

# Don't Waive Goodbye to Your Right to a Jury Trial

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The Seventh Amendment guarantees a right to a jury trial in cases arising under the common law. But even that fundamental right can be waived if not properly asserted in the lower court.

The Ninth Circuit reminded us of that recently in *Edmo v. Corizon, Inc.*, No. 19-35017, 2019 WL 3978329 (9th Cir. Aug. 23, 2019). There, a transgendered woman suffering from gender dysphoria was an inmate in an Idaho prison. Although she had complained to the prison's medical staff about the distress she was under and had previously tried to self-castrate, the prison denied her request for gender confirmation surgery. After a second attempt at self-castration, she sued the Idaho Department of Correction and the company running the prison, among others. She then moved for a preliminary injunction that would allow her to get the surgery, and after four months of discovery, the court held a three-day evidentiary hearing.

The district court found that the defendants were deliberately indifferent to the inmate's gender dysphoria in violation of the Eighth Amendment and that she was entitled to the gender confirmation surgery. The court noted that "the nature of the relief requested in this case, coupled with the extensive evidence presented by the parties over a 3-day evidentiary hearing, [may have] effectively converted these proceedings into a final trial on the merits of the plaintiff's request for permanent injunctive relief." On appeal, the defendants argued that the district court had improperly converted the evidentiary hearing on a preliminary injunction into a final trial on the merits and that, consequently, the defendants had been denied their Seventh Amendment right to a jury trial.

The Ninth Circuit disagreed. Affirming the district court (with some slight modifications), the Ninth Circuit wrote that the defendants "vigorously participated in the evidentiary hearing without ever raising the right to a jury trial" and "remained silent in the face of statements from the district court that it was considering treating" and in fact had treated "the hearing as a final trial on the merits, which made it clear that the court 'intended to make fact determinations.'" Likewise, the defendants "remained silent despite the district court asking twice whether the hearing was one for a

permanent injunction — as clear a time as any to raise any concerns about a jury trial.”

Because the defendants did not raise the issue of a jury trial until appeal, failing to raise it even after the district court’s ruling, the Ninth Circuit held that the defendants waived their right to a jury trial.

## TIPS

- As always, know your jurisdiction’s rules for preservation.
- If a jury trial is desired and a right to one exists in your case, assert your client’s right to it early in the process.
- Be wary of evidentiary hearings on preliminary matters with the potential to morph into final hearings on the merit — particularly when the trial court tells you that’s what it’s going to do! Ensure you make any objections, including to the transformation of the hearing, and raise any issues that you would raise at trial if it seems to be trending that direction.

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