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Civil Litigation Notes (August 2022)

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L G B T

LAW NOTES

August 2022

Michigan Supreme Court Rules That State Civil Rights Law Protects LGBTQ+ People

CIVIL LITIGATION *notes*

CIVIL LITIGATION NOTES

By Arthur S. Leonard

U.S. COURT OF APPEALS, 7TH CIRCUIT – A 7th Circuit panel ruled in *Starkey v. Roman Catholic Archdiocese of Indianapolis*, 2022 U.S. App. LEXIS 20890, 2022 WL 2980350 (July 28, 2022), that the Archdiocese and its Roncalli High School enjoy immunity from suit under the 1st Amendment "ministerial exemption" from federal and state law claims by Lynn Starkey, whose contract as Co-Director of Guidance at Roncalli was non-renewed when she revealed that she was in a same-sex union (in reaction to learning that the other co-director had been suspended for entering into a same-sex relationship). District Judge Richard L. Young confronted a motion to dismiss Starkey's Title VII and state contract and tort law claims by going directly to the constitutional doctrine and finding, based on the summary judgment record, that Starkey came within the scope of the ministerial exception as described by the Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012) and *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), and most recently the *en banc* 7th Circuit in *Demkovich v. St. Andrew the Apostle Parish*, 3 F. 4th 968 (2021). Although Starkey is not a Catholic and disclaimed having any particular ministerial duties as part of her job, she had signed an employment contract describing her job as part of the ministry of the school, and as Co-Director of Guidance had "helped draft performance criteria for Roncalli to evaluate the guidance counselors under her supervision" that explicitly described the counselors' role in terms of developing the students' "spiritual life," and referred to them as "ministers of the church" even though they were not ordained. Her "school teacher employment contract" also had a morals clause requiring that employees "refrain from 'any personal conduct or lifestyle at variance with the policies of the Archdiocese or the moral or religious teachings of the Roman Catholic Church,'" and the most recent contract she had signed (after same-sex marriages became an issue in Indiana due to the Supreme Court's *Obergefell* decision) specifically stated that an employee would be "in default" if they were to engage in a relationship "contrary to a valid marriage as seen through the eyes of the Catholic Church," whose catechism defines marriage as between a man and a woman. Applying these precedents and contractual provisions, Judge Young had little difficulty finding that the ministerial exception applies, granting the motion for summary judgment. The 7th Circuit panel agreed, in an opinion by Circuit Judge Michael Brennan (a Trump appointee), which also took note of the church autonomy doctrine that might apply even if Starkey were deemed not to be a ministerial employee, and rejected Starkey's argument that the various quoted documents were not accurately descriptive of facts on the ground, even though she did not directly contend that they were pretextual. The court also ruled that Starkey's state law claims were precluded as well, since they "implicate ecclesiastical matters because they litigate the employment relationship between the religious organization and the employee." In a concurring opinion, Circuit Judge Frank Easterbrook (a Reagan appointee), commented, "It is a stretch to call a high school guidance counsellor a minister. Even if the school expects counsellors to pray with students and discuss matters of faith with them, the job is predominantly secular. Designating the position as a minister by contract cannot be called pretextual, however, so I do not object to the majority's conclusion." But he stated concern that the court did not first engage with the question whether this case was governed by the religious organization exemption under Title VII, which could obviate the need to make a constitutional ruling and, by knocking out the federal question in the case, would allow for dismissal of the state law claims as a matter of jurisdictional discretion. He contended that it was possible to interpret Section 702(a), 42 U.S.C. Se. 2000e-1(a), the religious organization exemption, as applicable to this case. The third member of the panel, Circuit Judge Amy St. Eve, is also a Trump appointee. Starkey is represented by Kathleen A. DeLaney and Matthew R. Gutwein, of Delaney & Delaney LLC, Indianapolis. The court received a pile-on of amicus briefs, mostly in support of the defendants, who were represented by the Becket Fund for Religious Liberty. Amici supporting defendants included the Christian Legal Society, the Mormon Church, several state attorneys general from "Red States," the Associate of Christian Schools International, but amici also weighed in on the other side, led by Americans Untied for Separation of Church and State.

U.S. COURT OF APPEALS, 8TH CIRCUIT – In *School of the Ozarks, Inc. v. Biden*, 2022 WL 2963474, 2022 U.S. App. LEXIS 20734 (July 27, 2022), a three-judge panel of the 8th Circuit Court of Appeals granted the government's motion to dismiss an action brought by Alliance Defending Freedom (ADF) on behalf of School of the Ozarks, seeking an injunction "setting aside" and blocking enforcement of a memorandum that had been issued by an official of the Department of Housing and Urban Development in response to President Biden's executive order directing federal agencies to follow the Supreme Court's *Bostock* decision in interpreting and enforcing bans on sex discrimination. The School is described in the opinion for the panel majority by Circuit Judge Steven Colloton as "a private Christian college in Missouri." The School provides dormitory housing for its

students, segregated by biological sex. In February 2021, the Acting Assistant Secretary for Fair Housing and Equal Opportunity in the Department of Housing and Urban Development (HUD) issued a memo informing the relevant enforcement agency in HUD as well as state and local agencies and private organizations that administer and receive funds through HUD's programs that the Department would interpret the Fair Housing Act, which prohibits, *inter alia*, sex discrimination in housing, to encompass discrimination because of sexual orientation and gender identity. Claiming that it is in imminent danger of investigation and enforcement action because of this memo and its housing policies, the School sought a temporary restraining order and preliminary injunction, claiming violation of its free exercise and free speech rights. The panel voted 2-1 to uphold the district court's dismissal of the case on standing grounds, observing that HUD had never brought enforcement actions against religious colleges that qualified for a religious educational institution exemption under Title IX of the Education Amendments of 1972 as an "educational institution which is controlled by a religious organization" if applying the prohibition of sex discrimination "would not be consistent with the religious tenets" of the organization. Since the School had previously been recognized as exempt under Title IX, its claim to be in danger of imminent enforcement by HUD was rejected by the court, which reached a similar conclusion as to the free speech claim. Dissenting, Judge Steven Grasz asserted that the memo made an "important change in government policy" that should have been put through the full Administrative Procedure Act process before being adopted and distributed. "An agency's issuance of a guidance document that fails to adhere to the proper administrative procedures may achieve compliance with the government's desired policy outcomes by *in terrorem* means," he wrote, "but it skirts the rule of law and undermines our values. This is especially true where regulated entities are placed under a sword of Damocles but are denied access to the courts because the sword has not yet fallen." He argued that under APA regulations a guidance memo of this type should have been posted for notice and comment by the public, of which the School was deprived. Judge Colloton was appointed by President George W. Bush. Judge Jonathan Kobes, the other panel member in the majority, was appointed by President Donald Trump. Judge Grasz was also appointed by President Trump.

FLORIDA – *Bloomberg Daily Labor Report* reported on July 11 that the EEOC had announced a $100,000 settlement of a pending discrimination suit by a former employee of a Plant City, Florida, Applebee's restaurant, who alleged that two staff members had repeatedly harassed the employee with racist and homophobic epithets. One of the staff members also allegedly wore "paraphernalia of the Confederate flag" at work. When the operator of the restaurant allegedly failed to take action after the employee reported the harassment, he attempted to contact corporate headquarters and experienced a reduction of his work hours and constructive discharge. A three-year consent decree will require the company to provide training and to appoint an internal consent decree monitor.

FLORIDA – In *Silver v. City of Pembroke Pines*, 2022 U.S. Dist. LEXIS 125781 (S.D. Fla., July 15, 2022), Michael Silver, a gay Jewish police officer suffered summary judgment on his claims of discrimination because of his sexual orientation and religion and retaliation under Title VII and the Florida Civil Rights Act. U.S. District Judge Rodolfo A. Ruiz, II, found that the plaintiff had failed to allege facts linking the adverse employment action he suffered either to his sexual orientation or his religion, thus failing to allege sufficient facts to support an inference of discrimination applying the McDonnell Douglas pleading standards for Title VII. Michael Silver began working for the Pembroke Pines P.D. as a "road officer" in 2003 and was transferred to the detective bureau (Special Victims Crime Unit) in 2014. In the interim, he came out as gay to his co-workers and received various commendations and awards. However, in the detective bureau he came under the supervision of Sergeant Angela Goodwin, and to judge by the factual allegations in this case, they did not get along. It seems clear that Goodwin concluded Silver had an attitude problem toward respecting her and taking direction from her, and she documented numerous problems with his performance (from her perspective) in "notes to file," which became a source of evidentiary contention when Silver objected to them as hearsay. (In a footnote, June Ruiz explained that because Goodwin could testify as to the incidents detailed in her notes to file, although they constituted hearsay, they could be reduced to admissible form through her deposition testimony.) When Goodwin raised performance issues with Silver, he walked out of a meeting with her, asserting that his union rep and the commanding officer should have been present as "he felt he was being improperly disciplined." Soon Goodwin and her supervisor concluded that rather than place a permanent negative record in his file, Goodwin should be transferred back to being a road officer, which meant losing a small list of perks. Goodwin complained about his treatment to his union representative, and subsequently in a meeting with a captain and a major but, the judge points out, he did not mention his religion or sexual orientation as a reason for his claim that he was being "targeted" by Sergeant Goodwin. While

the court concluded that the transfer was an adverse personnel action, despite no loss of rank or pay, in order to sustain the discrimination charges, he had to make an evidentiary link between his sexual orientation and/or religion and to provide comparators to prove that the action was discriminatory. He proposed several comparators, but the court concluded that none of them was a true comparator because of distinguishing facts. Judge Ruiz wrote that the "undisputed facts paint a picture of a detective who regularly engaged in insubordination and was unwilling to accept the critiques of his supervisor. More importantly, the factual record clearly establishes serious performance issues existed, which is the stated reason for Defendant's decision to move Plaintiff to road patrol." As such, if a prima facie case had been made out, it would be rebutted, and "Plaintiff makes no attempt to prove or point to evidence that these clear, obvious, and nondiscriminatory reasons were pre-textual." Judge Ruiz granted summary judgment to the Pembroke Pines D.D. and directed his clerk to close the case. Silver is represented by Allison Beth Duffie, Boca Raton, and Michelle C. Levey, Fort Lauderdale. Judge Ruiz was appointed by President Donald J. Trump.

ILLINOIS – Michael Briggs, a gay man, was employed by Savor Chicago, which had a contract to supply food to the McCormick Place Convention Center in Chicago. Under the union contract, employees are scheduled to work based on tiers of seniority that depend on frequency of engagement. Briggs claimed that he was discriminated against because of his sex (male), sexual orientation ("non-heterosexual") and race (white) in terms of scheduling, alleging among other things that an alleged comparator, who is a black, received more engagements because of his friendship with the director of banquets. Unfortunately for Briggs, favoritism as such is not a violation of Title VII, and the court found no merit to his claim that the company discriminated against him by dropping him to the lowest seniority tier, since he had taken various leaves which left him less senior and subject to being dropped to a lower tier, unlike his alleged comparator, who had not taken leaves and thus had not decline assignments to the same degree as Briggs. Briggs also alleged that some co-workers had created a hostile working environment because of his sexual orientation. "Viewing the record in the light most favorable to Briggs," wrote U.S. District Judge Thomas M. Durkin, "he was subjected to offensive behavior such as coworkers 'misidentifying his name in a gender inappropriate way,' and making 'inappropriate comments of a sexually harassing nature.' Some of these comments included being referred to (along with another coworker) as 'day time friends, night time lovers,' and a coworker asking if he was going to 'get a free one' (referring to oral sex) when Briggs bent over to tie his shoe." The court found that this conduct was not "severe or pervasive," and that when Briggs complained about it, an HR representative investigated. The court also noted that Briggs did not allege that the comments about which he complained had "impacted his ability to do his job (or that they had any impact on him at all)." The court granted the employer's motion for summary judgment in *Briggs v. SMG Food and Beverage LLC*, 2022 WL 2915634, 2022 U.S. Dist. LEXIS 131391 (N.D. Ill., July 25, 2022). Briggs is represented by Diana C. Taylor of ST Legal Group. Judge Durkin was appointed by President Barack Obama.

MISSOURI – Sabrina Briony Duncan, a transgender woman, sues her employer, Jack Henry & Associates (JHA), the employer's health insurance plan, and companies with whom JHA contracts for administrative services under the plan, for refusing to cover facial feminization surgery recommended by her doctor as part of her "male-to-female transition process" and refers to the treatment standards of the World Professional Association for Transgender Health (WPATH) as authority. The defendants argue that under the terms of the plan, this is excluded as "cosmetic surgery" that is not medically necessary to treat an illness or disorder. Duncan's suit invokes the Employee Retirement Income Security Act (ERISA) and the Americans with Disabilities Act (ADA). In *Duncan v. Jack Henry & Associates, Inc*., 2022 U.S. Dist. LEXIS 132980, 2022 WL 2975072 (W.D. Mo., July 27, 2022), U.S. District Judge Roseann A. Ketchmark denied the defendants' motions to dismiss the ERISA claims, while granting the motion to dismiss the ADA claims. The judge found that the plaintiff had stated a claim calling for interpretation of the plan that was at least plausible at this stage of the litigation, and that the equitable and monetary remedies she sought were authorized by the statute. She also declined to dismiss a claim under the Parity Act, an amendment to ERISA specifying that employment benefit plans that cover both medical/surgical and mental health/substance use disorder benefits must ensure each category of benefits are treated the same, finding that the allegations of the complaint supported a plausible claim under this provision. However, the judge found that a claim against one of the contractors for failing to turn over certain requested study materials fell outside the statutory requirement of disclosures to plan beneficiaries. Most significantly, Judge Kretchmark found, based on Duncan's pleadings about the nature of her gender dysphoria, that Duncan was *not* a person with a disability within the meaning of the ADA. The ADA's exclusionary provision governing "gender identity disorders" that are not "not resulting

from a physical impairment" would, under a plain meaning interpretation, rule out Duncan's claim that her employer violated the ADA by providing a plan (in this case, a self-funded plan of which the employer was designated as the administrator) that failed to cover the procedure in question because it was part of her transitional care. Some courts have found certain gender dysphoria discrimination claims to fall outside the exclusion, based on allegations that the plaintiff's gender dysphoria had a physical basis, but in this case, Duncan managed to plead herself into the statutory exclusion by asserting in her complaint that her gender dysphoria was not caused by a physical impairment. Duncan is represented by the ACLU of Missouri and cooperating attorneys from Zuckerman Spaeder LLP. This part of the ruling could be appealed, but Judge Ketchmark provides what appears to be a detailed and cogent rationale for her conclusion. Judge Ketchmark was appointed by President Barack Obama.

NEBRASKA – This one is definitely strange and, we suspect, *pro se,* although the court doesn't mention that. *Elliott v. Roberts*, 2022 WL 2818380, 2022 U.S. Dist. LEXIS 128003 (D. Neb., July 19, 2022). The plaintiff had filed a petition for a name change to reflect her gender identity in the Douglas County, Nebraska, District Court. During the name-change hearing on April 21, 2022, the defendant, Omaha Douglas Federal Credit Union, through its counsel (the other defendant), Justine A. Roberts, objected by telephone to the granting of the name change. The Credit Union's testimony was that it "believes the Petitioner is attempting to change his name to avoid liability on his debts and to further frustrate the efforts of his creditors to collect on their debts." In this federal suit before Senior U.S. District Judge Richard G. Kopf, the plaintiff alleges that because of defendant's objection, "she was not granted a name change to align with her gender identity." She charges the defendants with "malpractice, emotional abuse, lbgtqa [sic] human rights [sic], discrimination sex and gender, verbal abuse, Threats/harassment/breaking the federal debt collection protection laws, violation of fair court hearings/trial, suspended business license/illegally under the federal court not allowed to practice law until legally active as of 05/23/2022." (You see why we surmise this is a *pro se* complaint?) She was not seeking to evade a debt, she insisted, just to have a legal name consistent with her gender identity, and all she was asking for in this federal suit was "my name change to become a woman." A check of the judicial records in the state law case showed, however, that "Plaintiff has received the relief she seeks in her Amended Complaint in this court," wrote Judge Kopf. "Mootness divests this court of subject matter jurisdiction. Accordingly, because the Douglas County District Court granted Plaintiff's desired name change – which is the issue underlying all claims and requests for relief sought in this court – I will order Plaintiff to show cause why this case should not be dismissed without prejudice as moot." Plaintiff was given one month to respond this decision. Judge Kopf was appointed by President George H.W. Bush.

NEW JERSEY – Nairah-Sahar Mutazz, described by Senior U.S. District Judge Robert B. Kugler in his opinion in *Mutazz v. Amazon.com Services LLC*, 2022 WL 2713974, 2022 U.S. Dist. LEXIS 123720 (D.NJ., July 13, 2022), as "a homosexual woman," was terminated for "job abandonment" after a series of incidents in which she had confrontations with co-workers and supervisors, beginning with a male co-worker who insisted repeatedly that "You the type to want men. You want dick." Her complaints to HR did not bring responses satisfactory to her, leading to further complaints. She was away from work while a particular complaint was being investigated when she learned that she had been terminated for job abandonment; she claimed she had not been notified to return to work. (This story sounds like old news concerning how fulfillment workers are sometimes treated at Amazon warehouses.) She brought claims of discrimination, hostile work environment, and retaliation under Title VII and state law against the employer and several individuals. Title VII claims only run against "the employer" – in this case a corporate entity – and not against the various individuals with whom plaintiff had confrontations, but they might be subject to state law liability. Judge Kugler granted motions to dismiss all claims against all defendants. Reading through the lengthy fact summary and analysis, it appears that plaintiff was subjected to possible sexual harassment by a male co-worker, the company handled her complaints poorly, and her frequency of complaining about things resulted in her receiving less than enthusiastic or expeditious assistance from HR personnel. In any event, the court found that her factual allegations were not adequate to support her legal claims. Although she was able to satisfy various pleading elements, the court concluded that she had failed to allege facts that would link her adversities with her sex or sexual orientation. "Plaintiff does not allege any additional facts that plausibly infer that other employees, or other complaints, were treated differently from her own or other members of her protected class," wrote Judge Kugler. "Put simply, Plaintiff's claim resembles the conclusory allegations form which courts in this Circuit have declined to find an inference of discrimination." The court found the factual allegations going to harassment insufficient to meet the "severe or pervasive" test set by federal caselaw, and found similar fault with the allegations underlying the retaliation claim. Plaintiff had also asserted an

"aiding and abetting" claim under the NJ statute against certain individuals, but the court found the lack of an indispensable element, since "aiding and abetting" requires the plaintiff to show that the employer committed an unlawful act, the defendant was aware and his or her own conduct knowingly and substantially assisted the employer's "principal violation." But in this case the court had decided to dismiss all claims against the employer, so there was no "principal violation" as to which the individual defendants had "aided and abetted" the employer to commit. Title VII is a discrimination statute. Lots of bad treatment of employees does not violate Title VII if the employee cannot plausibly allege facts showing that the bad treatment they received was "because of" a forbidden ground under the statute. The plaintiff is represented by Catherine Wellington Smith, of Derek Smith Law Group, PLLC, Philadelphia. Judge Kugler was appointed by President George W. Bush.

NEW YORK – In *Lopez v. United States Department of the Interior*, 2022 U.S. Dist. LEXIS 119458 (S.D.N.Y., July 6, 2022), Chief U.S. District Judge Laura Taylor Swain found that it was probably appropriate for the federal court to abstain from becoming involved in a controversy between Mariah Lopez, a transgender rights activist, and various federal and state officials and agencies, as part of Lopez's campaign to scuttle a development proposal involving construction of a beach and soccer fields in Hudson River Park between Christopher Street and the Gansevoort Peninsula. Lopez contends that this is a site of historic significance for LGBTQ people, among many others. She asserts that as the adopted daughter of transgender activist Sylvia Rivera, whose ashes were scattered in this area in 2002, she will suffer irreparable harm if the project continues, in the form of "psychic pain and a sense of personal loss, including part of her own identity, which may never be restored." Lopez claims that the NY State Historic Preservation Office, which rejected a proposed to designate this stretch of the riverfront for historic preservation, conducted a study that was "flawed, deficient, inadequate; intentionally misleading" and was essentially catering to the interests of "wealthy white developers" in a "rubber stamp approval process." She charges that the relevant communities – "minority groups, including those who are Black, Latino, gender nonconforming, homeless and poor" – were excluded from the process of approving this project, which will replace "TLGBQ+ communities [with] white, cis, hetero sunbathers." However, she filed an Article 78 proceeding with in Albany County Supreme Court before filing this federal lawsuit, denominated *Lopez v. Hochul*, Ind. No. 781-22, and has already obtained temporary injunctive relief against the project going forward, while the state court has not yet issued a decision on more a preliminary injunction, although that court did not bar certain preparatory aspects of the project from proceeding. In concluding that abstention is the proper course for the federal court at this point, Judge Swain explained, "There is arguably property at issue, of which the state court has assumed jurisdiction; the federal forum is not less inconvenient than the state forum in which the parties are already litigating the matter; staying or dismissing the action will avoid piecemeal litigation; the state-court action was filed first and has advanced well beyond the stage of litigation in this court; federal law does not necessarily provide the rule of decision; and, finally, state procedures are adequate to protect Plaintiff's federal rights." The court issued an order to show cause, giving Lopez until August 5 to "show cause why the Court should not abstain from exercising jurisdiction in this action." She denied Lopez's motion for preliminary injunctive relief without prejudice. Although the judge had granted Lopez's motion to proceed *in forma pauperis* on July 5, she certified "that any appeal from this order would not be taken in good faith, and therefore IFP status is denied for purpose of an appeal." Judge Swain was appointed by President Bill Clinton.

PENNSYLVANIA – A transgender woman is suing Independence Blue Cross, alleging that it denied health insurance coverage for facial feminization surgery in violation of anti-discrimination laws, and she wishes to proceed anonymously as "Jane Doe." In *Doe v. Independence Blue Cross*, 2022 WL 2905252, 2022 U.S. Dist. LEXIS 130152 (E.D. Pa., July 22, 2022), Senior U.S. District Judge Timothy J. Savage granted the plaintiff's motion to proceed as Jane Doe. "Plaintiff has shown a reasonable fear of severe harm," wrote Judge Savage. "She avers that she has 'been insulated, isolated, and assaulted for being trans.' She fears that disclosure of her personal identity will cause her 'severe harm because of society's discrimination against trans people." Her fairs are reasonable," wrote the judge, quoting from the National Center for Transgender Equality's Report of the 2015 U.S Transgender Survey, showing the high proportion of transgender people who encounter discrimination, harassment, and violence. The court found that the factors weighing in favor of anonymity far outweighed the factors against anonymity, finding that "there is no discernable significant public interest in disclosing of plaintiff's identity weighing in favor of disclosure. The issues can be considered and decided without revealing plaintiff's identity." However, a copy of the original complaint bearing plaintiff's name will be filed under seal. "All documents and other papers filed in this action containing the plaintiff's identity shall substitute Jane Doe for her named" ordered the judge.

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WEST VIRGINIA – Lora Leigh McCoy, suing *pro se*, alleged that her employer, Frontier Communications, subjected her to a hostile work environment based on her gender/sexual orientation. *McCoy v. Frontier Communications*, 2022 U.S. Dist. LEXIS 12837 (S.D. W. Va., July 13, 2022). Under a standing order of the court, the *pro se* complaint was referred to a magistrate judge for a Report and Recommendation. The magistrate judge found that the plaintiff's allegations "were not sufficiently 'severe or pervasive' to establish a hostile work environment under the prevailing case law." Among other things, she did not allege that the harassment was perpetrated by supervisor or managers, or that she had reported this harassment by co-workers to the employer. In hostile environment cases, the Supreme Court has held that vicarious liability of the employer is limited to acts of supervisors or managers, which can be imputed to the company. Acts of co-workers cannot by themselves be imputed to the employer, which is the only entity amendable to suit under Title VII. So, an employee with a claim of hostile environment based on the acts of co-workers had to bring the matter to the employer for resolution if she is to hold the employer accountable for failure to take reasonable steps in response to such complaints. The magistrate recommended dismissing the complaint. In her objections to the magistrate's report, McCoy "does not really grapple with the analysis" in the magistrate's report, wrote Senior District Judge David A. Faber, asserting that "She cannot create a disputed issue of material fact and defeat summary judgment by making vague and generalized allegations," and ordered that the case be dismissed. The court never discusses the details of McCoy's allegations. Judge Faber was appointed by President George H.W. Bush.

WISCONSIN – In *In the Interest of C.G., a person under the age of 18: State of Wisconsin v. C.G.*, 2022 WI 60, 2022 Wisc. LEXIS, 85, 2022 WL 2517266 (Wis. Sup. Ct., July 7, 2022), the Wisconsin Supreme Court ruled that a teenager convicted of sexually assaulting a younger male teen, who entered the juvenile justice system as a male, was not entitled, upon realizing her transgender identity, to obtain a legal name-change. According to the court's account, several teens were handing out in a bedroom, two of whom held down young Alan while the petitioner, C.G., then identifying and presenting as male, gave Alan oral sex, which the court characterizes as "a heinous act that forever changed Alan's life." (This due to the shame and humiliation Alan felt when word got around as to what had happened.) Ella (as she now identifies) complains that "she is bound to 'out herself' as a male anytime she is required to produce her legal name," but a statute precludes her from obtaining a legal name change because she is a sex offender. In response to her complaint, the state argued that she was free to use an alias provided that she notify the Department of Corrections in advance of her intent to do so. "Consistent with well-established precedent," wrote Justice Rebecca Grassl Bradley for the court, "we hold Ella's placement on the sex offender registry is not a 'punishment' under the Eighth Amendment. Even if it were, sex offender registration is neither cruel nor unusual. We further hold Ella's right to free speech does not encompass the power to compel the State to facilitate a change of her legal name." After noting the novelty of Ella's 1st Amendment claim, the court explained, "Few courts have addressed this issue. Among those that have, none have held that a prohibition on changing a person's legal name, standing alone, implicates the right to free speech. If a person is free to use a different name in day-to-day affairs, statutory restrictions on changing a person's legal name have not been understood to restrict speech or expression." Ella had argued that responding to a request to show identification is expressive conduct, enjoying 1st Amendment freedom of speech protection, but the court disagreed. "The act of producing identification is conduct unprotected by the 1st Amendment," wrote Justice Bradley. The Supreme Court affirmed the order of the court of appeals, which had denied her 8th and 1st Amendment claims. The court also rejected a "compelled speech" claim. A concurring opinion by Justice Brian Hagedorn differed with the court on its method of analyzing the 8th Amendment claim, but reached the same result. However, he wrote several paragraphs responding to the court's decision to use Ella's preferred name and pronouns in writing the opinion, even as the court was rejected her challenge to the statute precluding a legal name change for her. Hagedorn asserted that the court should be "scrupulously neutral rather than assume that pronouns are for choosing. These matters of grammar have downstream consequences that counsel caution, particularly as a court of law where such decisions could have unknown legal repercussions." Justice Ann Walsh Bradley dissented. Although she agreed with the majority's 8th Amendment holding, she challenged its 1st Amendment analysis, charging that the majority "takes an overly restrictive view of expressive conduct and denigrates the import of a legal name. She would apply strict scrutiny, arguing that "the question boils down to whether the State has met its burden to show that this statutory restriction is narrowly tailored to serve a significant government interest – as applied to Ella. If not, then such a restriction cannot be constitutionally applied to Ella's circumstances." This Justice Bradley (as distinguished from the Justice Bradley who wrote for the court) concluded that "Ella has established a violation of her 1st Amendment rights and that the State has not met its burden to demonstrate that Ella should be categorically

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banned from filing a petition for a name change." Her dissent was joined by Justices Rebecca Frank Dallet and Jill J. Karofsky. Thus, result in the seven-member court was 7-0 in rejecting the 8th Amendment claim, but 4-3 in rejecting the 1st Amendment claim. C.G. is represented by Assistant State Public Defender Cary E. Bloodworth.

PRISONER LITIGATION NOTES

By William J. Rold

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UNITED STATES SENTENCING COMMISSION – As *Law Notes* has reported several times, the United States Sentencing Commission has not had a quorum or the ability to act since 2018. This has affected LGBTQ prisoners in many ways, including those incarcerated who seek reduction of sentences, compassionate release due to illness, or other implementation of new federal law, such as the First Step Act, reclassifying certain offenses. It has also fostered conflicting rulings regarding compassionate release and standards for same under new COVID-19 regulations. On May 12, 2022, President Biden nominated a slate of seven new members for the seven-member Commission, which was created as an agency of the judicial branch. Nominees therefore need not resign a federal judgeship to be appointed, and in fact the statute requires that at least three members be federal judges. No more than four members can be of the same political party, and the terms of the members are six years. 28 U.S.C. §§ 991, 992. President Biden nominated U.S. District Judge Carlton Reeves (S.D. Miss.) to be chair. Vice Chair nominee is Iowa Public Defender Laura Mate. The other five nominees are: Claire McCusker Murray (of New Jersey, associate White House Counsel during the Trump Administration); Third Circuit Judge Luis Restrepo (of Pennsylvania); U.S. District Judge Claria Horn Boom (E.D. Ky.); former U.S. District Judge John Gleeson (E.D.N.Y.); and former U.S. Attorney Candice Wong (of the District of Columbia). The Senate held hearings on June 8, 2022, but there has been no further action on the nominations. No nominee is identified by the White House as a member of the LGBTQ community.

ARIZONA – This is one of nine related *pro se* cases brought by African-American transgender federal prisoner Antonio Crawford that are pending in the Tucson Division of the District of Arizona before U.S. District Judge John C. Hinderaker (Trump). Crawford sought a TRO for a permit for "female only" officer searches in *Crawford v. Tubb,* 2022 U.S. Dist. LEXIS 120889 (D. Ariz., July 8, 2022). Judge Hinderaker ordered expedited service and response by the Bureau of Prisons within fourteen days. BOP made an "individualized" decision and granted the female officer search status that Crawford was demanding. Judge Hinderaker then found the request for the TRO to be moot, since Crawford has received the specific relief sought in the TRO. Judge Hinderaker cites *Rosemere Neighborhood Ass'n v. U.S. Environmental Protection Agency*, 581 F.3d 1169, (9th Cir. 2009). [Note: The absence of a jump cite after the comma is not a typo, it appears that way in the decision – perhaps because *Rosemere* reversed a finding of mootness in an environmental case when "voluntary cessation" by a polluter failed to satisfy the court that the pollution would not resume. Analytically, this case involves not traditional "voluntary cessation" but the failure to apply an exception to general search rules.] Crawford argued that, since she could still be searched by male officers in "exigent circumstances" or the permit could be ignored, the case was not moot for two reasons: (1) the facility could deem non-exigent searches to be exigent, defeating the purposes of the permit; and (2) the isolated failure to honor her permit would be "capable of repetition yet evading review" – under *C.F. ex rel Farnan v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 983 (9th Cir. 2011). Judge Hinderaker found that Crawford failed to meet her burden of showing the likelihood of either scenario by producing something more than speculation. There is no need for preliminary relief at this stage. It is unclear where this or the other cases are ongoing. One claim Crawford made is that transgender accommodations are racially biased, with Black inmates receiving less favorable treatment. The following is worth quoting from the BOP's papers opposing the TRO: "Plaintiff is one of four African American transgender inmates at USP Tucson to obtain the female-only pat search exception. Ten White, one Hispanic, and one Native American transgender inmates also have requested and received the female-only pat search exception. Currently, 124 transgender inmates are housed at USP Tucson. Of these, 23 are African American, 72 White, 15 Hispanic and 13 Native American. Thus, 17.39% of African American, 12.50% of White, 6.67% of Hispanic and 7.69% of Native American transgender inmates at USP Tucson have received the female-only pat search exception." This may come back to haunt them. Regulations under the Prison Rape Elimination Act, 28 C.F.R. § 115.15 (effective August 2015), provide that cross-gender searches are prohibited for all transgender and intersex inmates absent exigent circumstances. BOP, by its own admission, seems out of compliance more than 80% of the time at FCI-Tucson.

CALIFORNIA – This short screening order, involving *pro se* transgender