

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHELLE KOSILEK,)	
Plaintiff,)	
)	
v.)	C.A. No. 92-12820-MLW
)	
MICHAEL T. MALONEY,)	
Defendant.)	

MEMORANDUM AND ORDER

WOLF, D.J. September 11, 2003

Plaintiff Michelle Kosilek has filed a motion seeking attorney's fees and costs pursuant to 42 U.S.C. §1988 as a prevailing party in an action brought under 42 U.S.C. §1983 ("the Motion"). Defendant Michael Maloney opposes the Motion, arguing that it was not timely filed and, in any event, is not meritorious. As set forth below, the Motion is not meritorious and, therefore, it is not necessary to decide whether there is "excusable neglect" to justify its late filing.

Federal Rule of Civil Procedure 54(b)(2)(B) provides, in pertinent part, that a motion for attorney's fees "must be filed and served no later than 14 days after entry of judgment." The court entered judgment for the defendant in this case on August 28, 2002. Kosilek filed his¹ motion for attorney's fees on October 30,

¹As the court wrote in its August 28, 2002 Memorandum and Order, "[t]he court recognizes that it is painful for Kosilek to be referred to as 'he' and that courts have, at times, referred to male transsexuals as 'she.' See, e.g., Farmer v. Perrill, 275 F.3d 958 n.1 (10th Cir. 2001); Schwenk v. Hartford, 204 F.3d 1187, 1192 n.1 (9th Cir. 2000). However, this court finds that referring to Kosilek by the male pronoun is necessary to make this Memorandum as

2002. Kosilek acknowledges that the motion was not timely:

Mindful of the fact that this motion exceeds the filing deadline set forth in Federal Rule of Civil Procedure 54(d)(2)(B), Kosilek submits to the Court that this delay is not without reason. Kosilek's counsel did not initially plan to seek fees. However, despite the Court's August 28, 2002 Order, Kosilek has yet to experience even the beginnings of change in her treatment at MCI Norfolk. Sixty days following this Court's order, the Department of Corrections "is conducting a search for a clinician with experience in treating individuals with gender dysphoria", but has put no time limit on when Kosilek will be referred for treatment. . . . Counsel to Kosilek has been able to obtain only minimal information regarding the DOC's plans. Far from the negotiated settlement counsel contemplated following the Court's order, another lawsuit may well be necessary. Due to this unexpected reaction to the Court's Order, Kosilek reconsidered her original inclination not to seek fees. Accordingly, Kosilek asks the Court to use its discretion to forgive the late filing of this petition - by thirty days - pursuant to Federal Rules of Civil Procedure 6(b) and 60(b).

Pl.'s Mot. ¶6.

As Maloney argues, Rule 60(b) is not a source of relief for Kosilek with regard to the Motion. He is not seeking relief from judgment or from an order of the court. Rather, he is seeking to file a motion late. Consequently, his request is governed by Rule 6(b).

Rule 6(b) provides, in pertinent part, that "the court for cause shown may at any time in its discretion . . . upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect." "The district court is afforded great leeway in granting

clear as possible." Kosilek v. Maloney, 221 F. Supp. 2d 156, 158 n.1 (D. Mass. 2002).

or refusing enlargements and its decisions are reviewable only for abuse of that discretion." Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 584 (1st Cir. 1994) (citations omitted).

The court need not decide whether, in the particular facts of this case, Kosilek has demonstrated excusable neglect because the Motion is not meritorious. Counsel did not appear for Kosilek until 2000. See Pl.'s Reply at 3. The standards governing fee awards for work performed after April 26, 1996 in a §1983 case brought by a prisoner are set forth in the Prison Litigation Reform Act ("PLRA"), Pub. L. No. 104-134, §803(d). See Martin v. Hadix, 527 U.S. 343, 360-62 (1999); Madrid v. Gomez, 190 F.3d 990, 994-95 (9th Cir. 1999). For the reasons described below, even if Kosilek could meet the requirements for a fee award under 42 U.S.C. §1988, the PLRA does not permit fee awards for the work performed by his attorneys.

42 U.S.C. §1997e(d) (1) (A) requires that any fee be "directly and reasonably incurred in proving an actual violation of the plaintiff's rights." Kosilek did not, in this case, prove an actual violation of his rights. See Kosilek v. Maloney, 221 F. Supp. 2d 156 (D. Mass. 2002). Rather, the court found that Kosilek was not receiving adequate treatment for a serious medical need, but since Maloney's failure to provide adequate treatment was not a result of his deliberate indifference, Kosilek's Eight Amendment rights were not violated. Id. at 195. In the absence of a proven actual violation of the plaintiff's rights, fees cannot be awarded

under the PLRA. See 42 U.S.C. §1997e(d) (1) (A); Siripongs v. Davis, 282 F.3d 755, 758 (9th Cir. 2002) (finding that actual violation language of §1997e(d) (1) (A) is clear on its face).

Kosilek argues that his claims accrued prior to the PLRA's enactment. This argument was rejected by the Supreme Court in Hadix. See Hadix, 527 U.S. at 360-62. Hadix clearly established that the critical inquiry is not when a lawsuit was filed, but when work was performed. Although Kosilek correctly points out that Hadix addressed §1997e(d) (3)'s limitation on the amount of attorney's fees rather than §1997e(d) (1) (A)'s limitation on what types of work can result in a fee award, this is a distinction without a difference. Cf. Cody v. Hillard, 304 F.3d 767, 775-77 (8th Cir. 2002) (awarding attorney's fees after determining compliance with PLRA's "actual violation" standard for work performed after PLRA's effective date in a case originally filed in 1980). Applying either provision of the PLRA to work performed after the Act's effective date will not upset any reasonable expectations of the parties or the attorneys who begin representing a prisoner after the PLRA was enacted. Furthermore, Kosilek's claims for attorney's fees could not have vested until his attorneys performed the work at issue. Thus, applying the PLRA to Kosilek's request that the defendant pay those fees is not an impermissible retroactive application of the statute.

Accordingly, it is hereby ORDERED that:

1. Plaintiff Michelle Kosilek's Motion for Leave to File

