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**9th Circuit Panel Reverses Adverse Credibility Determination by
BIA for Gay Tailor from Senegal**

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LAW NOTES

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Victory for LGBTQ Parents in Alaska

few times, but nothing happened,” but testified in response to several questions during his removal proceedings that he had not gone to the police, and further that in a taxi incident he told the asylum officer that someone “let off gunshots” but testified in removal proceedings that “there w[as] a group of people from the national police [and] . . . [o]ne of them shot . . . at the cab.” The BIA agreed with the IJ and affirmed the denial. A timely petition for review was filed with the 1st Circuit.

Writing for a panel, Circuit Judge David J. Barron first noted that the government did not dispute that if the Board’s affirmance of the IJ’s adverse credibility determination cannot be sustained, the court “must vacate and remand the [Board’s] ruling affirming the IJ’s denial of [Petitioner’s] request for withholding of removal.” Judge Barron set forth the standard under which a credibility determination will only be upheld: 1) the alleged discrepancies or omissions provide specific and cogent reasons to conclude the testimony are actually present and are incredible with regard to facts central to the merits of the claim, and 2) the Petitioner has failed to provide a convincing explanation for the discrepancies and omissions.

The government argued that an adverse credibility finding on either the reporting to the police or the taxi issue “would suffice to warrant a conclusion that [Petitioner’s] showing of past persecution fails;” however, Judge Barron held: “we disagree,” ruling that “it is more accurate to say that the [Board] rejected [Petitioner’s] attempt to show past persecution based on a finding of adverse credibility solely because of the inconsistency between his testimony at the hearing and the reasonable fear interview with respect to whether he ever reported incidents of abuse that he had suffered to the police.”

Judge Barron noted that the Board cited to three portions of Petitioner’s testimony in support of its determination that the IJ did not clearly err in finding an inconsistency between what Petitioner told the asylum officer and his testimony before the IJ, but stated: “none of those passages supports the [Board’s] determination.” The first

section regarded discussion of when Petitioner was raped when he was 15 and was asked if he called the police and he said “No . . . because I was very afraid of the national police and I knew they were not going to give me any type of protection.” The second was respecting later when asked whether when he was raped two times in his country was that “done by private individuals . . . did you ever report that to the police?” to which Petitioner answered: “No.” Finally, when asked regarding if anyone else in Honduras threatened Petitioner, Petitioner stated that the family of his former partner who died of AIDS had threatened him and he was asked: “did you go to the police for protection,” and Petitioner answered: “No, no, I didn’t do anything like that.”

Judge Barron concluded: “In sum, although the [Board] found that [Petitioner] ‘did not limit his testimony when describing the fact that he never went to the authorities,’ [Petitioner] did not at any point in his testimony state that he “never” went to authorities with any such complaints. He merely answered in response to specific questions about specific incidents that he had not done so.”

Finding the purported discrepancies or omissions in this case to not in fact be discrepancies or omissions, Judge Barron vacated and remanded the withholding claim for further proceedings. Further, finding that the CAT claim relied similarly on the adverse credibility determination, that claim was also remanded for further proceedings. ■

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A 9th Circuit panel voted 2-1 to reverse an adverse credibility determination by an immigration judge (IJ) and the Board of Immigration Appeals (BIA) in an asylum, withholding of removal and Convention Against Torture (CAT) proceeding involving a gay tailor from Senegal. *Toure v. Garland*, 2021 WL 4876139 (Oct. 19, 2021).

The court’s Memorandum decision noted that the BIA affirmed the IJ’s adverse credibility determination “on a single ground” when “it concluded that the IJ did not clearly err in finding an inconsistency between Toure’s initial written statements, which explained that he was persecuted in Senegal because he worked as a tailor for a gay clientele, and his later testimony that he is himself gay.” The court stated that this finding “is belied on the record, as the purported inconsistency is not an inconsistency at all.” The court insisted that “there is no inherent inconsistency between Toure’s superseding I-589 application, which explained that he was persecuted for catering to the gay and bisexual community in Senegal, and his testimony at the hearing that he is gay.” Furthermore, the written application stated that “the government and his uncle persecuted him because they believe he is gay.” The opinion goes on: “And Toure’s written statement explained that, when his younger uncle saw him in Brazil, the uncle ‘told everybody’ that Toure is gay, that he worked for the gay and bisexual community in Senegal, and that he was a shame to their religion.”

The panel majority thus concluded that “the purported inconsistency was not a ‘specific cogent reason’ for adverse credibility finding.”

This drew a dissent from Circuit Judge Consuelo Callahan. “The majority does not deny that Toure first stated that he worked as a tailor for gay clientele and later testified that he was himself gay,” she wrote. “Indeed, the BIA commented that the IJ ‘found that he initially testified that he had problems because he worked as a tailor for gay clientele, but later changed his testimony to say that he was actually gay himself’ and that Toure did not ‘address this discrepancy on appeal.’” She argues that the majority “offers no authority” for its conclusion that this was not a discrepancy, and she points out that “a review of the entire record reveals that in his initial interview with an immigration officer, Toure stated that he left Senegal because ‘people lent me money in Senegal and I don’t have money to pay them back.’” Callahan insists that there was “substantial evidence” to support the agency’s adverse credibility determination, and she would deny the petition for review.

In addition to reversing the credibility determination, the panel granted Toure’s motion for a stay of removal, stating that his removal “is stayed pending issuance of the mandate” from this decision. Toure had filed a second petition for review of BIA’s decision not to reopen the proceeding, finding that its ruling on his first petition mooted the second.

Petitioner is represented by Samantha J. Chang, Andrew Richard Gray, Wesley J. Horton, Bradley A. Hyde, Emily R. Orman, of Latham & Watkins, LLP (Costa Mesa, CA), and Fraser Donald Muir of the Public Law Center (Santa Ana). The majority of the panel consisted of Circuit Judges Richard Paez (appointed by Bill Clinton) and John B. Owens (appointed by Obama). Judge Callahan was appointed by George W. Bush. ■



Arizona District Court Denies Defendant Biolife Plasma Service’s Motion to Dismiss, Finding Some Duty to Provide Accuracy in HIV Screening Results

By *Brandon Dolinger*

On October 14, 2021, Chief Judge G. Murray Snow of the United States District Court for the District of Arizona denied a motion for Judgment on the Pleadings sought by BioLife Plasma Service, an Arizona-based company that operates a plasma collection facility in Tempe, Arizona. *Trinidad v. BioLife Plasma Services LLC*, 2021 WL 4805325. This case was brought after BioLife Plasma Service provided a false positive test result for HIV to the Plaintiff, Claudette Trinidad. Chief Judge Snow concluded that based on the public policy considerations enumerated by *Stanley v. McCarver*, BioLife owed a duty of care to the Plaintiff based on the facts as pled in the complaint. 208 Ariz. 219, 92 P.3d 849 (2004). This duty creates a genuine issue of material fact as to whether BioLife breached that duty by providing false test results.

On July 23, 2020, Claudette Trinidad walked into the Defendant’s Tempe facility with the intent to donate plasma but was shocked to find out that she was unable to because of “an unspecified issue relating to her blood test results.” About a week later, on July 31, 2020, Plaintiff received a package from BioLife advising her that she had tested positive for the human immunodeficiency virus (HIV). Plaintiff waited a few months, and after failing to manifest any symptoms of HIV, she was tested again at Sonoran Quest Laboratories on November 2. This test came back negative, and she brought suit against the Defendant for providing false test results.

In order to survive dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint must contain factual allegations sufficient to “raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 500 U.S. 544,

555 (2007). Allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party; in this case, that would be the Plaintiff. Evidence outside the pleadings normally cannot be considered for a 12(b)(6) motion; however, a court may consider certain material such as documents attached to the complaint or documents incorporated by reference in the complaint. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir., 2003). Finally, if the document merely creates a defense to the well-plead allegations in the complaint, then that document did not necessarily form the basis of the complaint, and the court will not consider it. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018).

The Plaintiff alleges that BioLife Plasma Services owed her a duty to provide accurate test results because they knew that the Plaintiff and her medical providers would rely on said results to care for her. However, the Defendant argues that no such duty exists because the Plaintiff signed an “Informed Consent for Automated Plasmapheresis,” which was attached to the Defendant’s motion as Exhibit B. The Defendant argues that this informed consent demonstrates that the Plaintiff was aware that her blood would be tested for HIV, that there was a slight possibility of a false-positive test result, and that the screen test should not be used for health care reasons. The Defendant further alleges that the Plaintiff was given these warnings not only prior to her attempting to donate plasma but also when she received the package on July 31 informing her of her test results.

The District Court started its analysis by first determining what evidence would be admitted at this point of the