arguments raised for the first time on appeal are waived. *Williams v. Rajoli*, 44 F.4th 1041, 1047 (7th Cir. 2022). Balsewicz admits that she did not ask the court to provide her with expert assistance or appoint a neutral expert, so we will not address that argument in the first instance.

Finally, at screening, the district court did not improperly "ignor[e]" a claim about an unwritten policy of delay. The court was required to review Balsewicz's complaint, "identify cognizable claims," and allow only those claims that were supported by well pleaded facts to move forward. 28 U.S.C. § 1915A. The court did not identify a *Monell* claim against the defendants—all individuals sued in their personal capacities—and Balsewicz never moved to amend her complaint. She could not add claims based on new facts in her summary judgment filings, *see Anderson v. Donahoe*, 699 F.3d 989, 998 (7th Cir. 2012), and she cannot do so on appeal, *see Wagner v. Teva Pharm. USA, Inc.*, 840 F.3d 355, 359–60 (7th Cir. 2016).

AFFIRMED