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Arthur S. Leonard

involving transgender people. It is only now, in the context of litigation, that officials of the State suggest otherwise."

Respecting the question of the merits, the court's analysis goes so far as to assume the Defendants are correct that rational basis applies and finds that, even if it did, the Act could not survive this level of review. Although not explicit, Judge Trauger's reasoning here arguably harkens back to an earlier and lengthy portion of the opinion examining Plaintiffs' submission of a declaration from an expert on gender identity, Dr. Shayne Sebold Taylor, M.D.

On this score, Judge Trauger points to evidence from Dr. Taylor that the Act might create issues of the sort it claimed to be trying to address. For example, a literal reading of the Act's required signage would seem to require a transgender man to use the women's restroom and a transgender woman to use the men's restroom and the opposite seems a goal, if only implicit, of the legislation.

The court easily found for Plaintiffs on the other three prongs of the analysis.

The opinion recites the oft-cited principle that "'[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." "The irreparable harm posed by the Act, however, does not end with the abstract question of constitutionality . . . the [P]laintiffs have presented evidence that they have strived to be welcoming spaces for communities that include transgender individuals and that the signage required by the Act would disrupt welcoming environments that they wish to provide. That harm would be real, and it is not a harm that could be simply remedied by some award at the end of litigation."

As to the public interest, the court concludes that there is " . . . a low likelihood that the injunctive relief would intrude on any power legitimately retained by the State of Tennessee." The Defendants had complained that by enjoining the state from enforcing the Act it would suffer an irreparable injury because the Act was passed by duly elected representatives. Judge Trauger pointed out, however, that no harm was, in fact, being done in this regard because "[n]o legislature can enact a law it lacks the power to enact."

In balancing the equities, the court " . . . [had] little difficulty concluding the preliminary injunction should issue . . . " because without it, Plaintiffs would be irreparably harmed and requiring Tennessee to " . . . abide by the U.S. Constitution, sooner rather than later, vindicates the public interest in rule of law and the acceptance, by States, of constitutional government."

The opinion concludes with the simple order that Defendants "take no actions to enforce" the Act.

Judge Trauger was appointed by President Bill Clinton. The ACLU appeared on Plaintiffs' behalf by Emerson Sykes, Esq., Rose Sykes, Esq. Stella Yarbrough, Esq., and Thomas H. Castelli, Esq. ■

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By Arthur S. Leonard

U.S. District Judge Jane Magnus-Stinson ruled in *Kluge v. Brownsburg Community School Corporation*, 2021 WL 2915023, 2021 U.S. Dist. LEXIS 129122 (S.D. Ind., July 12, 2021), that the Brownsburg (Indiana) Community School Corporation did not violate music teacher John Kluge's statutory rights under Title VII of the Civil Rights Act of 1964 when it effectively discharged him for his refusal to comply with the School's requirement that he address transgender students by their preferred names and pronouns. Granting summary judgment in favor of the Corporation, the court rejected Kluge's assertion that his proposal to address all students by last name without using pronouns was a reasonable accommodate to his religious beliefs that the Corporation was obligated to accept.

The judge had previously dismissed Kluge's claims that the School violated his First Amendment rights of free exercise of religion and freedom of speech, but she had denied the School's motion to dismiss his Title VII reasonable accommodation claim at that time. See *Kluge v. Brownsburg Community School Corporation*, 432 F. Supp. 3d 823 (S.D. Ind., Jan. 8, 2020).

Kluge began working as a music teacher and orchestra leader at Brownsburg High School in August 2014, and by all accounts was a successful and effective teacher – at least until the issue of transgender names came up. In 2016, the U.S. Education Department sent a "Dear

Colleague" letter to public school officials advising them of the rights of transgender students under Title IX of the Education Amendments of 1972, including the right to be addressed by the students' preferred first names and pronouns. This letter was sparked by Gavin Grimm's lawsuit against Gloucester School District in Virginia, which had adopted a rule barring the transgender boy from using the boys' restrooms at the high school. The Obama Administration granted a request by Grimm's ACLU attorneys to notify the court of the Administration's position on Grimm's Title IX right and followed up with the "Dear Colleague" letter sent nationwide.

The Corporation came to grips with this issue in the spring of 2017, as some transgender students were expected to attend the high school. The Corporation used a database called PowerSchool to maintain student records. It implemented a "Name Policy" to take effect in May 2017, requiring all staff to address students by the name that appeared in the PowerSchool database. Under the policy, transgender students could change their first name in the database by presenting a letter from a parent and a letter from a health care professional concerning the need for a name change consistent with their gender identity. A change in gender marker and pronouns on the database could go along with the name change.

Kluge "identifies as a Christian and is a member of Clearnote Church, which is part of the Evangelical Presbytery," wrote Judge Magnus-Stinson. As a "church elder," he holds leadership positions in the church and is a worship group leader. "Mr. Kluge's religious beliefs 'are drawn from the Bible,' and his 'Christian faith governs the way he thinks about human nature, marriage, gender, sexuality, morality, politics, and social issues,'" Kluge stated in a document filed with the court. "Mr. Kluge believes that God created mankind as either male or female, that this gender is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual's feelings or desires." Under his beliefs, he would be sinning if he encouraged a student's gender dysphoria by calling them by a name inconsistent with their sex as identified at birth.

Kluge notified the high school principal that he could not comply with the Name Policy, and was told he had three options: comply, resign, or be discharged. He proposed a compromise: that the school accommodate his religious beliefs by allowing him to call all students by their last name and avoid using pronouns. The school authorities agreed to let him do this, but at the end of the fall semester, they told him it wasn't working and although they would let him finish out the school year under that arrangement, he would be expected in future to comply with the policy or to resign. Kluge alleged that he was told that he could submit a conditional letter of resignation and it would not be acted upon until the end of the spring semester, but the letter that he submitted said nothing about it being conditional, and at the end of the semester, as he indicated continued unwillingness to comply with the Name Policy, his resignation was accepted. He contended that this was a constructive discharge.

Kluge claimed that he had been discharged for his religious beliefs and filed suit, claiming violations of the 1st Amendment (and analogous provisions of the Indiana Constitution) and Title VII and parallel state laws.

Judge Magnus-Stinson granted the School's motion to dismiss the constitutional claims in January 2020, finding that Kluge's 1st Amendment rights of free exercise of religion and freedom of speech were not implicated in the case. The Name Policy, she found, was a neutral, generally applicable policy, and he had no constitutional right under the religious freedom clause to refuse to comply with it. Similarly, she found, the language he was required to use in addressing students was not protected political speech of a private citizen, but rather was speech incidental to performing his duties as a public school teacher, and thus subject to regulation by the School. She also rejected his argument that the Name Policy violated the Due Process Clause on grounds of vagueness, pointing out that he was not required to make any judgment or interpretations, but just to use the names and gender designation as they appeared in the Corporation's database, as clearly specified by the policy.

But Judge Magnus-Stinson found, based on the allegations Kluge made in his complaint, that he had stated a claim of religious discrimination (failure to accommodate) and retaliation under Title VII, so the case proceeded to discovery. After discovery was completed, the School moved for summary judgement, which was granted on July 12, 2021.

The question under Title VII was whether the accommodation that Kluge sought would impose an "undue hardship" on the School. The judge decided that it would. "Mr. Kluge's religious opposition to transgenderism is directly at odds with BCSC's policy of respect for transgender students, which is founded in supporting and affirming those students," she wrote, finding that "the undisputed evidence in this case demonstrates that the last names only accommodation indeed resulted in undue hardship to BCSC as that term is defined by relevant authority."

Transgender students had filed declarations with the court showing that "Mr. Kluge's use of last names only – assuming, only for the purposes of this Order, that Mr. Kluge strictly complied with the rules of the accommodation – made them feel targeted and uncomfortable." One of the students stated that they "dreaded going to orchestra class and did not feel comfortable speaking to Mr. Kluge directly. Other students and teachers complained that Mr. Kluge's behavior was insulting or offensive and made his classroom environment unwelcoming and uncomfortable." One transgender student "quit the orchestra entirely." According to news reports (but not the judge's opinion), students also complained that Kluge occasionally slipped up and misgendered trans students by using "Mr." or "Ms." to address them.

Thus, the court found, "this evidence shows that Mr. Kluge's use of the last

names only accommodation burdened BSCS's ability to provide an education to all students and conflicted with its philosophy of creating a safe and supportive environment for all students." The court also noted the possibility that allowing Kluge to continue with this "accommodation" might subject the School to liability to the transgender students under Title IX, an issued which came into even clearer focus after the Biden Administration began in January 2021 by revoking the Trump Administration's position that Title IX does not protect transgender students, and then issuing a formal interpretation applying the Supreme Court's *Bostock* decision to the interpretation of Title IX, as several federal courts had done during 2020 despite the Trump Administration's position to the contrary. In addition, the 7th Circuit was the first federal appeals court to recognize a transgender high school student's right to use facilities consistent with their gender identity under Title IX, so the application of that statute to a gender identity discrimination claim is a binding precedent on the Indiana district court.

The judge also rejected Kluge's retaliation claim, finding that because his refusal to comply with the Name Policy was not a "protected activity" under Title VII, the School's discharge of Kluge for his opposition to the policy could not be the basis for a retaliation claim.

Judge Magnus-Stinson noted that between the time she issued her earlier order dismissing Kluge's constitutional claim and the date of this new decision, the U.S. Court of Appeals for the 6th Circuit had issued a ruling accepting a similar constitutional claim by a public university professor who was disciplined by the university's administration for actually misgendering transgender students in the classroom, after having agreed not to do so by adopting the same procedure that Kluge had proposed: avoiding using first names and pronouns in class. Indiana is in the 7th Circuit, so the 6th Circuit's ruling was not binding on an Indiana district court, and that court premised its ruling solely on the 1st Amendment.

"Interestingly," noted Judge Magnus-Stinson, "the case upon which Mr. Kluge so vehemently relies as to the objective conflict issue, could fairly be read to support the existence of an undue hardship" on the Corporation. "In describing the relevant facts, the Sixth Circuit called the university's suggestion that the professor eliminate all gendered language 'a practical impossibility that would also alter the pedagogical environment in his classroom' and noted that the professor was of the opinion that 'eliminating pronouns altogether was next to impossible, especially when teaching.'"

Press attention to Judge Magnus-Stinson's ruling may attract the attention of the anti-LGBTQ organizations that frequently take cases like this one, such as Alliance Defending Freedom or Liberty Counsel, which might result in an appeal to the 7th Circuit. Judge Magnus-Stinson was appointed by President Barack Obama in 2010. ■

California Appeals Court Strikes Misgendering Provision from Patient Bill of Rights

By Arthur S. Leonard

A three-judge panel of California's 3rd District Court of Appeal partially reversed a ruling by Sacramento County Superior Court Judge Steven M. Gevercer in *Taking Offense v. State of California*, 2021 Cal. App. LEXIS 583, 2021 WL 3013112 (July 16, 2021), holding that the state violated the 1st Amendment free speech rights of staff members in long-term-care facilities by making it a misdemeanor for such individuals to repeatedly and knowingly misgender a resident of such a facility. At the same time, however, the court rejected an equal protection challenge to a provision that protects transgender residents' rights to be housed consistent with their gender identity. Judge Elena Duarte wrote the opinion for the appellate panel. Judge Gevercer had rejected constitutional challenges to both provisions.

The misgendering provision is part of California's LGBT Long-Term-Care Facility Residents' Bill of Rights, passed in 2017 in response to evidence that LGBT people have suffered significant discrimination in such facilities. The plaintiff in this case, an "unincorporated association which includes at least one California citizen and taxpayer," calls itself "Taking Offence," and they "take offence" to the state making such speech a crime.

The court decided that the misgendering provision is a content-based regulation of speech by the government, which under both the state and federal constitutions would be presumptively unconstitutional unless it met the test of strict scrutiny. Under that two-part test, the government must have a compelling interest for