
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 MOTION TO SUPPLEMENT THE RECORD AND REQUEST FOR JUDICIAL NOTICE

Lori Rifkin, Esq. [S.B. #244081]
Hadsell Stormer & Renick LLP
4300 Horton Street, #15
Emeryville, CA 94608
Telephone: (626) 585-9600
Facsimile: (626) 577-7079
Email: lrifkin@hadsellstormer.com

Dan Stormer, Esq. [S.B. #101967]
Shaleen Shanbhag, Esq. [S.B. #301047]
Hadsell Stormer & Renick LLP
128 North Fair Oaks Avenue
Pasadena, California 91103
Telephone: (626) 585-9600
Facsimile: (626) 577-7079
Emails: dstormer@hadsellstormer.com
sshanbhag@hadsellstormer.com

(Counsel continued on next page)

Attorneys for Plaintiff-Appellee, ADREE EDMO

Counsel continued from previous page:

Craig Durham (ISB # 6428)
Deborah Ferguson (ISB # 5333)
FERGUSON DURHAM, PLLC
223 N. 6th Street, Suite 325
Boise, ID 83702
Telephone: 208-345-5183
Facsimile: 208-908-8663
Emails: chd@fergusondurham.com
daf@fergusondurham.com

Amy Whelan, Esq. (CA # 215675)
Julie Wilensky, Esq. (CA # 271765)
NATIONAL CENTER FOR
LESBIAN RIGHTS
870 Market Street, Suite 370
San Francisco, CA 94102
Telephone: 415-365-1338
Facsimile: 415-392-8442
Emails: awhelan@NCLRights.org
jwilensky@NCLRights.org

Attorneys for Plaintiff-Appellee, ADREE EDMO

Plaintiff-Appellee Adree Edmo ("Plaintiff") moves to supplement the excerpts of record on appeal with the District Court's April 9, 2019 Memorandum Decision and Order Denying Plaintiff's Motion for Indicative Ruling as Unnecessary. Ex. A. (D.Ct. Dkt. 193, April 9, 2019 Memorandum Decision and Order). In the alternative, Plaintiff requests that the Court take judicial notice of the April 9, 2019 Order. The District Court's Order, which was entered after Plaintiff filed her answering brief on April 3, 2019, is directly relevant to the issues before this Court and is material to Plaintiff's case.

RELEVANT PROCEDURAL BACKGROUND

The District Court entered its order for preliminary injunctive relief on December 13, 2018. D.Ct. Dkt. 149. Defendants-Appellants ("Defendants") filed their notices of appeal on January 9, 2019, and their opening brief on March 6, 2019. D.Ct. Dkt. 154, 155; Dkt. 13-1. In their opening brief, Defendants argued that the District Court did not making findings required by the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626(a)(1): 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. Dkt. 13-1 at 61 n.13.

As Plaintiff explained in her answering brief, Dkt. 32-1 at 55-61, the District Court's December 13, 2018 Order did substantively address the PLRA requirements. However, out of an abundance of caution due to the urgency of Ms.

Edmo's medical need, Plaintiff also moved the District Court for an indicative ruling under Federal Rule of Civil Procedure 62.1 that it would modify its preliminary injunction to expressly state that the relief satisfies the PLRA requirements. D.Ct. Dkt. 185. After Plaintiff filed her motion for an indicative ruling in the District Court on March 28, 2019, Defendants filed a motion on April 3, 2019 in this Court to vacate the District Court's December 13, 2018 preliminary injunction order based on the District Court's alleged failure to satisfy the PLRA injunctive relief requirements. Dkt. 31. This Court has indicated it will consider Defendants' motion to vacate alongside Defendants' appeal. Dkt. 37.

On April 9, following briefing and a hearing on Plaintiff's motion for an indicative ruling, the District Court denied the motion as unnecessary because the Court's preliminary injunction order "made findings in accordance with the applicable provision in the PLRA." Ex. A at 1, 3, 5. Plaintiff attached the District Court's April 9 Order as an exhibit to her Opposition to Defendants-Appellants' Joint Motion to Vacate the District Court's Order, Dkt. 68, Ex. A. However because the April 9 Order issued after Plaintiff filed her answering brief on April 3, 2019, Plaintiff was not able to include the Order as part of her supplemental excerpts of record before this Court.[1]

[1] Because the April 9 Order did not state that the District Court would grant Plaintiff's motion or that Plaintiff's motion raised a substantial issue, Plaintiff was not required to notify the Ninth Circuit Clerk of the Order pursuant to Fed. R. App. P. 12.1(a). However, in its Order, the District Court stated it would have "no

Pursuant to Ninth Circuit Advisory Committee Note 5 to Federal Rule of Appellate Procedure 27-1, counsel for Plaintiff contacted counsel for Defendants-Appellants prior to filing this Motion and inquired as to whether Defendants would stipulate to supplementing the excerpts of record with the April 9 Order as permitted by Federal Rule of Appellate Procedure 10(e)(2)(A). Declaration of Shaleen Shanbhag ¶ 2. Although the April 9 Order is clearly relevant and material to issues raised by Defendants in their opening brief, motion to vacate, and reply brief, Defendants refused to stipulate, necessitating the filing of this Motion. Defendants have indicated they oppose this Motion. *Id.*

ARGUMENT

I. This Court Should Permit Supplementation of the Excerpts of Record to Include the District Court's April 9 Order Because It Is Material to the Issues on Appeal

The record on appeal includes "the original papers and exhibits filed in the district court." Fed. R. App. P. 10(a)(1). The Ninth Circuit requires the parties to prepare excerpts of record for the express purpose of providing "the panel with those portions of the record necessary to reach a decision." Ninth Circuit Rule 30-1.1(a). The excerpts of record must include "any opinion, findings of fact or

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hesitancy in following [a Ninth Circuit] order" to use the precise language of the PLRA and would "immediately" issue an order on remand "if deemed necessary by the appellate court." Ex. A at 5 n.3.

conclusions of law relating to the judgment or order appealed from." Ninth Circuit Rule 30-1.4(a)(iv). Federal Rule of Appellate Procedure 10(e) gives this Court authority to supplement the appellate record if anything "material to either party" has been omitted from the record or if there are questions regarding the form or content of the record. Fed. R. App. P. 10(e)(2)-(3).

Supplementation of the appellate record is appropriate if "anything 'material to either party' [is] missing." *In re Ashley*, 903 F.2d 599, 606 n.9 (9th Cir. 1990) (quoting Fed. R. App. P. 10(e)). It is proper to permit supplementation of the record to include a district court order entered during the pendency of an appeal that relates directly to the issues raised on appeal. *Garcia*, 997 F.2d at 1278 (concluding that district court properly supplemented the appellate record under Rule 10(e) with its own order issued after appellant's opening brief was filed); *see also McKinney ex rel. NLRB v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 342 (6th Cir. 2017) (citing district court order denying motion for indicative ruling that specifically related to injunction being appealed).

The District Court's April 9, 2019 Order is material to Plaintiff's case on appeal based on the issues Defendants raised in their opening brief, their subsequent motion to vacate, and their reply brief. *See* Dkt. 13-1 at 61 n.13; Dkt. 31 at 2-7; Dkt. 74 at 29-33. The April 9 Order directly addresses Defendants' contention that the District Court did not make the required PLRA findings, and explains how the

District Court considered and made findings related to each of the PLRA injunctive relief requirements. Ex. A at 2-5. Further, the April 9 Order is an opinion relating to the order on appeal, and thus falls within the materials this Court requires to be included as excerpts of record. *See* Ninth Circuit Rule 30-1.4(a)(iv). Supplementation under Rule 10(e) is therefore appropriate. *See Garcia*, 997 F.2d at 1278; *In re Ashley*, 903 F.2d at 606 n.9.

II. This Court May Also Take Judicial Notice of the District Court's April 9 Order

In the alternative, or in addition to supplementation of the excerpts of record, Plaintiff requests that this Court take judicial notice of the District Court's April 9 Order. Judicial notice may be taken "at any stage of the proceeding." Fed. R. Evid. 201(f). The appellate court "may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned," Fed. R. Evid. 201(b), including "court filings and other matters of public record," *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006). A court must take judicial notice "if a party requests it and the court is supplied with the necessary information." Fed. R. Evid. 201(c).

This Court has taken judicial notice of district court orders issued subsequent to the filing of the appeal where the orders "may affect . . . consideration of the

various issues presented" on appeal. *Bryant v. Carleson*, 444 F.2d 353, 357 (9th Cir. 1971) (taking judicial notice of two post-judgment orders entered by the district court in addition to other district court filings), *cert. denied*, 404 U.S. 967 (1971); *see also Wilson v. Rigby*, 909 F.3d 306, 319 (9th Cir. 2018) (taking judicial notice of district court opinion not part of the record on appeal); *Benvin v. United States Dist. Court (In re Benvin)*, 791 F.3d 1096, 1104 n.2 (9th Cir. 2015) (granting motion to take judicial notice of district court order); *Dahlia v. Stehr*, 491 F. App'x 799, 800 n.1 (9th Cir. 2012) (granting request for judicial notice of records involving the same parties that affected appellate court's consideration of issues on appeal).

Because the District Court's April 9 Order will affect this Court's consideration of Defendants' argument that the District Court did not make the required PLRA findings, judicial notice of the April 9 Order is also appropriate here. *See Bryant*, 444 F.2d at 357.

CONCLUSION

For the reasons set forth above, this Court should permit Plaintiff to supplement the record on appeal with the District Court's April 9, 2019 Order, or take judicial notice of the April 9, 2019 Order.

DATED: April 26, 2019

Respectfully submitted,
Hadsell Stormer & Renick LLP

By: s/ Shaleen Shanbhag
Shaleen Shanbhag
Attorneys for Plaintiff-Appellee

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.

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DECLARATION OF SHALEEN SHANBHAG IN SUPPORT OF PLAINTIFF-APPELLEE'S MOTION TO SUPPLEMENT THE RECORD AND REQUEST FOR JUDICIAL NOTICE

Lori Rifkin, Esq. [S.B. #244081]
Hadsell Stormer & Renick LLP
4300 Horton Street, #15
Emeryville, CA 94608
Telephone: (626) 585-9600
Facsimile: (626) 577-7079
Email: lrifkin@hadsellstormer.com

Dan Stormer, Esq. [S.B. #101967]
Shaleen Shanbhag, Esq. [S.B. #301047]
Hadsell Stormer & Renick LLP
128 North Fair Oaks Avenue
Pasadena, California 91103
Telephone: (626) 585-9600
Facsimile: (626) 577-7079
Emails: dstormer@hadsellstormer.com
sshanbhag@hadsellstormer.com

(Counsel continued on next page)
Attorneys for Plaintiff-Appellee, ADREE EDMO

Counsel continued from previous page:

Craig Durham (ISB # 6428)
Deborah Ferguson (ISB # 5333)
FERGUSON DURHAM, PLLC
223 N. 6th Street, Suite 325
Boise, ID 83702
Telephone: 208-345-5183
Facsimile: 208-908-8663
Emails: chd@fergusondurham.com
daf@fergusondurham.com

Amy Whelan, Esq. (CA # 215675)
Julie Wilensky, Esq. (CA # 271765)
NATIONAL CENTER FOR
LESBIAN RIGHTS
870 Market Street, Suite 370
San Francisco, CA 94102
Telephone: 415-365-1338
Facsimile: 415-392-8442
Emails: awhelan@NCLRights.org
jwilensky@NCLRights.org

Attorneys for Plaintiff-Appellee, ADREE EDMO

DECLARATION OF SHALEEN SHANBHAG

I, Shaleen Shanbhag, hereby declare and state:

1. I am an associate at the law firm of Hadsell Stormer & Renick, LLP. I am an attorney licensed to practice law in the state of California and before this Court, and am counsel of record for plaintiffs in this action. The information contained herein is based on my personal knowledge, or upon review of files and documents generated or received and regularly maintained by my office in connection with this case. If called upon, I could testify in a court of law to the accuracy of the matters set forth herein.

2. Pursuant to Ninth Circuit Advisory Committee Note 5 to Federal Rule of Appellate Procedure 27-1, I contacted counsel for Defendants-Appellants prior to filing this Motion and inquired as to whether Defendants would stipulate to supplementing the excerpts of record with the District Court's April 9, 2019 Order as permitted by Federal Rule of Appellate Procedure 10(e)(2)(A). Defendants refused to stipulate and have indicated that they oppose this Motion.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed April 26, 2019 in Pasadena, California.

/s/ Shaleen Shanbhag
Shaleen Shanbhag