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LEGISLATIVE & ADMINISTRATIVE - Notes (April 2022)

Arthur S. Leonard

Mitchell's aversion to gay men." She also castigates the Magistrate Judge, albeit in a footnote: "That Plaintiff is an openly gay man . . . is not included in the R&R. This omission is critical because the inferences drawn from Plaintiff's sexual orientation, when coupled with Mitchell's alleged homophobia, provide the factual enhancement that nudges Plaintiff's failure to protect claim 'across the line from conceivable to plausible.'" *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). *Compare* the Tenth Circuit's abysmal treatment of similar facts involving a federal prisoner (Rios) in an article appearing this month in *Law Notes*. Jubeck was represented by Barth & Associates (Pittsburgh).

WISCONSIN – Transgender inmate Denzel Samonta Rivers sued eleven defendants who failed to protect her from sexual assault in the shower when she had a "shower alone" order in *Rivers v. Burns,* 2022 WL 767888 (E.D. Wisc., Mar. 14, 2022). Senior U.S. District Judge J. D. Stadtmueller (Reagan) allows her to proceed against two officers on Eighth Amendment protection from harm claims. [Note: Rivers is a male to female transgender person, who has not stated a gender pronoun preference. Judge Stadtmueller "defaults" to "them/theirs." This writer defaults to "her/hers."] At first, Rivers was in segregation, then she was moved to general population with a shower alone restriction posted "in the sergeant cage." Rivers told defendant Larson that she was being harassed. He promised to "move" her, but he never did. On the day of the assault, defendant Lambert opened Rivers' cell door for congregate showers despite the restriction, whereupon she was assaulted in the shower by a gang member, C.H. Rivers required medical and dental treatment. Judge Stadtmueller dismisses nine of the defendants, who were not involved in the failure to protect or who took steps to protect, such as granting and posting the "shower alone" order. For now, Larson stays in the case for not responding as promised to the complaints of harassment, and Lambert remains for opening the cell door for congregate showering. Judge Stadtmueller grants Rivers' motions to redact the name of her assailant to initials (unclear if they are the actual initials or a placeholder) and to instruct defense counsel to use the initials in all publicly filed papers. Most of the substance of the opinion concerns Rivers' request for the court to "appoint" counsel. It is the most thorough treatment of this issue this writer has seen, but it focuses mostly on Seventh Circuit law. In the end, Judge Stadtmueller denies counsel, in part because the case is relatively simple and in part (this writer surmises) because Rivers was sophisticated enough to seek a protective order about her assailant. Rivers has also been moved to a new prison, so her injunctive claims are moot. A twenty-page *pro se* pamphlet from the Clerk of Court for the E.D. Wisconsin is attached to the opinion. It covers common questions, rules (including local rules), common terms (glossary), how cases proceed, filing, service, motions to dismiss, discovery, compelling discovery, summary judgment, legal assistance available to indigents throughout Wisconsin (with contact information), internet filing, and mediation. This publication is now accessible nationally through any PACER access point. Judge Stadtmueller orders the remaining defendant to answer within 60 days but to file any motions about exhaustion under the Prison Litigation Reform Act within 45 days. This writer has not previously seen such a short leash on PLRA exhaustion.

WISCONSIN – *Pro se* transgender inmate Melissa Balsewicz won a protection from harm case in the Seventh Circuit, reversing U.S. District Judge J.D. Stadtmueller (Reagan) in *Balsewicz v. Pawlyk*, 963 F.3d 650, 653 (7th Cir. 2020). That case settled. Now, Balsewicz alleges that prison officials are retaliating against her for that case by verbal harassment and voyeurism (watching her shower) – and retaliating again for her complaints about the retaliation, in a continuing spiral. In *Balsewicz v. Moungey,* 2022 WL 671373 (E.D. Wisc., Mar. 7, 2022), Judge Stadtmueller screens her new complaint. Although staff voyeurism is prohibited by the Prison Rape Elimination Act (28 C.F.R. § 115.6), which defines "sexual abuse" to include "voyeurism," Judge Stadtmueller applies the usual "no stand-alone cause of action" to PREA claims, since voyeurism and verbal abuse, without more, have not been held to violate the Eighth Amendment. He allows the retaliation claims to proceed against most of the defendants, which would include biased processing of her PREA complaints if that were done in retaliation. Since Seventh Circuit standards for First Amendment retaliation require only that retaliatory animus be "a factor" in challenged conduct (and perhaps having been burned once with this plaintiff on appeal), Judge Stadtmueller permits discovery to show how much involvement the remaining defendants had in the allegedly retaliatory conduct. He gives them tight imitations on an answer and on filing an exhaustion defense under the Prison Litigation Reform Act. He also attaches a lengthy *pro se* packet to the decision. *See* more detailed discussion of his similar actions in *Rivers* under "Wisconsin" in this issue of *Law Notes*.

LEGISLATIVE & ADMINISTRATIVE NOTES

By Arthur S. Leonard

FEDERAL – On March 15, President Joe Biden signed into law the much-delayed reauthorization of the Violence against Women Act, which was allowed to lapse

during the prior administration when Republican majorities refused to pass it through Congress. Among changes from the prior law were the addition of a grant program dedicated to initiatives to deal with LGBTQ domestic violence and sexual assault survivors, according to a statement from the National LGBTQ Task Force. At a ceremony celebrating the enactment, President Biden stated, "No one, regardless of gender or sexual orientation, should experience abuse. Period. And if they do, they should have the service and support to get through it, and we're not going to rest."

FEDERAL – The *New York Times* reported on March 30 that the U.S. Department of Education is on the verge of publishing a proposed regulation under Title IX of the Education Amendments Act which will implement President Biden's Day-One Executive Order directing federal agencies to apply the Supreme Court's ruling in *Bostock v. Clayton County* to all federal laws banning discrimination because of sex. According to the Times report, a draft of the proposed regulation, which would reverse the position taken by the Trump Administration, would expressly state that Title IX applies to discrimination "on the basis of sex stereotypes, sex-related characteristics (including intersex traits), pregnancy or related conditions, sexual orientation, and gender identity." In addition, the proposed regulation will reformulate rules governing how educational institutions are supposed to deal with sexual harassment and sexual assault complaints. The Trump Administration had overturned Obama Administration regulations, making it more difficult to impose discipline on those accused of sex-related misconduct; the new regulations are expected to rebalance the rules, although final wording won't be known until the proposed regulation is published for public comments, probably during April. The new regulations, once adopted, would have the force of law, and could arguably preempt the dozen state laws restricting or barring transgender girls from participating in scholastic sports consistent with their gender identity.

FEDERAL – On March 31, the U.S. Department of State announced that effective April 11 applicants for passports will have the option of seeking an X designation instead of M or F if the applicant identifies as non-binary. Last spring the government settled the Zzyym case, brought by Lambda Legal, by issuing Dana Zzyym an X passport after years of litigation, and committing to change the necessary forms and computer software to accommodate non-binary identification. Announcements by the Biden Administration went further, however, indicating that changes are in process through-out the government to incorporate non-binary options in all situations where a gender designation has been required. Indeed, one change will be to the format of Social Security cards, which at present do not have a gender specification but will in future, including X for non-binary. In honor of Transgender Day of Visibility, President Biden met with transgender Americans in the White House. Also on March 31, Assistant Attorney General Kristen Clarke sent a letter (released to the public through the Justice Department's website) to all state attorney generals, reminding them of the federal constitutional, statutory and regulatory protections for transgender people, pointing out that the increasing number of states attempting to interfere with the provision of gender-affirming care to minors are violating several provisions of federal law. As lawsuits are filed challenging such laws and policies, the Justice Department will be filing amicus briefs on behalf of plaintiffs. The Justice Department reiterated prior statements that under the Equal Protection Clause of the 14th Amendment, any state policy that discriminates based on gender identity is subject to heightened scrutiny, which requires the state to provide an "exceedingly persuasive" reasons for discriminating on this basis. The letter noted court decision at the federal appellate level applying heightened scrutiny in gender identity discrimination cases. The letter also invoked Section 1557 of the Affordable Care Act, Title IX of the Education Amendments of 1972, the Omnibus Crime Control and Safe Street Act of 1968, and Section 504 of the Rehabilitation Act of 1973.

ARIZONA – On March 30, Republican Governor Doug Ducey signed into law two anti-transgender bills: According to *Advocate.com*, "Arizona Senate Bill 1138, bans gender-affirming surgery for trans minors" and "Arizona Senate Bill 1165, bars trans girls and women from participating in female sports in grades K-12 or colleges and universities, in either public schools or private ones whose students or teams compete against public schools."

FLORIDA – Governor Ron DeSantis signed the Parental Rights in Education Act into law on March 28. Popularly dubbed as the "Don't Say Gay Law," it prohibits discussion of sexual orientation or gender identity in Florida public schools in grades K through 3, and limits discussion on such topics based on "age appropriateness" (which is left vague in the statute) from grades 4 and up. It doesn't apply to higher education institutions. It reflects a judgment by a majority of the Florida state legislators and the governor that it is never age-appropriate to discuss these subjects in public schools for students in the prohibited age groups. Parents are empowered to sue teachers and schools for alleged violations. Since the notion of "age appropriate" seems

very subjective, a lawsuit aimed at invalidating that part of the law on due process grounds might be successful. On March 31, Equality Florida and others filed an 80-page complaint in the U.S. District Court for the Northern District of Florida, challenging the new law's constitutionality under the 1st and 14th Amendments and Title IX of the Education Amendments of 1972. Plaintiffs are represented by Roberta Kaplan's firm, Kaplan Hecker & Fink LLP (NYC), the National Center for Lesbian Rights, and Florida local counsel, Elizabeth Schwartz of Miami. The case was assigned to U.S. District Judge Allen Winsor, a Federalist Society members who served as Solicitor General of Florida under Governor Rick Scott, who appointed him to the Florida Court of Appeals, where he was serving when President Donald Trump appointed him to the district court. (Cases in U.S. District Court are assigned by a random process.)

INDIANA – On March 21, Indiana Republican Governor Eric Holcomb vetoed a measure that would have prohibited transgender girls from competing in scholastic women's sports. His letter to legislators explaining the veto stated that "the presumption of the policy laid out in H.E.A. 1041 is that there is an existing problem in K-12 sports in Indiana that require further government intervention" relating to fairness in competition, but, he wrote, "After thorough review, I find no evidence to support either claim even if I support the overall goal." It was widely predicted that the legislature would override the veto. Such bills have been enacted in Alabama, Arkansas, Florida, Idaho, Iowa, Mississippi, Montana, South Dakota, Tennessee, Texas, and West Virginia, even though there were few if any transgender girls attempting to participate in competitive women's sports in those states at the time of passage.

IOWA – Early in March, Iowa Governor Kim Reynolds signed into law HF 2416, which bans transgender girls and women in the state from competing in sport consistent with their gender identity, as reported by Iowa Public Radio on March 3. The new law applies to all public and private K-12 schools, as well as community colleges and institutions of higher education affiliated with the NCAA and NAIA. It purports to protect Cisgender girls and women from unfair competition, but makes no distinction between transgender women who transitioned prior to the onset of puberty and those whose transition was more recent, and, as described by the governor, is intended to protect women from competition with men. Transgender girls and women who want to compete in athletics must compete against men, regardless of any such distinctions. Fair? Opponents of the measure expect it to be challenged in the courts under Title IX, which has been construed by the Obama and Biden administrations and many federal courts consistent with the Supreme Court's Title VII ruling in *Bostock* as prohibiting discrimination based on gender identity in educational institutions that receive federal funding (which is virtually all the public educational institutions).

OKLAHOMA – On March 30, Governor Kevin Stitt signed into law Senate Bill 2, the "Save Women's Sports Act," which forbids students from participating in sports competition in any gender other than the one identified at their birth. The same measure passed the lower house last year but stalled in the Senate. It was recently revived and past by the overwhelming Republican majority. The bill takes no account of differences in athletic ability depending on when and how a transition process occurs, effectively treating all transgender girls and women as presenting a threat of unfair competition to cisgender women regardless of individual differences.

SOUTH DAKOTA – H.B. 1012, "An Act to protect students from critical race theory," was signed into law on March 30 by South Dakota Governor Kristi Noemi. Despite its title, the actual legislative language is rather anodyne, presents a superficial understanding of "critic race theory," a subject which has never been part of the curriculum of schools in South Dakota. The purported purpose of the measure is to prevent educational institutions in the state from teaching students that members of particular groups are inherently superior or inferior to others due to their group membership, or should feel guilt or shame for the discriminatory sins of past generations.

TENNESSEE – Last year, Tennessee legislated against transgender girls participating in scholastic sports competition. A measure is now progressing through the state legislature that would give "teeth" to the law, according to the measure's sponsors, by threatening to cut off state funding for any school district that allows transgender girls to compete with cisgender girls in sports. Another proposed measure would extend the ban to the college level.

UTAH – On March 25, Utah legislators voted to override Republican Governor Spencer Cox's veto of a law slated to go into effect July 1 that bans transgender girls from participating in girls' scholastic sports competition. Legislators had been meeting with LGBT groups on a potential compromise under which a commission of experts would be appointed to evaluate on an individual basis whether a particular transgender girl could fairly compete with cisgender girls, but a deadlock in negotiations resulted in the introduction of a bill imposing a categorical ban in the closing hours of the legislative session. The governor objected to

the bill on substantive and economic grounds, noting that the inevitable lawsuits would impose severe financial burdens and that the measure would be unfair to those transgender girls who could fairly compete due to the nature and progress of their transition. He also noted the issue of suicidal tendencies of transgender youths denied equal access, and premised his veto as an attempt to save lives. The bill passed without a veto-proof majority, but enough Republicans who voted no were persuaded to switch their votes for the override, which was accompanied by passage of a bill to provide state funding for defending lawsuits.

LAW & SOCIETY NOTES

By Arthur S. Leonard

MARRIAGE EQUALITY – Keeping up with marriage equality developments around the world is daunting, as the issue is "in play" either in the courts or the legislatures – or both – in numerous jurisdictions. The best way to keep current is to consult the frequently updated blog established by journalist Rex Wockner. The current URL for this is https://wockner2.blogspot.com/2022/. Journalists and legal scholars seeking to write on the issue should find it particularly useful. This newsletter attempts to highlight the most important developments each month in the International Notes section, but we are not as comprehensive as Wockner's blog.

LAW SCHOOL ACCREDITATION – The American Bar Association's House of Delegates approved amendments to the accreditation standards for law schools, adding a requirement that schools provide training on bias as part of their curriculum and making additions to the required non-discrimination policies for law schools, including for the first time "gender identity or expression." The ABA added "sexual orientation" many years ago. The accreditation standards do not require religiously affiliated law schools to adopt any non-discrimination policy that would contradict their religious creed.

WHO APPOINTED THE JUDGES? – We have begun as a matter of course in federal cases to identifying the president who appointed the judges rendering the decision. During his single term President Donald J. Trump set a record for judicial appointments, and this has been much in evidence particularly at the district court level. We thought it was useful and information to note how the Trump-appointed judges are doing in handling LGBTQ-related cases. We leave it to our readers to draw conclusions.

INTERNATIONAL NOTES

By Arthur S. Leonard

UNITED NATIONS – The United Nations Committee on the Elimination of Discrimination Against Women voted on February 21, 2022, to approve a decision finding that Sri Lanka was in violation of the U.N. Convention on the Elimination of All Forms of Discrimination against Women by maintaining a criminal prohibition on sex between women and failing to protect lesbians from violence. The decision ends with a list of recommendations to the Sri Lanka government, including repealing the criminal prohibition, adopting comprehensive anti-discrimination legislation that would protect lesbian, bisexual, transgender, and intersex women, and to take various steps to protect women from violence based on their sexual orientation or gender identity. The formal title of the decision is "Views adopted by the Committee under article 7(3) of the Optional Protocol, concerning Communication No. 123/2018," so apparently it took several years for the Committee to investigate the claim brought by Rosanna Flamer-Caldera, a Sri Lankan lesbian. The Committee observed that Sri Lanka formally adhered to the Optional Protocol on January 15, 2003, thus obligating itself to act on the Committee's recommendations. The decision was released publicly on March 23, 2022.

CUBA – *NBC News* reported March 30 that proponents of a new Family Code in Cuba, which would allow for same-sex marriages, civil unions, and other progressive family law policies, is uncertain of approval in a national referendum scheduled for this fall. The news report stated that referenda sponsored by the government normally pass with an overwhelming margin, but political observers suggest that passage this time will not be so easy. The Catholic Church in Cuba has come out strongly against the government's proposals.

GUATEMALA – A bill combining strict abortion bans as well as bans on marriage equality and discussion of sexual diversity in schools was threatened with a veto by President Alejandro Giammattei, due to concerns about its constitutionality. On March 15, the legislature voted to "archive" the measure rather than send it to the president for approval or veto. *Associated Press*, March 15.

HUNGARY – LGBT rights advocates are urging voters in the national elections on April 3 to "spoil" the portion of their ballot dealing with the government's referendum on LGBT issues, preventing it from being valid. Under the law, a referendum is not valid if fewer than 50% of the voters cast valid ballots. The government's proposal is a grab-