

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GEOFFREY PESCE,

Plaintiff,

Civil Action
No. 18-11972-DJC

V.

KEVIN COPPINGER, et al.,

Defendants.

November 5, 2018
3:04 p.m.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE DENISE J. CASPER

UNITED STATES DISTRICT COURT
JOHN J. MOAKLEY U.S. COURTHOUSE

1 COURTHOUSE WAY

BOSTON, MA 02210

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20 ALSO PRESENT:

21 Geoffrey Pesce, Plaintiff
22
23
24
25

P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Denise J. Casper, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, 1 Courthouse Way, Boston, Massachusetts, on November 5, 2018.)

THE CLERK: Court is in session. You may be seated. Civil action 18-11972, Pesce v. Coppinger, et al. Would counsel please state your name for the record.

MS. ROSSMAN: Good afternoon, your Honor. Jessie Rossman from the ACLU.

THE COURT: Good afternoon.

MS. VALENTI: Good afternoon, your Honor. Alexandra Valenti with Goodwin Procter.

THE COURT: Good afternoon.

MR. PESCE: Geoffrey Pesce.

MR. PFAFF: Good afternoon, your Honor. Stephen Pfaff, Louison, Costello, Condon & Pfaff for defendants Coppinger and Eastman.

THE COURT: Good afternoon, counsel.

Counsel, sir, I know we're here for the plaintiff's motion for injunctive relief. I've had a chance to review the motion papers and the opposition. I'm aware of the positions on either side, and I'm prepared to hear argument, counsel.

MS. VALENTI: Thank you, your Honor.

1 Good afternoon, your Honor. With the Court's
2 permission, I will address the likelihood of success on the
3 merits, and Ms. Rossman will address the equitable factors as
4 well as the appropriate remedy.

5 Your Honor, Mr. Pesce's opioid use disorder nearly
6 killed him. It was methadone treatment that saved his life.
7 Defendants now threaten to undo his hard-earned recovery and
8 take away his lifesaving treatment based on a policy that has
9 no basis in medical standards or modern science as applied to
10 Mr. Pesce. The effects of that policy will be to put him
11 through excruciatingly painful withdrawal, including vomiting,
12 severe diarrhea, body shakes and aches, excessive sweating and
13 dehydration, loss of sleep, and a host of other dangerous side
14 effects. He will be provided none of the three FDA-approved
15 medications for opioid use disorder for a minimum of 59 days;
16 and on the last day of his incarceration, he will receive a
17 single shot of naltrexone, a medication that we already know is
18 ineffective to treat his disorder.

19 But statistics show what happens to individuals in
20 Mr. Pesce's circumstances. He will be at a dramatically
21 increased risk of relapse, overdose, and death, both during his
22 incarceration as well as after his release.

23 The Court should grant a preliminary injunction so
24 that Mr. Pesce may continue his methadone treatment and avoid
25 these dire consequences.

1 In light of the some of the remarkable statements in
2 defendants' papers regarding the right and wrong way to treat
3 opioid use disorder in their opinion, the strength of
4 Mr. Pesce's claim under the Americans with Disabilities Act
5 became apparent, and so I will address that issue first.

6 Regarding his claim under the ADA, Mr. Pesce has shown
7 that he's likely to succeed in proving a violation of that act
8 because defendants' policy is facially discriminatory. It is
9 facially discriminatory because it rests on stereotypes about
10 the disabled rather than an individualized assessment of a
11 patient's condition.

12 THE COURT: Even in light of the fact that they appear
13 to offer some type of MAT treatment, just not methadone?

14 MS. VALENTI: Your Honor, they do not provide any
15 treatment for opioid use disorder for the entire length of
16 incarceration, and at the end of the incarceration will only
17 offer one shot of naltrexone. So it's no treatment for most of
18 the time he will be incarcerated and one shot of a medication
19 that we know in Mr. Pesce's particular case will be
20 ineffective. It is a blanket denial of the other two
21 FDA-approved medications for the treatment for opioid use
22 disorder, which are methadone and buprenorphine.

23 And defendants' argument defending the policy here
24 shows the facial discrimination. Their arguments rest on the
25 moral rather than the medical judgment that the only worthwhile

1 recovery for opioid use disorder is one that is medication or
2 opioid-free.

3 But no less an authority than the Substance Abuse and
4 Mental Health Service Administration admonishes that kind of
5 thinking. As SAMHSA's website on Medicated-Assisted Treatment
6 explains, it's a common misconception about medication-assisted
7 treatment that it just simply substitutes one drug for another.
8 And that may sound familiar to the Court because that's the
9 very same thing that defendant said to defend their policy at
10 page 5 of their opposition brief.

11 Second, defendants' policy, which treats all inmates
12 with opioid addiction the same, precludes the type of
13 independent assessment of medical needs that's required under
14 the Americans with Disabilities Act. Importantly, this blanket
15 denial of methadone treatment under a one-size-fits-all policy
16 does not apply to inmates at Middleton suffering from any other
17 chronic condition that might require another medication for
18 treatment.

19 In this way, defendants' policy is based not on
20 medical judgment or individual need but outdated and dangerous
21 misconceptions about the nature and efficacy of methadone
22 treatment for individuals with opioid use disorder.

23 For these reasons, Mr. Pesce is likely to succeed on
24 his claims under the ADA.

25 In addition and for the independent reason, Mr. Pesce

1 is likely to succeed on the merits of his Eighth Amendment
2 claim. Defendants concede that to satisfy the Eighth
3 Amendment, the treatment that will be offered to Mr. Pesce at
4 Middleton must be reasonably commensurate with modern medical
5 standards. But four doctors have unanimously offered their
6 opinion that discontinuing Mr. Pesce's methadone treatment is
7 categorically contrary to the standard of care here. Instead,
8 those physicians say that discontinuing methadone would be
9 inconsistent with sound medical practice, inhumane, and grossly
10 inappropriate.

11 Defendants have offered the testimony of no physician
12 in response to these opinions. So this is not case where we
13 have competing medical opinions --

14 THE COURT: Is that because he's already begun the
15 treatment successfully or -- and/or because it's the standard
16 of care?

17 MS. VALENTI: It's both reasons, your Honor. He has
18 already been successful on methadone. Continuing that
19 methadone is the standard of care, and in particular, in his
20 case we already know that buprenorphine, naltrexone, and
21 detoxification without medication were all unsuccessful, and so
22 the only remaining option for him is methadone which has been
23 successful.

24 So this is not a case where there are competing
25 medical opinions either of which might be reasonable, but

1 instead one where all of the evidence shows that the Essex
2 policy as it's applied to Mr. Pesce will grossly deviate from
3 the standard of care.

4 THE COURT: And, counsel, what do you say to the
5 defendants' argument about their concern -- I understand your
6 argument about sort of a blanket policy based on individualized
7 medical conditions, but what do you say to the defendants'
8 concern that all of this needs to be considered in the reality
9 of an incarceration setting in which there is, perhaps for lack
10 of a better term, a market for the drugs that could be used to
11 assist your client?

12 MS. VALENTI: Yes, your Honor. First, the security
13 concerns raised by the defendants are of a generalized nature
14 and are not particular or specific or grapple with the
15 specifics of Mr. Pesce's case.

16 So the concerns they raise do not take into account
17 the fact that Mr. Pesce is not a violent criminal, that he
18 takes methadone for his treatment, which is administered in a
19 liquid form and is particularly difficult to divert. But, more
20 importantly, they don't acknowledge that prisons across the
21 country are on a daily basis administering methadone to inmates
22 without incident, including in facilities in Massachusetts in
23 particular.

24 THE COURT: And is this part of that pilot program
25 there was some reference to?

1 MS. VALENTI: Your Honor, there is a pilot program
2 under which Franklin is offering buprenorphine treatment, but,
3 actually, for years Massachusetts has been administering
4 methadone to pregnant inmates at South Bay House of Correction
5 and at MCI Framingham, and so the security concerns don't take
6 into account there are established protocols nationwide for
7 administering methadone to inmates safely.

8 As to your Honor's point about there being a market,
9 that's all the more reason to treat opioid use disorder in
10 inmates. The records show that treating the condition, it
11 reduces the incentive for trafficking because the inmates are
12 not suffering from cravings for the opioid.

13 So Middleton will treat Mr. Pesce in contradiction to
14 unanimous medical opinion without conducting an individualized
15 assessment of his medical need. And they provide no evidence
16 that security concerns are animating the decision to deny
17 methadone treatment in Mr. Pesce's case.

18 For those reasons, Mr. Pesce is likely to succeed on
19 his claim under the Eighth Amendment.

20 I will now pass to Ms. Rossman to address the other
21 factors.

22 THE COURT: Counsel, I don't know how much it's
23 pressed or not, but what about the arguments about ripeness?

24 MS. VALENTI: Yes, your Honor. As the Court
25 recognized when it was determining how best to adjudicate our

1 motion, we cannot wait for Mr. Pesce to already be sentenced in
2 order to deal with this claim. He will be denied methadone
3 immediately upon being incarcerated, and we expect that to
4 happen at his upcoming court date on December 3rd. It's
5 just -- it would simply be too late to wait for that period of
6 time to address his claim.

7 THE COURT: Just remind me, counsel, for those who
8 practice more in state court, it's been a little while for me,
9 would it be the normal course that he would be taken into
10 custody on that occasion, or would he self-surrender, or what
11 is the likelihood of the time lag between sentence and serving
12 his sentence where we're talking about House of Corrections,
13 District Court matter?

14 MS. VALENTI: Yes, your Honor. Our understanding from
15 Mr. Pesce's criminal counsel is that he will be remanded on the
16 same day he is sentenced because there is a mandatory minimum
17 jail sentence associated with the charge.

18 THE COURT: Thank you.

19 MS. VALENTI: Good afternoon again, your Honor.

20 THE COURT: Good afternoon.

21 MS. VALENTI: As Ms. Valenti had mentioned, I'll
22 briefly address the equitable factors and appropriate relief.

23 When it comes to irreparable harm, his case is
24 presenting a matter of life and death. We're not simply
25 talking about the pain that is associated with forced

1 withdrawal, although that is excruciating. Methadone is saving
2 Mr. Pesce's life. He was an active user for many years. As
3 you heard, he tried Suboxone, Naltrexone, and detoxification,
4 none of which were able to treat his disease. He overdosed
5 multiple times, including three times within a span of just 48
6 hours, and this incident was what motivated him to enter the
7 methadone program that changed his life.

8 Mr. Pesce's treating physician, Dr. Yuasa, has
9 determined that it is still medically necessary to provide this
10 methadone treatment to Mr. Pesce, and that he is at a high risk
11 of relapse, overdose, and death, both during his time in
12 incarceration and afterwards, if he's forced off of this
13 treatment.

14 The defendants have not put forward --

15 THE COURT: Even presuming no access to the drug he
16 was abusing?

17 MS. ROSSMAN: Yes, your Honor. In part because what
18 we know from the defendants' own statements is that there is a
19 market for illicit drugs that is present in the facility. And
20 then, of course, once Mr. Pesce is released, even if he was on
21 Vivitrol, which, again, we understand does not work in his
22 case, it would require a period of time before he could be
23 ramped back up on the methadone treatment that we know is
24 necessary to treat his condition. During that period of time
25 he would be exceedingly vulnerable to relapse, and we know that

1 month period immediately after incarceration is a time when
2 individuals can be most vulnerable.

3 It's also undisputed on this record that the
4 defendants' proposed alternative is not medically appropriate
5 for Mr. Pesce. Again, not one doctor has said that it's within
6 the medical standard of care to forcibly remove someone from
7 methadone treatment that is effectively treating their opioid
8 use disorder, provide no medication-assisted treatment for an
9 arbitrary period of time that is set by a length of sentence
10 rather than medical need, and then provide a single shot of
11 naltrexone upon release.

12 Defendants did not provide any declarations from the
13 doctors within their own facility, and the medical
14 professionals who did submit declarations were conspicuously
15 absent on this core issue in the case.

16 Instead you have doctor after doctor on the record
17 saying that the defendants' practice would violate the medical
18 standard of care for Mr. Pesce, and that violation has real
19 consequences. We're talking about that high risk of relapse
20 and overdose, not just when he is released, but, again, while
21 he is incarcerated where there would be no access, and it's
22 undisputed, no access to medication-assisted treatment. He
23 would be in an active state of relapse where his brain disorder
24 would cause uncontrollable urges for opioids, and, again, the
25 defendants have said that that is accessible in an illicit

1 market within their facility.

2 Just in 2017, ten individuals overdosed while they
3 were in the defendants' custody. And it's because we're
4 talking about that kind of risk that this case presents an
5 irreparable harm on the highest order.

6 THE COURT: In the defendants' custody in Essex, the
7 defendants' custody in Middleton?

8 MS. ROSSMAN: Based on the defendants' own papers, it
9 simply said that it's in their custody. So it's not clear that
10 all of those overdoses occurred within the Middleton facility.
11 But, again, we know, based on their own submissions, that they
12 are concerned about individuals having access to illicit drugs
13 while they are housed in the Middleton facility itself.

14 In addition to this irreparable harm, your Honor, the
15 balancing of equities also support providing injunctive relief
16 because the undisputed record is that the defendants can safely
17 and securely provide this medically necessary treatment to
18 Mr. Pesce.

19 The relief that Mr. Pesce is requesting is both doable
20 and flexible. The best evidence that the defendants can
21 provide this methadone treatment are that jails and prisons are
22 already providing it, as Ms. Valenti suggested, throughout the
23 country, from Rikers to Rhode Island and right here in
24 Massachusetts.

25 And even without obtaining their own independent

1 license to administer methadone, there's a variety of methods
2 that facilities have used to administer this medically
3 necessary medication. Some bring outside providers into the
4 facility to administer the methadone on site, others transport
5 individuals to a clinic on a weekly or a daily basis to get
6 their dosing.

7 What's important to highlight is that Mr. Pesce is not
8 trying to dictate the particular method the defendants provide
9 this methadone. Instead, he's seeking an order that would
10 require them to provide this medically necessary treatment but
11 maintain their flexibility to determine the method that works
12 for them to do so, and that could be modeled on the settlement
13 agreement that was recently entered in that State v. Smith case
14 coming out of Maine, which is referenced in our papers, that
15 followed that exact framework.

16 The only argument that the defendants are making to
17 the contrary in light of this dispute -- undisputed record are
18 these generalized safety and security concerns which are
19 inapplicable to the particular kind of treatment that we're
20 talking about here, again, that's liquid methadone.

21 Their arguments don't make sense when you apply them
22 to the treatment that Mr. Pesce is seeking, and that, again, is
23 because they cannot provide a single example or even
24 explanation of how methadone specifically can lead to security
25 concerns or diversion concerns. Again, it's in a liquid form.

1 We know that that is particularly difficult to divert.
2 Dr. MacDonald in his declaration describes well-established
3 protocols that can help minimize that already very small risk.
4 In Dr. MacDonald's experience administering methadone at Rikers
5 and in his conversations with treatment programs throughout the
6 country, he does not know of a single program that provides
7 methadone that has been shut down because of diversion or
8 security concerns. And that is echoed in Dr. Walley's
9 declaration from right here in Massachusetts where he's been
10 providing methadone treatment for over seven years to the women
11 at South Bay. And in his experience there has not been a
12 single safety, security, or diversion risk that has occurred.
13 In fact, the evidence that is coming out of Rhode Island, which
14 has incorporated medication-assisted treatment of all three
15 FDA-approved medications throughout their system, what we see
16 is that it actually decreases drug trafficking within the
17 facilities and decreases disciplinary issues. And the
18 defendants do not provide any evidence to rebut that record.

19 As a result, it is necessary and appropriate to issue
20 an order that will maintain the flexibility of the defendants
21 to determine how they will provide this methadone treatment but
22 require them to somehow do so to keep Mr. Pesce alive while he
23 is in their custody.

24 THE COURT: And the relief you're seeking is applying
25 only as your client as I understand it.

1 MS. ROSSMAN: That's correct, your Honor.

2 THE COURT: In these other matters that you referred
3 to at other facilities, was the adoption of this treatment as a
4 standard of care or was it in regards to specific defendants?

5 MS. ROSSMAN: With respect --

6 THE COURT: Understanding that the two overlap, but --

7 MS. ROSSMAN: With respect to Maine, for example, your
8 Honor, in that instance, the settlement agreement that was
9 reached was with respect to an individual, a particular
10 individual for whom it was medically necessary to continue
11 their particular form of medication-assisted treatment. There
12 it was buprenorphine.

13 When you're talking about places like in Massachusetts
14 right here at South Bay, that is something that women who are
15 pregnant and incarcerated at South Bay are provided the
16 opportunity to continue their methadone treatment throughout
17 the period of their pregnancy and incarceration because that is
18 the uniform medical standard of care.

19 THE COURT: Thank you.

20 Counsel, I'll hear from you.

21 MR. PFAFF: Thank you, your Honor.

22 Good afternoon, once again. Stephen Pfaff for
23 defendants Coppinger and Eastman.

24 THE COURT: Good afternoon.

25 MR. PFAFF: Your Honor, if in fact the methadone

1 treatment program that my sisters wish to convince the Court is
2 the right one, if in fact it is the standard of care, why is it
3 then for the last 30 years the treatment program in place at
4 the Essex County Sheriff's Department, based on the
5 accountability training program model, as I suggested to you
6 and gave you on page 10 of my memorandum, the Valle affidavit
7 supporting same? If the standard of care is methadone, why did
8 the DHH just recently give the Essex County Sheriff's
9 Department \$1.5 million grant to continue the program that in
10 fact they've had in place for the last 30 years? Why is it --
11 and this is not in my brief but you may have seen this on TV
12 just the other day -- why is it that Sheriff Koutoujian in
13 Middlesex County has just received national acclaim for what he
14 calls the MATADOR, M-A-T-A-D-O-R, program in Middlesex County,
15 modeled exactly on the Essex County Sheriff Department's
16 program of accountability, training, program model? If that's
17 the case, Judge, if methadone treatment, MAT, methadone opioid
18 treatment is the case, why is it the legislature then passed a
19 bill in August of this year waiting to get information after
20 implementation of the program, which won't begin until
21 September of next year, why did they not pass a piece of
22 legislation that said, Let's have all correctional facilities
23 in Massachusetts immediately go to methadone treatment?
24 There's a reason for that.

25 The reason is the Essex County Sheriff's Department

1 program, your Honor, is a highly successful one, it has been
2 for the last 13 (sic.) years. There have been over 13,000
3 graduates, if you will, or individuals treated in that program
4 who have successfully completed the program.

5 THE COURT: Counsel, that's for some reason why I
6 asked my last question to counsel. I understand your position
7 about all that I think lots of facilities are trying to do in
8 light of this opioid epidemic that's affecting not just
9 prisoners but lots of people, but I guess in light of the
10 particularized record before me about what this particular
11 petitioner needs from a medical standpoint from medical
12 professionals, what is the facility's response to that?
13 Meaning, understanding that programmatically perhaps the shift
14 has not entirely happened in regards to correctional
15 institutions, but presumably they don't all have the record I
16 now have before me about Mr. Pesce's condition.

17 MR. PFAFF: I think your Honor is referring to the
18 fact that he's failed two previous programs through treatment.

19 THE COURT: In regards to methadone, in regards to
20 methadone.

21 MR. PFAFF: Well, the fact that he's failed two
22 previous programs, there's no indication as to whether or not
23 he's actually completed a program, your Honor.

24 Here at the jail there's -- there are protocols and
25 programs in place, there's assistance 24/7 with respect to him

1 getting through the detoxification process. The first step
2 here, you get evaluated when you come in the door, you go to
3 detoxification, counseling, programming, community services
4 after you're released, and part of the MAT is in fact Vivitrol
5 on your last day of incarceration.

6 That program has been effective, Judge. That program
7 has been effective for the last 30 years. And what I get from
8 plaintiff's argument and their paper here is effectively such
9 that methadone is somewhat of a better treatment, it's the best
10 treatment, it's the oncoming treatment, it's what you need to
11 do. But I remind the Court that's not the standard for
12 injunctive relief, your Honor. Nobody inside this rail, nobody
13 arguing before you, and certainly not the Court, is in any
14 position it make a judgment as to whether or not this program
15 is a better medical program or this program is a better medical
16 program.

17 The standard for you, and this is something that the
18 plaintiffs cannot overcome, Judge, but the standard for you
19 under the Eighth Amendment is whether or not the treatment
20 program in place at the Essex County Sheriff's Department has
21 been so inadequate as to contribute to unnecessary and wanton
22 infliction of pain or to be repugnant to the conscience of
23 mankind. They don't meet that standard, Judge, with respect to
24 the Eighth Amendment; they don't meet it with respect to the
25 ADA because we do have reasonable accommodation.

1 What we have in place is a practice that's been
2 recognized nationally, a practice that's been recognized by
3 recent grant money, and -- but also a recognition, I say to
4 you, Judge, by the legislature that something different may be
5 coming, that there may be something else that correctional
6 facilities should explore, and that program will be put in
7 place next September, the results of that program will be
8 manifested the following September --

9 THE COURT: Again, is this about the pilot program
10 that there's been some reference to?

11 MR. PFAFF: It is, right.

12 There are certain requirements in the pilot program,
13 your Honor, that need to be in place. There has to be some
14 sort of infrastructure placed in there. And there are
15 protocols and requirements in the legislation, to wit, one of
16 them, uniform guidelines to ensure the safety and security of
17 correctional facility personnel and people in the custody of
18 the facility during the administration of medication-assisted
19 treatment and behavioral health counseling.

20 Let me talk about that just for a minute, if I might.

21 The plaintiff -- the plaintiff's argument here is that
22 I am not a violent person, and you need to treat me with
23 methadone here.

24 Now, with no protocols in place for methadone
25 treatment, it's not so much -- it's the plaintiff's safety

1 clearly that the Essex county Sheriff's Department has in mind,
2 because if he's somebody who is going to be taken out to get
3 methadone or he's somebody who is going to have methadone
4 brought in, he's a risk for other inmates in there. And this
5 has all been laid out in the affidavit of defendant Eastman.
6 He's at risk at harm with respect to that. And other inmates
7 can be put at risk, because if methadone is brought into the
8 facility, that means there's a potential, a potential for that
9 methadone to be diverted, for that methadone to go some place
10 where it shouldn't go.

11 THE COURT: What do you say to your sister's argument
12 that the risk, that risk, the security risk, seems to be a
13 generalized risk and not something that's been specified or
14 identified.

15 MR. PFAFF: Well, I disagree with that, your Honor.
16 There are specific references to how illegal drugs can get in
17 the facility in the Eastman affidavit. I don't know how more
18 specific you can be with Eastman's recitation that in fact
19 illegal drugs can get in through -- hidden in an inmate's
20 body --

21 THE COURT: No, but I thought you were talking about
22 in regards to the use of methadone as opposed to illegal drugs.

23 MR. PFAFF: Well, if he's -- if the inmate -- the
24 plaintiff is using methadone inside the jail, your Honor,
25 because it's being supplied to him there through some sort of

1 program, that makes him at risk for other inmates who want that
2 methadone and want to get at it illegally. The same risk is --
3 the risk is the same if he's being transported out to a
4 facility at a clinic as well --

5 THE COURT: Well, isn't it the case with most
6 medications, that they're administered in the health unit?

7 MR. PFAFF: They are administered in the health unit,
8 Judge, but --

9 THE COURT: Okay.

10 MR. PFAFF: -- we're talking an opioid here, and that
11 puts it in a different class than when you say "most
12 medications."

13 Right now there are no facilities in Massachusetts
14 that supply methadone to male inmates. There are no protocols
15 in place for technical medical assistance, no guidelines in
16 place as to how to bring this opioid into the facility or how
17 do you take somebody out of the facility to get to it.

18 The legislature contemplated the difficulty with
19 respect to putting in infrastructure, policies, and procedures.
20 They allowed five correctional facilities to put into place, as
21 of next year, those protocols, those policies, those guidelines
22 to address all the concerns that -- including safety -- that
23 come up when you have to bring opioids into a jail facility.

24 I have cited case law with respect to how this does
25 not rise to an Eighth Amendment violation, your Honor, and I

1 have cited case law as to how this does not rise to an ADA
2 violation. There is no constitutional right to methadone.

3 There is a reasonable procedure, a reasonable
4 accommodation in place right now at the Essex County Sheriff's
5 Department that for 30 years has been functioning dramatically
6 well with respect to inmates' treatment, when an inmate is
7 addicted to something. That must be worth something, your
8 Honor.

9 THE COURT: And what -- just turning back to the ADA
10 claim, what is -- and, counsel, I'll go back to your papers if
11 it's cited there -- but what's the best case you cite to for
12 the idea that someone with an undisputed -- what I think is
13 undisputed -- medical condition identifies a medication, and
14 the denial of that would not be an ADA violation?

15 (Pause.)

16 THE COURT: Counsel, if it's in your papers, I can
17 certainly go back.

18 MR. PFAFF: It is, your Honor.

19 The issue would be much easier for, your Honor, if
20 there is no such treatment program in place at the Essex County
21 facility, or if the program was simply, as the plaintiffs
22 originally tried to make it in their complaint and in their
23 motion.

24 It's not as if the plaintiff is getting locked up and
25 thrown into a cell and they're throwing away the key and

1 they're leaving him there for X amount of time until he comes
2 off his high and is completely detoxed. The program in place
3 is recognized nationally. I've given you the current
4 affidavit. The program in place allows an individual to detox
5 but with the assistance of what they call "comfort drugs."

6 Mr. Pesce is going to be no different than any other
7 inmate who has come through the program addicted, who comes in,
8 is evaluated, is attended to, is provided with numerous comfort
9 drugs, is watched 24/7 around the clock.

10 And then the whole idea, Judge -- because this is the
11 accountability module that Valle has offered -- is to get the
12 individual off opioids for the rest of his life. I mean, if
13 you look right now with respect to the plaintiff, I mean, the
14 treatment program that he's on now with methadone apparently
15 hasn't worked too well because he is -- the District Court
16 proceedings I think manifest that. He's -- apparently, an OUI
17 while he was on the methadone treatment program and then
18 driving without -- driving with a revoked license. So I don't
19 see how that particular program has worked well for the
20 plaintiff. And the program in place at the Essex County
21 Sheriff's Department places some sort of accountability on the
22 inmate. It doesn't allow him to simply glide through, if you
23 will. He has to participate. He has to get involved in
24 counseling. He has to understand the therapies behind it. He
25 has to go to the community outreach programs that are in place

1 once he leaves with the whole idea that at some point in time,
2 the plaintiff, like 13,000 other individuals who have come
3 through the program in the last 30 years, will lead an
4 opioid-free life outside of the jail.

5 THE COURT: Thank you.

6 Counsel, I'll give you a brief moment to respond if
7 you'd like to.

8 MS. ROSSMAN: Your Honor, briefly just to address a
9 factual matter to make very clear Mr. Pesce does not have an
10 OUI during his time on the methadone, that he has been in
11 methadone treatment. That stemmed from a period of time from
12 before he was on his treatment --

13 THE COURT: Which led to not having the license.

14 MS. ROSSMAN: That is correct, your Honor.

15 THE COURT: And he got pulled over because he was
16 driving without a license or after suspension.

17 MS. ROSSMAN: That is correct, your Honor, in order to
18 get his methadone treatment for that day. And he has accepted
19 responsibility for that. He has been in complete compliance,
20 and Dr. Yuasa's declaration, his treating physician, is clear
21 on that with his methadone treatment program for the entire
22 period of time that he has been on it.

23 The defendants' argument is based on moral judgment,
24 not medical judgment, and this is incorrect for two reasons for
25 this Court to rely on. First, this is based on an outdated

1 understanding of how we treat opioid use disorder. Just last
2 year the FDA commissioner explained in his testimony to
3 Congress that individuals who are on all three forms of the
4 FDA-approved medication assisted treatment, including
5 methadone, are not addicted to drugs. These are individuals
6 who he said are role models in the fight against the opioid
7 crisis, and that is reflected not just in the FDA's own
8 approval of these medications, but also SAMHSA, which
9 encourages facilities to provide not just one but all three of
10 the FDA-approved medications. While it has provided this grant
11 for Vivitrol to the facility -- and we agree that Vivitrol may
12 work for some individuals -- it makes that recommendation
13 because not every drug works for every person. And for
14 Mr. Pesce, the medication that his own medical doctors deem
15 medically necessary, and this is undisputed, is methadone.

16 I want to make very clear that this is not a case
17 about preference. This is matter of preserving Mr. Pesce's
18 life. And the statement that no one on this record has said
19 what is the better treatment in this case for Mr. Pesce simply
20 is not true.

21 Plaintiffs are not asking you to trust the attorneys
22 who are speaking in this case, we're asking to you trust the
23 doctors who have submitted unanimous declarations in this case
24 that what is medically necessary for Mr. Pesce is methadone
25 treatment. And the proposal from the defendants to remove him

1 from an effective methadone treatment for his opioid use
2 disorder will place him at a high risk of relapse, overdose,
3 and death and would violate the medical standard of care.

4 The final point I want to make, your Honor, has to do
5 with the declarations and what is in the record with respect to
6 what the safety and security concerns are and what the
7 protocols are in place.

8 Mr. Pfaff stated that he doesn't know how more
9 specific defendant Eastman's declaration could be with respect
10 to his generalized concerns about safety and security risks. I
11 would direct your Honor to paragraphs 14 and 15 of that
12 declaration. Could be more specific, your Honor, by actually
13 stating how methadone in liquid form could lead to any of those
14 safety and security risks that are listed there. Methadone is
15 not listed once in those declarations with respect to what
16 those safety and security concerns are, your Honor, and that's
17 important because those diversion examples, like placing
18 something in clothing or cheeking, which is the practice where
19 an individual would put a pill in their mouth, simply cannot
20 happen --

21 THE COURT: Sadly, I know what cheeking is.

22 MS. ROSSMAN: I'm sure your Honor does.

23 -- simply cannot happen when you're talking about
24 liquid methadone. And the protocols that are in place already
25 exist, your Honor, right here in Massachusetts. I direct you

1 to paragraph 8 of Dr. Walley's declaration where he speaks to
2 the protocols in place for the administration of methadone both
3 at South Bay and at his clinic in South Bay. The women are
4 transported to his clinic once a week, and they receive the
5 remainder of their methadone treatments while they are in their
6 facility itself. And there are protocols in place, which
7 includes having the individual inmate drink a glass -- drink
8 the methadone, excuse me, then drink a glass of water following
9 that liquid, and finally speak to the nurse. And they have
10 found that that is an effective and well-established protocol
11 that is in place to avoid diversion.

12 We also can point your Honor to the Franklin County
13 House of Corrections protocols for the administration of
14 buprenorphine, which in some essence is actually more easy to
15 divert because it is not in liquid form, and still, Franklin
16 County has managed to put into place well-established protocols
17 to avoid that risk. Those same things could happen here.

18 We're not speaking about a constitutional right, your
19 Honor, to methadone across the board. There is a
20 constitutional right to medically necessary treatment, and for
21 Mr. Pesce, the record is unequivocal that that's methadone.

22 THE COURT: Thank you.

23 Counsel, on both sides -- counsel, did you rise to
24 address something?

25 MR. PFAFF: I did, your Honor.

1 THE COURT: Briefly.

2 MR. PFAFF: I will, your Honor.

3 This is not a moral judgment, Judge. This is a
4 judgment based on 30 years of success up at the Essex County
5 Sheriff's Department.

6 And I understand also my sister's argument that
7 methadone being a liquid, these incidences in paragraphs 14 and
8 15 of Eastman's affidavit thereby would not apply.

9 Number one, I understand methadone can also be given
10 in pill form, Judge, so that would apply to paragraphs 14 and
11 15. But if the Court would like, I'd be more than happy to
12 supplement Eastman's affidavit with some more particularized
13 instances of liquid drugs coming into the facility. I'm more
14 than happy to do that.

15 Final point, Judge, you asked this earlier, this
16 applies directly to Mr. Pesce, I think was your question to my
17 sister. The Court has to know, and I know they do, that this
18 is a bigger picture situation other than Mr. Pesce here, that
19 your Honor's ruling is going to effect not only Mr. Pesce but
20 it's going to effect any other individuals who come as
21 incarcerated inmates to the Essex County Sheriff's Department
22 with a script.

23 So at the end of the day, your Honor, you have to ask
24 yourself if they've met the Eighth Amendment standard or the
25 ADA, and I suggest to you the program in place there is not one

1 that's inadequate and inflicts unnecessary and wanton pain.
2 I'd ask that you deny the motion.

3 THE COURT: Okay, thank you.

4 Counsel, I appreciate the arguments on either side.
5 The papers and the arguments today have given me a fair amount
6 to think about, which I will. I'm also aware of the time frame
7 here given the December 3rd court date, so I will certainly
8 keep that in mind as I deliberate further over the motion.

9 Thank you.

10 THE CLERK: All rise.

11 (Court adjourned at 3:44 p.m.)

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13 CERTIFICATION

14 I certify that the foregoing is a correct transcript
15 of the record of proceedings in the above-entitled matter to
16 the best of my skill and ability.

17
18
19
20 /s/Debra M. Joyce
21 Debra M. Joyce, RMR, CRR, FCRR
22 Official Court Reporter

November 11, 2018
Date

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