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Gay Judge Nixes Anonymity for Genderqueer Plaintiff

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EMPLOYMENT

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Fired employee's participation in news story about their case likely doomed bid

BY ARTHUR S. LEONARD

US District Judge J. Paul Oetken, the first out gay man to be appointed a federal trial judge, has granted a motion by the defendants in an employment discrimination case to lift an order he had previously issued allowing the plaintiff, a "genderqueer and trans-masculine" individual, to proceed anonymously as "Jamie Doe." Doe, whose preferred personal pronouns are "they," "their," and "theirs," had sued their former employer, Fedcap Rehabilitation Services, and two of the company's supervisors.

Oetken gave the plaintiff 14 days from his April 27 ruling on FedCap's motion to decide whether they intend to proceed with this suit using their real name.

Doe alleges that the company and the named supervisors "discriminated against Doe based on Plaintiff's disability (breast cancer, depression, anxiety, and post-traumatic stress disorder), sexual orientation (queer), and gender (gender non-conformity/ genderqueer/ trans-masculine). Plaintiff also alleges that Defendants retaliated against Plaintiff for exercising their rights under the Family Medical Leave Act. Plaintiff has since left Fedcap and found new employment."

When they filed the lawsuit, Doe moved to proceed under a pseudonym. The court initially granted the motion but without prejudice to the defendants' right to seek lifting of the order, which they did.

The Federal Rules of Civil Procedure provide that "all the parties" be named in the title of a complaint. The Second Circuit, which has appellate jurisdiction over cases filed in the Southern District of New York, has ruled that this requirement "serves the vital purpose of facilitating public scrutiny of judicial proceedings and therefore cannot be set aside lightly."

That court has commented, "When determining whether a plaintiff may be allowed to maintain an action under a pseudonym, the plaintiff's interest in anonymity must be balanced against both the public interest in disclosure and any prejudice to the defendant."

COURTESY OF JUDGE J. PAUL OETKEN

US District Judge J. Paul Oetken.

The Second Circuit has identified a list of 10 different factors that courts might consider in conducting such a balancing test.

The plaintiff identified four harms if their name were revealed in this litigation. Doe stated that their trans-masculinity is an "intimate detail" they don't want to disclose through the public record; that "outing them" as trans-masculine would compound the trauma they have already suffered from the defendants' discrimination; that "genderqueer individuals suffer disproportionately from discrimination" and "outing" them in this way would place them "at further risk of discrimination by employees at their new job"; and, finally that, as a parent of school-age children, they are concerned that disclosing their identity may expose their children to bullying.

The defendants, in response, identified three types of prejudice to them if the plaintiff is allowed to proceed anonymously. First, the "non-trivial cost of sealing or redacting court filings"; second, that "anonymity might allow Plaintiff to make accusations that they would not have made if their identity were publicly known"; and third, that "anonymity creates an imbalance when it comes to settlement negotiations." The reasoning behind the third factor is that the defendants, who are not anonymous, may feel public pressure to settle the case in order to avoid bad publicity, while an anonymous plaintiff might "hold out for a larger settlement because they face no such reputational risk."

Judge Oetken concluded that the case "presents no particularly strong public interest in revealing Plaintiff's identity beyond the 'universal public interest in access to the identities of litigants,'" which he remarks is "not trivial." But the public interest would not be "especially harmed if Plaintiff proceeded pseudonymously."

He went on to observe, however, "The key issue here is the extent to which Plaintiff has already revealed their gender and sexual orientation to the general public. Defendants point to Plaintiff's voluntary participation in a news story for a major news outlet. In the story, Plaintiff used their real name, identified as genderqueer, and revealed other details about their gender non-conformity. The article also featured a photograph of Plaintiff, and the picture specifically illustrated Plaintiff's non-conformance with gender norms."

As a result, Fedcap and the supervisors named in the suit argued that Doe had already voluntarily disclosed "the sensitive issues they seek to keep secret in this case."

Doe disagrees, saying they have revealed their sexual orientation but not their gender identity, particularly their identity as "trans-masculine," which would be disclosed if they

▶ **ANONYMITY**, continued on **p.11**

CIVIL LIBERTIES

Despite Acquittal, Man Assigned Sex Registry Status

Judge points to "clear and convincing evidence" of crimes jury didn't find

BY ARTHUR S. LEONARD

In a ruling that received surprised comment from the media, the New York Court of Appeals affirmed by a 6-1 vote a decision by Kings County Supreme Court Justice Vincent Del Giudice to assign sufficient points under the state's Sex Offender Registration Act to a man acquitted of all the felony sex crimes charges against him to place him in the category of a level 2 sex offender, which requires lifetime registration and other restrictions under SORA.

The defendant, Quinn Britton, then 44, was charged with first-degree rape, two counts of criminal sexual act in the first degree (felony

▶ **OFFENDER REGISTRY**, continued on **p.16**

▶ ANONYMITY, from p.10

have to proceed under their real name in this lawsuit.

This argument did not persuade Oetken, who wrote, "But while that is true, the news story still shows that Plaintiff was comfortable with putting their gender-non-conformity in the public eye. The Court is mindful that coming out is a delicate process, and that LGBTQ individuals may feel comfortable disclosing one aspect of their identity but uncomfortable disclosing another. Nevertheless, Plaintiff's very public coming out as genderqueer undermines their arguments about the harm that would be caused by disclosure of their trans-masculinity."

The court concluded that the issue was "whether the additional disclosure of Plaintiff's identity as trans-masculine would so harm Plaintiff as to outweigh the significant prejudice to Defendants and the public interest in access to the identities of the litigants. Plaintiff has not met that significant burden."

Oetken suggested that Doe wants "what most employment-discrimination plaintiffs would like: to sue their former employer without future employers knowing about it," but that is not how the civil litigation system is set up.

"Defendants — including two individuals — stand publicly accused of discrimination and harassment, including detailed allegations of misconduct. Defendants do not have the option of proceeding pseudonymously," Oetken wrote. "Allowing Plaintiff to proceed anonymously would put Defendants at a genuine disadvantage, particularly when it comes to settlement leverage. Courts allow such an imbalance only in unique circumstances, and Plaintiff has not shown that this is one of those special cases."

While acknowledging that Doe's disclosure of their trans-masculinity "would be difficult and uncomfortable," wrote the judge, "this alone is not enough to demonstrate the exceptional circumstances required to proceed pseudonymously, especially in light of Plaintiff's public identification as genderqueer."

During the early years of the AIDS epidemic, many federal courts granted motions for plaintiffs suing for AIDS-related discrimination to proceed as John Doe or Jane Doe, accepting the argument that requiring them to sue under their own names would have compounded the discrimination they had suffered, especially in light of the media interest in reporting about legal issues stemming from the epidemic. Today, when there is considerable litigation by transgender individuals, including high school students seeking appropriate restroom access, it is not unusual to find that the court will refer to plaintiffs by their initials, even though the plaintiffs — represented by public interest law firms — may have revealed their names and posed for photos to publicize their cases. But one suspects that Jaime Doe would have been allowed to proceed anonymously had they not already participated under their name in news stories about the case.

Doe is represented by Brittany Alexandra Stevens and Marjorie Meritor of Phillips & Associates. Attorneys from the law firm of Epstein, Becker & Green represent the defendants.