UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 12-2194

MICHELLE L. KOSILEK,
Plaintiff / Appellee,

v.

LUIS S. SPENCER, Commissioner of the
Massachusetts Department of Correction,
Defendant / Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
Hon. Mark L. Wolf, U.S. District Judge

SUPPLEMENTAL BRIEF OF PLAINTIFF / APPELLEE MICHELLE LYNNE KOSILEK ON REHEARING *EN BANC*

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Preliminary Statement

Plaintiff/Appellee submits this supplemental brief in response to the Court's invitation in its February 12, 2014 order granting rehearing *en banc* and vacating the panel opinion and dissent released on January 17, 2014 and the related judgment. Kosilek does not intend this brief to replace her principal brief, but to amplify and clarify the arguments offered therein. Kosilek refers the Court to her principal brief for the Jurisdictional Statement, Statement of the Issues, Statement of the Facts, and Standard of Review.

Introduction

This appeal follows a fact-intensive, deliberate assessment by the district court into the medical needs for Michelle Kosilek and the Department of Corrections' ("DOC") response to such needs. The legal roadmap that guided the district court is not in dispute. Nor is the fact that deference must be given to the district court's factual findings and judgment calls on the application of facts to the law. Nonetheless, the DOC asks this Court to second-guess the district court's findings in urging for reversal. Equally troubling, by faulting the district court for crediting the majority of medical experts who recommended sex reassignment surgery for Kosilek, the DOC seeks judicial imprimatur to carve out this particular medical treatment from the protection afforded to prisoners by the Eighth Amendment.

This Court will not establish any new legal precedent or a conflict among the federal circuits by affirming the district court's decision. It will, however, by reversing.

Argument

I. Since The DOC's Appeal Challenges Factual Determinations By The District Court, The Standard of Review Is Deferential.

It is a fundamental principle of appellate procedure that "[l]egal issues are open to *de novo* review, factual findings are reviewed for clear error, and judgment calls by the district judge may get deference depending on the circumstances." Battista v. Clarke, 645 F.3d 449, 452 (1st Cir. 2011). Mixed questions of law and fact are evaluated on a continuum -- the more fact-intensive the question, the more deferential the review. In re IDC Clambakes, Inc., 727 F.3d 58, 64 (1st Cir. 2013). Or as Judge Boudin has explained, "In truth, the standard of review varies depending on the precise underlying issue in the mosaic of arguments and counter-arguments." Battista, 645 F.3d at 452.

In this case, the DOC's appeal challenges the factual findings that led the district court to conclude that the DOC refused to provide medically necessary treatment for a serious medical condition that could be accommodated without real security risks. Such findings are reviewed for clear error. Even if these findings ultimately led to a judgment call as to whether the facts established a violation of the Eighth Amendment, this Court reviews such determinations with deference to the district court's judgment.

There seems to be no serious dispute that Kosilek's medical need, the seriousness of her medical condition, and the security assessment[1] are findings of fact subject to clear error review. To the extent there is any real dispute about the standard of review, it may be in whether the two ultimate findings -- (1) that the DOC did not provide adequate medical care and (2) that it was deliberately indifferent to Kosilek's serious medical need -- are subject to something more akin to the pure clear error standard or something deferential but slightly less so than clear error. In other words, the question -- if any -- is about the degree of deference accorded the district court's findings, not whether or not there is deference.

Without doubt, the two findings challenged by the DOC on appeal are not pure legal questions. As to the adequacy of medical care, this Court has defined it as "services at a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards."

[1] To the extent the DOC disputes the level of review this Court should apply to the security assessment, it is not based on its characterization as an issue of law. Rather, it is based on DOC's unsupported position (Pet. at 10-11) that the trial court was required to defer to the DOC's security assessment notwithstanding the district court's finding that the DOC's stated security concerns were pretextual and, in any case, did not justify denying Kosilek the prescribed surgery. Kosilek v. Spencer, 889 F. Supp. 2d 190, 238-47 (D. Mass. 2012) (hereinafter, "Kosilek II").

United States v. DeCologero, 821 F.2d 39, 43 (1st Cir. 1987).[2] This standard requires determining the state of "modern medical science" and "prudent professional standards," findings best characterized as factual. See, e.g., Lugenbeel v. Pa. Inst. Health Sers., No. 95-CV-1167, 1996 U.S. Dist. LEXIS 10059, at *11 (N.D.N.Y. Mar. 20, 1996)(determination of adequate care is question of fact).[3]

That analysis is equally true of the deliberate indifference finding. As this Court has explained, the deliberate part of deliberate indifference establishes a "subjective framework" through which a "*factfinder* may conclude" knowledge based on the obviousness of a risk. Burell v. Hampshire Cnty., 307 F.3d 1, 8 (1st Cir. 2002) (Lynch, J.) (emphasis added). Both because of the subjectivity analysis and

[2] Other circuits are in accord. See Fernandez v. United States, 941 F.2d 1488, 1493-1494 (11th Cir. 1991) (citing DeCologero); Smith v. Jenkins, 919 F.2d 90, 93 (8th Cir. 1990) (measuring standard of care under Eighth Amendment by "professional standards"); Nasious v. Colorado, No. 09-cv-01051, 2011 U.S. Dist. LEXIS 70601, at *22 (D. Colo. Apr. 22, 2011); Austin v. Wilkinson, No. 4:01-cv-0071, 2006 U.S. Dist. LEXIS 53719, at *12 (N.D. Ohio Aug. 3, 2006); Plata v. Schwarzenegger, No. C01-1351, 2005 U.S. Dist. LEXIS 43796, at *20 n.2 (N.D. Cal. Oct. 3, 2005) (citing DeCologero); Tillery v. Owens, 719 F. Supp. 1256, 1305 (W.D. Pa. 1989).

[3] Even if the Court were to disagree with this characterization, an adequacy of medical care standard could be at most a mixed question of law and fact. Accordingly, the district court's determination of inadequacy of medical care in this case must be reviewed with deference and not *de novo*.

because of the quantum of knowledge necessary to be demonstrated, courts have expressly said that a deliberate indifference finding is a question of fact. See, e.g., Torraco v. Maloney, 923 F.2d 231, 234 (1st Cir. 1991) (state of mind issue such as deliberate indifference usually presents a jury question); Schaub v. VonWald, 638 F.3d 905, 915-16 (8th Cir. 2011) (serious medical need and deliberate indifference both questions of fact); Coleman v. Wilson, 912 F. Supp. 1282, 1316 (E.D. Cal. 1995) (same).

II. The DOC's Position Seeks To Establish A Blanket Rule Prohibiting Sex Reassignment Surgery as Medical Treatment Available to Inmates with Gender Identity Disorder and Is Inconsistent with This and Other Courts' Established Eighth Amendment Jurisprudence.

The DOC concedes several key legal and factual principles that support Kosilek and significantly narrow the scope of this Court's review: (1) GID is a serious medical need that must be treated (Pet. at 7-8); (2) Kosilek suffers from severe GID (id. at 3); (3) a majority of medical experts in this case supported the provision of sex reassignment surgery as necessary medical care for Kosilek (id. at 7); (4) the Eighth Amendment requires the provision of adequate medical care, DeCologero, 821 F.2d at 42 (1st Cir. 1987) (Pet. at 5); (5) each inmate's medical need is fact-specific (id. at 8).

Given the DOC's and Kosilek's agreement on these facts and key legal principles, the DOC's argument that the panel majority

does not comport with those of sister circuits that have considered these issues is a mystery. (Pet. at 7.) It appears that the DOC seeks to draw a hard line around sex reassignment surgery and exclude it categorically as medical care within the range of possible treatment for incarcerated persons with gender identity disorder. That argument is in conflict with established Eighth Amendment principles and must fail.[4]

The federal courts have consistently found that inflexible applications of blanket exclusionary policies that bar certain forms of treatment violate the Eighth Amendment. See Johnson v. Wright, 412 F.3d 398, 406 (2d Cir. 2005) (reflexive denial of hepatitis C treatment to a prisoner based on a policy that a particular drug could not be administered to inmates with recent history of substance abuse could constitute deliberate

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[4] Federal courts do not discriminate among medical conditions in evaluating Eighth Amendment claims. For instance, many courts have found delays in providing dental care to meet the deliberate indifference standard. See Hartsfield v. Colburn, 491 F.3d 394, 397 (8th Cir. 2007) (dental care to alleviate suffering meets the Eighth Amendment standard). Mitchell v. Liberty, No. 8-341-B-W, 2009 U.S. Dist. LEXIS 244, at *9-10 (D. Me. Jan. 5, 2009) (finding possible constitutional violation in jail's policy of refusing to provide routine dental fillings to inmates); Roy v. Wrenn, No. 07-cv-353-PB, 2008 U.S. Dist. LEXIS 19944, at *22-23 (D.N.H. Feb. 29, 2008) (deliberate indifference includes a delay in dental care that gives rise to a substantial risk of harm to the prisoner); Chambers v. Gerry, 562 F. Supp. 2d 197, 201 (D.N.H. 2007) (delayed dental care combined with knowledge of prisoner's pain demonstrates deliberate indifference); Palermo v. White, No. 08-cv-126-JL, 2008 U.S. Dist. LEXIS 80047, at *15 (D.N.H. Sep. 5, 2008) (refusal of eyeglasses constituted inadequate vision care and supported action alleging Eighth Amendment violation).

indifference since policy did not allow exceptions based on medical need); Mahan v. Plymouth Cnty. House of Corr., 64 F.3d 14, 18 n.6 (1st Cir. 1995) ("inflexible" application of prescription policy may violate Eighth Amendment); Jorden v. Farrier, 788 F.2d 1347, 1349 (8th Cir. 1986) (application of prison pain medication policies must be instituted in a manner that allows individualized assessments of need).

This requirement of individualized assessment is equally true in the context of medical care for inmates with gender identity disorder. In Fields v. Smith, 653 F.3d 550 (7th Cir. 2011), the Seventh Circuit held that a state law that prohibited consideration of sex reassignment surgery as a possible treatment for an inmate with gender identity disorder *facially* violated the Eighth Amendment.[5] In De'Lonta v. Johnson, 708 F.3d 520, 526 (4th Cir. 2013), the Fourth Circuit held that a prisoner could proceed on a deliberate indifference claim based on the prison's refusal to "evaluate [the inmate] for surgery, consistent with the Standards of Care." In Soneeya v. Spencer, 851 F. Supp. 2d 228 (D. Mass. 2012), a District of Massachusetts

[5] The DOC's attempt to distinguish Fields (Pet. at 8) as limited to the specific treatment at issue -- hormone therapy -- is disingenuous. The state law at issue in Fields prohibited the expenditure of funds for hormone therapy *or* sex reassignment surgery. Fields, 653 F.3d at 552. The Seventh Circuit, citing the standards of care, also found: "In the most severe cases [of GID], sexual reassignment surgery may be appropriate." Id. at 554.

judge similarly found that a prison policy that "removes the decision of whether sex reassignment surgery is medically indicated for any individual inmate from the considered judgment of that inmate's medical providers" violated Eighth Amendment guarantees.[6] Id. at 249.

While the DOC does not purport to argue for a blanket rule excepting sex reassignment surgery from the range of medical care available to prisoners, its position -- if accepted -- leads inexorably to this result. Kosilek's history reflects no security risks. She has been evaluated over the past ten years by five different clinicians (Drs. Forstein, Brown, Kapila, Kaufman, and Appelbaum), each of whom recommended sex

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[6] See also Allard v. Gomez, 9 Fed. Appx. 793, 795 (9th Cir. 2001)("[T]here are at least triable issues as to whether hormone therapy was denied Allard on the basis of an individualized medical evaluation or as a result of a blanket rule, the application of which constituted deliberate indifference to Allard's medical needs."); Houston v. Trella, No. 04-1393, 2006 U.S. Dist. LEXIS 68484, at *27 (D.N.J. Sept. 22, 2006)(claim that prison doctor's decision not to provide hormone therapy to prisoner with GID based not on medical reason but policy restricting provision of hormones stated viable Eighth Amendment claim); Barrett v. Coplan, 292 F. Supp. 2d 281, 286 (D.N.H. 2003)("A blanket policy that prohibits a prison's medical staff from making a medical determination of an individual inmate's medical needs and prescribing and providing adequate care to treat those needs violates the Eighth Amendment."); Brooks v. Berg, 270 F. Supp. 2d 302, 312 (N.D.N.Y. 2003), *vacated in part by* Brooks v. Berg, 289 F. Supp. 2d 286 (N.D.N.Y. 2003) ("Prison officials cannot deny transsexual inmates all medical treatment simply by referring to a prison policy which makes a seemingly arbitrary distinction between inmates who were and were not diagnosed with GID prior to incarceration.").

reassignment surgery as her minimally adequate treatment; without such surgery, "the likelihood of her experiencing serious medical consequences up to and including suicide are exceedingly high." RA 3644. As Dr. Brown put it, she is "arguably the most evaluated transsexual in history." RA 3649. She has a spotless disciplinary record and has consistently lived as a woman in an all-male facility for over ten years. There may never be another inmate who presents a more dire need for sex reassignment surgery and lower security risk. This begs the question: if not her, then who?

Because the DOC cannot point to any specific deviations by the district judge in his application of the law as compared to other circuits' approaches, it cites instead a range of cases in which courts have either dismissed complaints for medical care for gender identity disorder or directed summary judgment for the prison facility. (Pet. at 7-8.) Kosilek can point to just as many cases in which courts have denied motions to dismiss or ordered that care be provided.[7] The only thing proved by these cases is that claims under the Eighth Amendment regarding medical care for gender identity disorder are intensely fact-

[7] See, e.g., Wolfe v. Horn, 130 F. Supp. 2d 648 (E.D. Pa. 2001); Gammett v. Idaho State Bd. of Corr., No. CV05-257, 2007 U.S. Dist. LEXIS 66456 (D. Idaho Sept. 7, 2007); Phillips v. Michigan Dep't of Corr., 731 F. Supp. 792 (W.D. Mich. 1990); De'Lonta, 708 F.3d 520; Fields, 653 F.3d 550; Kothmann v. Rosario, No. 13-13166, 2014 U.S. App. LEXIS 4263 (11th Cir. March 7, 2014).

specific. It is no surprise that inmates have not met the pleading or summary judgment standards in related factual contexts -- this simply demonstrates the uniqueness of Kosilek's case. As with any medical care case under the Eighth Amendment, the standard for stating, much less proving, a claim is high. The floodgate will not open upon enforcement of the district court's order.

That said, this case presents no novel legal issues. It is a straightforward denial of medical care case in which the court heard hours of testimony, appointed and heard testimony from an independent expert, carefully considered the relevant facts, and painstakingly made factual and legal findings in support of the order it ultimately issued.

III. The District Court Did Not Err In Finding that Sex Reassignment Surgery Was Minimally Adequate Care Necessary to Treat Kosilek.

A. The District Court Was Well Within Its Discretion Not To Credit The Testimony of Court-Appointed Expert Stephen Levine, M.D.

The testimony of an expert appointed under Fed.R.Civ.P. 706 is evaluated in the same manner as the testimony of any expert. See Monolithic Power Sys. v. O2 Micro Int'l Ltd., 558 F.3d 1341, 1347 (Fed. Cir. 2009). Even when the testimony is unequivocal, "[t]he court may not rubber stamp the conclusions reached by a court-appointed expert." Gonzales v. Galvin, 151 F.3d 526, 535 (6th Cir. 1998). Rather, the court must recognize "that even an

impartial expert can be wrong, and that the impartial expert must be subjected to the same evaluation of credibility as any other witness." DeAngelis v. A. Tarricone, 151 F.R.D. 245, 247 (S.D.N.Y. 1993); Kosilek II, 889. F. Supp. 2d at 234 n. 15.

Moreover, if the record establishes a critical fact contrary to an assumption of an expert, then his or her testimony may be excluded. See Casas Office Machs. v. Mita Copystar Am., 42 F.3d 668, 681 (1st Cir. 1994) ("A district court may exclude expert testimony where it finds that the testimony has no foundation or rests on obviously incorrect assumptions or speculative evidence."); Network Commerce, Inc. v. Microsoft Corp., 422 F.3d 1353, 1361 (Fed. Cir. 2005) ("[E]xpert testimony at odds with the intrinsic evidence must be disregarded.").

When Dr. Levine testified initially that the DOC's expert Dr. Schmidt's treatment recommendation was within prudent professional standards, he did so based on two incorrect assumptions: first, that a real life experience could not occur in prison, and second, that costs could be considered in determining the course of Kosilek's treatment.[8] RA 6084-6085.

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> The Court: Why then is it your opinion that it would be consistent with the standards used by prudent professionals in the community to not offer Michelle Kosilek Sex Reassignment Surgery, but instead rely on

These assumptions were inconsistent with two unchallenged findings. First, the district court found as it had in Kosilek v. Maloney that a real life experience was possible in prison. Kosilek v. Maloney, 221 F. Supp. 2d 156, 167 (D. Mass. 2002) ("Kosilek I"); Kosilek II, 889 F. Supp. at 232.[9] Second, the court found that the cost of adequate medical care is not a legitimate reason not to provide such care to a prisoner. Kosilek I, 221 F. Supp. 2d at 182; Kosilek II, 889 F. Supp. 2d at 247 (citing case law from federal circuits). Yet Dr. Levine testified that a prudent professional would not deny sex reassignment based on medical reasons; rather, "life, reality would deny Sex Reassignment Surgery." RA 6095. In so testifying, he acknowledged that a denial of treatment for Kosilek did not result from a sound medical judgment.

> monitoring psychotherapy, hospitalization and antidepressants?
>
> The Witness: ***Because I thought there was a very important issue about the real life experience and that the people who recommended Sex Reassignment Surgery did not indicate that there was any uncertainty about that.*** (emphasis added).

Id.

[9] Even if the DOC did challenge this finding, the testimonies of Drs. Brown, Kapila, and Kaufman, combined with the plain language of the Standards of Care, provide more than adequate support for the district court's finding. See Kosilek II, 889 F. Supp. 2d at 235.

Accordingly, rather than impermissibly limit Dr. Levine's testimony, the district court merely required him to accept certain undisputed factual findings and legal principles so the court could adequately assess the credibility and accuracy of his answers consistent with factual and legal predicates already established. See, e.g., Network Commerce, 422 F.3d at 1361 ("A court should discount any expert testimony that is clearly at odds with the claim construction mandated by . . . the written record of the patent.") When Dr. Levine accepted these findings, the district court found that his opinion supported Kosilek.

Nonetheless, even if Dr. Levine stuck to his original position that Dr. Schmidt's proposed treatment was not inadequate, the district court would have had no obligation to credit his opinion over that of any other expert. "As the factfinder, it was the district court's responsibility to determine how much weight to give each expert's testimony." Omnipoint Holdings, Inc. v. City of Cranston, 586 F.3d 38, 49 (1st Cir. 2009) (Lynch, J.).

Ultimately, the district court did nothing exceptional with Dr. Levine's testimony other than perform its role as factfinder in determining its persuasive value versus the persuasiveness of the other testifying experts.

B. The District Court Did Not Err in Crediting The Opinions of The Plaintiff's Experts and The Treating Clinicians Over The Defendant's Experts.

The district court heard from five GID experts -- Drs. Brown, Kaufman, Kapila, Forstein, and Appelbaum -- who testified that sex reassignment surgery was the minimally adequate treatment for Kosilek. Drs. Kaufman and Kapila were the treating clinicians retained by the DOC's medical provider. The only experts who recommended otherwise were Dr. Schmidt and Cynthia Osborne, the experts retained by the DOC for trial.

In an appeal challenging the credibility of experts, the judge's determination withstands appellate review unless the challenged expert opinion was "inherently implausible, internally inconsistent, or critically impeached." Blue Cross & Blue Shield v. AstraZeneca Pharms. LP (In re Pharm. Indus. Average Wholesale Price Litig.), 582 F.3d 156, 181 (1st Cir. 2009). Where, even in the characterization of the DOC, a majority of the experts recommended surgery for Kosilek (Pet. at 7), the district court was well within its discretion to accept the expert majority and reject contrary testimony.

The district court had ample evidence to justify crediting Plaintiff's experts over Dr. Schmidt. As one example, the Standards of Care expressly provide that sex reassignment surgery is medically necessary in some patients; Dr. Schmidt denies this. RA 4206. Thus, it is incorrect to say that Dr.

Schmidt expressed a neutral viewpoint on sex reassignment surgery; rather his opinion diametrically opposes the Standards. (Brief of Appellant ("DOC Br.") at 33.) Further Dr. Schmidt also believed that a real life experience could not occur in prison, which was contrary to the finding of the district court. RA 4202-03.

Drs. Kapila, Kaufman, and Appelbaum all testified that Dr. Schmidt's proposed treatment was not minimally adequate. Dr. Brown, who estimated that he evaluated over 1,000 patients for GID and treated around two hundred, testified that sex reassignment surgery was the minimally adequate medical care to treat Kosilek's GID. RA 3644. There are no grounds to challenge these opinions as implausible or incoherent -- the DOC does not even attempt to do so. As such, the district court cannot be faulted for crediting them over the opinion of Dr. Schmidt. See Villegas v. Metro. Gov't of Nashville, 709 F.3d 563, 577 n. 9 (6th Cir. 2013) ("[C]ompeting expert opinions present the classic battle of the experts and it is up to a jury to evaluate what weight and credibility each expert opinion deserves.").

The district court's rejection of Dr. Schmidt's opinion is not undermined by the fact that Kosilek has received some treatment tailored to her GID. This case concerns her current medical needs. That she has received some medical care does not mean that her current needs are being adequately met. See

De'Lonta, 708 F.3d at 526 ("[J]ust because Appellees have provided De'Lonta with some treatment consistent with the GID Standards of Care, it does not follow that they have necessarily provided her with constitutionally adequate treatment."); Greeno v. Daley, 414 F.3d 645, 654 (7th Cir. 2005) (prisoner could prevail on Eighth Amendment claim with evidence that defendants "gave him a certain kind of treatment knowing that it was ineffective");[10] (See Brief of Appellee ("App. Br.") at 48-49.).

IV. The District Court Correctly Rejected The Defendant's Security Concerns.

A. Deference Afforded to Prison Officials Can Be Lost Due to Bad Faith.

The Eighth Amendment does not countenance blind deference to prison officials in regards to inmate medical care. Deference applies, as this Court explained in Battista, "so long as the balancing judgments [between conflicting demands] are within the realm of reason and ***made in good faith***." Battista, 645 F.3d at 454 (emphasis added); Mitchell v. Maynard, 80 F.3d 1433, 1438 (10th Cir. 1996) (refusing to "blindly acquiesce" to prison

[10] Moreover, the DOC has incorrectly asserted throughout this appeal that Kosilek is continuing to receive hormone therapy and hair removal. She is not. RA 57-59. The DOC stopped providing hair removal after concluding that further removal is not medically necessary for Kosilek. The district court denied without prejudice Kosilek's request in her second amended complaint for an independent evaluation regarding electrolysis. RA 59. While the subject of hair removal is not at issue in this appeal, the DOC should not be credited for treatment that it no longer provides.

officials' assertion of facts regarding security measures); Whitley v. Albers, 475 U.S. 312, 322 (1986)(deference "does not insulate from review actions taken in bad faith and for no legitimate purpose").[11] Good faith is the touchstone. Where a court finds this lacking, the "advantage of deference" is lost. Battista, 645 F.3d at 455.

B. The District Court Did Not Err in Finding that The Defendant Lost The Advantage of Deference.

After considering all the testimony and evidence, the court properly ruled that the deference owed to the DOC was lost because its security concerns were not raised in good faith. The record amply supports this conclusion. A sampling of factors that led to the court's conclusion includes: Dennehy's decision to "regroup" on the GID issue when she became commissioner, including requiring Kosilek to be reevaluated for laser hair removal although there was no medical reason for such a reevaluation, RA 1713; her decision to retain Cynthia Osborne, a supposed GID expert known to be "sympathetic" to the DOC's position, RA 3751; her testimony in June 2006 that she did not understand that UMass had recommended sex reassignment surgery

[11] As explained previously (see App. Br. at 54), the "heightened level of deference" afforded to prison officials under Whitley applies to decisions made in haste during prison riots and similar emergencies. See Johnson v. Lewis, 217 F.3d 726, 733-734 (9th Cir. 2000). Whatever deference must be afforded to the DOC here is certainly less than under Whitley.

as medically necessary, even though she had already requested the help of a security expert because, as she stated, "[o]ur medical providers . . . is [sic] supporting their consultant's recommendation for the surgery!!!!!!," RA 2609, 5379. Dennehy also testified that she would retire before allowing Kosilek's surgery. RA 5457-58.

The district court also had evidence that Commissioner Clarke did not approach Kosilek's medical needs in good faith. When it came time for him to testify about his security concerns, he had not consulted with Spencer, then the superintendent of MCI-Norfolk, where Kosilek was housed, or familiarized himself with Kosilek's disciplinary and classification records, or even her age. RA 6358-64. He acknowledged that these factors may have been relevant to his review, despite not having considered them, and that they showed fewer security risks. RA 6358, 6363. This is further evidence of the DOC's practice of addressing Kosilek's medical needs, and its ability to care for such needs, through generalizations rather than an individualized assessment.

The district court's conclusion that the DOC's stated concerns were pretextual was the culmination of a deliberate effort to avoid such a determination. As the district court noted, "special care should be exercised before judges intrude on matters of prison administration." Kosilek II, 889 F. Supp.

2d at 204. The court acted consistent with this obligation throughout the trial: the court had Commissioner Dennehy and Commissioner Clarke submit written reports regarding their security review, then heard testimony from both commissioners regarding the bases of their reports and security assessments; the court recalled several witnesses -- including Dennehy -- to offer additional testimony regarding whether their opinion had changed in light of the evidence at trial; the court also offered Commissioner Spencer the opportunity to testify regarding his security concerns, but he declined. 8/18/2011 Status Conference Tr. at 32:7-33:5. As in Battista, "the district court was far from anxious to grant the relief sought." Battista, 645 F.3d at 455.

That the record does not establish a "sinister motive" by the DOC is inconsequential.[12] It establishes a "pattern of delays, new objections substituted for old ones, misinformation and other negatives" that caused the district court to finally "conclude[]that he could not trust the DOC in this instance."

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[12] The deliberate indifference standard does not require Kosilek to establish any particular motive for the DOC's action. Thus, while the district court found that the DOC's motivation was due to political and public controversy, Kosilek II, 889 F. Supp. 2d at 246, this finding was not necessary to its determination of bad faith. Nonetheless, there was ample circumstantial evidence to support the court's finding. Id. at 246. See Lamboy-Ortiz v. Ortiz-Velez, 630 F.3d 228, 240 (1st Cir. 2010) (question of political motivation may be established through circumstantial evidence).

Battista, 645 F.3d at 455. This led the district court to closely examine the DOC's security concerns and conclude that such concerns were not reasonable.

C. Once The DOC Lost The Advantage of Deference, The District Court Had Ample Evidence To Conclude that Security Concerns Did Not Prevent Kosilek's Surgery.

Once the deference afforded to the DOC dissolved, the district court was left with ample evidence to conclude that Kosilek could be provided surgery without compromising security.

The security concerns raised by the DOC fell under two categories: transportation to and from the surgery and post-surgery housing. As to the first issue, even Commissioner Clarke acknowledged that he had "some degree of certainty" that he could safely transport Kosilek to and from the surgery. RA 6372. The record established that Kosilek was transported regularly to and from court and to and from medical appointments, and the idea that she would attempt escape when she was in the process of receiving the very treatment she had been seeking for so long was not credible. As to post-surgery housing, the evidence showed that Kosilek could be safely placed in segregated units either at MCI-Norfolk, her current prison, or at the female prison at MCI-Framingham.

The evidence also supported the finding that Kosilek could be safely placed post-surgery in the general population at MCI-Framingham. First, both Commissioner Dennehy and Commissioner

Clarke testified that if a male-to-female transsexual were arrested after receiving sex reassignment surgery, she would be placed at MCI-Framingham. RA 2331, 6437-638. Second, while the DOC expressed concern that Kosilek would upset the climate at MCI-Framingham either by becoming a threat to other inmates or a potential victim, there was ample evidence that such concerns existed with any number of inmates and were not peculiar to Kosilek.

The superintendent of MCI-Framingham, Lynn Bissonnette, testified that Kosilek's history of committing a violent crime against a woman might traumatize the inmates and make her a victim of an assault. RA 5499-5500. However, Bisonnette also testified that the prison housed several inmates convicted of crimes against children -- including rape and murder -- whose presence might traumatize the many inmates who were mothers. RA 5507-08. Despite this risk, these two classes of inmates were housed together because MCI-Framingham had policies and procedures to address conflicts between inmates. Indeed, Bissonnette testified that if Kosilek were assigned to MCI-Framingham, maximum emphasis would be placed on integrating her with the general population. RA 5510.

Although it could have, the district court did not entirely reject the DOC's security concerns regarding Kosilek's post-surgery placement at MCI-Framingham. Rather, the court found

"conflicting" testimony as to whether Kosilek's presence at MCI-Framingham would present a security risk. Kosilek II, 889 F. Supp. 2d at 244. But the court also found that the DOC had other options, including an out-of-state transfer of Kosilek, which would largely eliminate the concerns with her notoriety contributing to a security risk. Id. Clarke was the Commissioner of Corrections in the state of Washington when a post-operative transsexual, Joseph/Josephine Shanley, was transported there from New Hampshire, and the inmate's presence at the female prison in Washington created no security concerns. Id. at 244. Critically, both Commissioners Dennehy and Clarke knew of the transfer option but did not explore it -- a particularly telling inaction by Clarke considering his experience in Washington.

The foregoing evidence provides more than ample authority to support the district court's finding that the DOC's security concerns were pretextual and did not prevent the DOC from providing Kosilek's surgery. This conclusion cannot be disturbed on appeal when it derives from credibility assessments of the witnesses and the weighing of evidence, tasks solely in the province of the factfinder. See Pagán-Colón v. Walgreens of San Patricio, Inc., 697 F.3d 1, 14 (1st Cir. 2012) (factual findings related to "good faith" and "reasonableness" reviewed for clear error on appeal).

<u>Conclusion</u>

For the foregoing reasons and the reasons set forth in Brief of Appellee, this Court should affirm the district court in all respects.

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March 14, 2014

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and the Court's February 14, 2014 order because this brief contains 5,311 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and does not exceed twenty-five pages. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface using Microsoft Word 2010 and "Courier New" 12-point font.

/s/Joseph L. Sulman
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Dated: March 14, 2014

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing, and paper copies will be sent to those indicated as non-registered participants on March 14, 2014.

/s/ Joseph Sulman____________
Joseph Sulman