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Arthur S. Leonard

The court also cites *Laufer* for the proposition that, with 130,000 inmates in Texas, "it cannot be plausibly inferred that Linthicum [medical director] played any role in the decisions Haverkamp challenges as unconstitutional." She certainly had more to do with transgender policy as medical director than Texas Prison Director Estelle had with a work excuse for J. W. Gamble after a bale of cotton injured his back in *Estelle v. Gamble,* 429 U.S. 97 (1976). Yet, claims against him were remanded.

According to the court here, Haverkamp failed to allege: (1) whether her treating doctor took treatment decisions to the Committee; (2) whether the Committee adjudicated a dispute; or (3) whether the Committee enforced any decision to her detriment. With that, the panel apparently got Judge Dennis's vote. He wrote in concurrence "specially," because the rest of the panel did not join in his observation that Judge Tagle should freely allow amendment on remand and reconsider appointing counsel in the district court.

For the most part, this debate about *Ex parte Young* is a creature of the 5th Circuit. It recognized *Ex parte Young's* usefulness recently when it struggled to preserve it for a utility company in *Green Valley Spa Utilities District v. City of Schaz,* 969 F.3d 4670, 471-75 (5th Cir. 2020) (*en banc*). Taken together, in this writer's view, the arc from *Young* to *Green Valley* in the Fifth Circuit shows a disposition in favor of vested interests (from railroads in the Gilded Age, to landlords, hoteliers, utility companies, and prisons) and away from the less powerful (localities, tenants, transients, and prisoners – especially LGBTQ ones). Yet, these civil rights plaintiffs are those least able to protect themselves without the doctrine.

Haverkamp was represented on the appeal by Rights Behind Bars (Washington, DC) and Goldman & Russell, PC (Bethesda, MD). Public Citizen Litigation Group, Washington, DC, appeared as *amicus curiae*. ■

William J. Rold is a civil rights attorney in New York City and a former judge. He previously represented the American Bar Association on the National Commission for Correctional Health Care.

Church Deemed a "Hate Group" by Southern Poverty Law Center Loses Its Battle with Amazon.com Over Exclusion from the AmazonSmile Program

By Arthur S. Leonard

The AmazonSmile Foundation, a tax-exempt corporation affiliated with Amazon.com, declined an application by Coral Ridge Ministries Media, a Christian ministry and media corporation, to participate in the AmazonSmile program, because the Southern Poverty Law Center (SPLC) listed Coral Ridge as a "hate group" on its website, due to Coral Ridge's expressed views about homosexuality. Under the Amazon Smile program, Amazon customers designate charities from a list approved by the Foundation to receive a donation from Amazon of 0.5% of purchases of qualifying goods and services from the Amazon.com website. Under the terms of the program, "hate groups" may not participate, even if they would otherwise qualify as tax-exempt charitable organizations.

On July 28, the U.S. Court of Appeals for the 11th Circuit rejected Coral Ridge's state law defamation claim against SPLC for labeling it a "hate group" and its religious discrimination claim against Amazon for excluding it from the Smile program. Circuit Judge Charles Wilson wrote for the three-judge panel in *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 2021 WL 3184962.

Senior U.S. District Judge Myron Thompson had dismissed the lawsuit on both claims in September 2019, concluding that Coral Ridge's allegations fell short of describing actionable defamation under Alabama law, and that the AmazonSmile program is not a public accommodation covered by Title II of the Civil Rights Act of 1964, which forbids discrimination because of religion. See 406 F. Supp. 3d 1258 (M.D. Ala.). He alternatively found that allowing Coral Ridge's claim would violate Amazon's First Amendment rights, and that Coral Ridge's factual allegations did not support a claim of discrimination because of religion. While agreeing that Thompson correctly dismissed the case, the three-judge Court of Appeals panel ruled more narrowly than had Thompson on both claims.

To win a defamation suit, a plaintiff must allege that the defendant made a damaging false statement of fact about the plaintiff. If the plaintiff is considered a "public figure," which Coral Ridge conceded that it is, the plaintiff has to show that the false statement was made with "actual malice" by the defendant. "Actual malice" is a term of art in defamation law. It means that defendant made the false statement "with knowledge that it was false or with reckless disregard of whether it was false or not."

"Coral Ridge did not sufficiently plead facts that give rise to a reasonable inference that SPLC 'actually entertained serious doubts as to the veracity' of its hate group definition and that definition's application to Coral Ridge," wrote Judge Wilson, "or that SPLC was 'highly aware' that the definition and its application was 'probably false.'" In this case, Coral Ridge was quibbling with the definition of a hate group that SPLC stated on its website. Since SPLC states its own definition, however, "it is hard to see how SPLC's use of the term would be misleading," wrote Judge Wilson.

While conceding that Coral Ridge rejected homosexuality based on religious beliefs, the church alleged that it "has never attacked or maligned anyone on the basis of engaging in homosexual conduct," but even

accepting that allegation as true – which the court would have to do in ruling on a motion to dismiss the case as a matter of law – the court found that Coral Ridge's allegation provided no basis for finding that SPLC intentionally or recklessly mislabeled the church, so it upheld Judge Thompson's dismissal of this claim.

The discrimination claim against Amazon is more complicated. For one thing, it is not clear that Amazon.com or its affiliate AmazonSmile Foundation could be considered public accommodations in their dealings with applicants to participate in the Smiles program. While Judge Thompson had assumed without analysis that these defendants could be considered "places of public accommodation," he found that the AmazonSmile program "did not qualify as a 'service,' 'privilege,' or 'advantage' under the statute," or, alternatively, that it could violate the First Amendment for a court to order Amazon to donate to Coral Ridge.

Avoiding having to rule on the statutory issue, the court of appeals went directly to Amazon's constitutional defense, which it found to be valid. The Supreme Court has frequently ruled that donating money, whether to a charity or a political cause, is expressive conduct protected by the First Amendment. That's the basis, for example, for the Court's decision striking down various campaign finance reforms by Congress, such as the infamous Citizens United case. Judge Wilson quoted *Harris v. Quinn*, 573 U.S. 616 (2014), a Supreme Court ruling stating that "no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." The court found that this ruling "mapped on" to Amazon's constitutional argument.

Coral Ridge argued that because Amazon patrons select the charities to which 0.5% of their purchases would be donated, they are the real donors, treating Amazon as a mere conduit for their donations. But AmazonSmile makes clear in its application process that Amazon exercises judgment about which charities can participate, and specifically states that entities designated as "hate groups" by SPLC are disqualified. "We have no problem finding that Amazon engages in expressive conduct when it decides which charities to support through the AmazonSmile program," wrote the judge.

The court drew an analogy to the Supreme Court's ruling in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), that the South Boston Allied War Veterans Council had a First Amendment right to exclude the Irish-American Gay, Lesbian & Bisexual Group of Boston from the St. Patrick's Day Parade organized by the Council. The Supreme Court ruled that the state could not require the Council to let GLIB march, as that would be imposing on the Council a message that they did not wish to include in their parade. The Massachusetts Supreme Judicial Court had ruled that the Parade was a public accommodation and GLIB was entitled to participate, but the Supreme Court unanimously reversed that ruling to protect the free speech rights of the parade's organizers.

"In the same way that the Council's choice of parade units was expressive conduct," wrote Judge Wilson, "so too is Amazon's choice of what charities are eligible to receive donations through AmazonSmile. Applying Title II in the way Coral Ridge proposes would not further the statute's purpose of 'securing for all citizens the full enjoyment of facilities described in the Act which are open to the general public.'" Consequently, the court concluded that Coral Ridge's proposed interpretation of Title II "would infringe on Amazon's first Amendment Right to engage in expressive conduct and would not further Title II's purpose," so it affirmed Judge Thompson's decision to dismiss Coral Ridge's religious discrimination claim.

Judge Wilson was appointed to the Court by President Bill Clinton. Joining his decision were Circuit Judge Britt Grant, appointed by President Donald Trump, and Senior Circuit Judge Gerald Tjoflat, appointed by President Gerald Ford. Senior District Judge Thompson was appointed by President Jimmy Carter. ■

Federal District Court Blocks Tennessee Restroom Signage Law

By Matthew Goodwin

On July 9, 2021, Judge Aleta A. Trauger of the U.S. District Court for the Middle District of Tennessee issued a preliminary injunction against enforcement of a law passed by the Republican-controlled legislature in that state requiring and regulating signs outside restrooms of trans-friendly public and private spaces, including businesses. *Bongo Productions, LLC v. Lawrence*, 2021 U.S. Dist. LEXIS 128262; 2021 WL 2897301.

In May of 2021, Tennessee enacted H.B. 1182/S.B. 1224, which amended the state's zoning laws and building code. "The Act," as it is referred to throughout the opinion, went into effect on July 1, 2021 and requires any "public or private entity or business that operates a building or facility open to the general public . . . " to post a notice at the entrance to their public restrooms if they allow a member of either "biological sex" to use any public restroom within the building or facility. In other words, if a business allows customers to use the restroom consistent with their gender identity, that business must notify its customers of this policy through a posted sign stating as much.

However, not only does the Act require that a notice be posted, it also mandates certain language as well as what Judge Trauger termed " . . . a red-and-yellow, warning-sign color scheme, as if to say, Look Out: Dangerous Gender Expressions Ahead." The required notice must read in boldface, block letters: "THIS FACILITY MAINTAINS A POLICY OF ALLOWING THE USE OF RESTROOMS BY EITHER BIOLOGICAL SEX, REGARDLESS OF THE DESIGNATION ON THE RESTROOM."