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Civil Litigation - Notes

Arthur S. Leonard

CIVIL LITIGATION *notes*

CIVIL LITIGATION NOTES

By Arthur S. Leonard

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U.S. COURT OF APPEALS, 6TH CIRCUIT – Mohamed Ould Sid Ahmed Lehbib, a native and citizen of Mauritania and lawful permanent resident of Italy, sought review of the Board of Immigration Appeals' dismissal of his appeal from an immigration judge decision denying his application for withholding of removal. *Lehbib v. Garland*, 2023 U.S. App. LEXIS 1782, 2023 WL 532267 (6th Cir., Jan. 24, 2023). Lehbib, who entered on a six-month visitor visa and applied to remain in the U.D. shortly before the visa expired, identifies as a gay Islamic man who opposes criminalization of homosexuality in Mauritania and fears persecution there based on his religion and political opinion and membership in a particular social group. The immigration judge denied relief but offered to designate Italy as the country of removal, which Lehbib's counsel at the hearing responded would be "wise." The IJ found that Lehbib's resettlement in Italy prior to entering the U.S. barred his asylum claim, and that the withholding claim lacked merit "because he failed to establish either a nexus between his alleged past of future harm and his political opinion or religion, or a well-founded fear of persecution on account of his homosexuality," and similarly denied a claim under the Convention Against Torture (CAT). Lehbib's appeal focused on Mauritania, but, the court observed, he was not being removed to Mauritania, but rather to Italy. Thus, the court held it was without jurisdiction to consider his arguments on appeal. "Lehbib's claim for withholding of removal to Mauritania will not become ripe unless and until the government's efforts to remove him to Italy prove unsuccessful and the government seeks his removal to Mauritania in the alternative," commented the court. The panel deciding this case included Senior Circuit Judge Ralph Guy, Jr. (Reagan), Circuit Judge Karen Nelson Moore (Clinton), and Circuit Judge Raymond Kethledge (George W. Bush). Lehbib is represented by John M. Vickerstaff, Louisville, KY.

U.S. COURT OF APPEALS, 9TH CIRCUIT – In *Hecox v. Little*, 479 F. Supp. 3d 930 (D. Idaho, 2020), the court refused to dismiss a constitutional challenge to an Idaho law banning trans women from participating as women in scholastic sports. Plaintiff Lindsay Hecox, a transgender woman, won a preliminary injunction on August 27, 2020, Chief District Judge David Nye finding that she was likely to succeed on her equal protection claim. But she subsequently withdrew from Boise State University due to illness and her father's passing, in October 2020. Judge Nye found that this did not moot her claim, because she stated her intention to re-enroll and had made specific arrangements to do so and preserve her academic eligibility, so the preliminary injunction remained in effect. The state appealed and drew a 9th Circuit panel consisting of Senior Circuit Judge Andrew Kleinfeld (George H.W. Bush appointee) and Circuit Judges Kimi McLane Wardlaw and Ronald Gould (both Clinton appointees). The panel agreed with Judge Nye, in *Hecox v. Little*, 2023 WL 1097255 (9th Cir., Jan. 30, 2023) (unpublished disposition), that the case wasn't mooted. Under the circumstances described in the opinion, Hecox would be able to compete despite various issues raised by the state concerning NCAA standing and so forth, because she was willing to extend her academic career to earn sufficient credits to meet the requirements for eligibility. Hecox is represented by lawyers from or associated with the ACLU. District Judge Nye was appointed by President Trump.

U.S. COURT OF APPEALS, 9TH CIRCUIT – A panel of the 9th Circuit issued a Memorandum in *DeFrancesco v. Arizona Board of Regents*, 2023 U.S. App. LEXIS 1270, 2023 WL 313209 (Jan. 19, 2023), affirming in part and reversing in part a decision by District Judge Cindy K. Jorgenson (D. Ariz.). Judge Jorgenson had dismissed a Title VII claim of sexual orientation discrimination against University of Arizona Health Services by out gay employee Anthony T. DeFrancesco, whose bid for a promotion was unsuccessful. The Court of Appeals agreed that based on the pleadings it was not inferable that the treatment of which DeFrancesco complained was due to his sexual orientation. In the absence of direct evidence of discriminatory intent, DeFrancesco had relied on an inference of homophobia by the decision-makers because they were surgeons, asserting that surgery has "a reputation for a jock/frat culture" that was presumably biased against gay men. Neither the district court nor the Court of Appeals was willing to draw an inference of anti-gay motivation from such a vocational stereotype, especially when noting that the person who was given the promotion had many more years of relevant experience than DeFrancesco. On the other hand, however, it was quite plausible that DeFrancisco suffered from retaliation because of statements his husband, Gregg Goldman, then Chief Financial Officer of University of Arizona Health Sciences, made about the ultimately successful candidate for the position of UAHS Senior Vice President, Michael Dake, whose subsequent treatment of DeFrancesco was the object of both the Title VII claim and a First Amendment retaliation claim targeted against Dake and former President Robert Robbins. Judge Jorgenson had denied a motion to file an amended complaint on the

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First Amendment claim, which the Court of Appeals determined was an abuse of discretion. At issue is whether DeFrancesco could premise his First Amendment retaliation claim on the speech of his husband rather than his own speech, and whether his husband's speech – negative comments to President Robbins about Dake – enjoyed First Amendment protection. Judge Jorgenson had found that Goldman spoke pursuant to his official duties on "individual personnel disputes and grievances," which was allegedly part of his job and thus not protected speech. In seeking to file an amended complaint, DeFrancesco argued that he would allege facts showing that Goldman spoke as a "whistleblower on cronyism and corruption at UAHS," which would be a matter of public concern. "The district court should have permitted DeFrancesco to amend his complaint to allege Goldman's whistleblowing speech and facts that demonstrate that Goldman spoke outside the 'scope and content of his job responsibilities,'" wrote the court, quoting *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1131 (9th Cir. 2008). The district court had alternative based its ruling on qualified immunity claims by Dake (and former UAHS President Robert Robbins), but the Court of Appeals opined that it was inappropriate to decide the qualified immunity issue based on the original complaint, since the court should have allowed DeFrancesco to amend his complaint along the lines suggested in his appellate argument, with the amended complaint being the basis for making a qualified immunity determination. DeFrancesco is represented by Jonathan A. Dessaules, Phoenix, and Louis R. Miller and David W. Schechter, Biller Barondess, LLP, Los Angeles. The 9th Circuit panel included Circuit Judges Kim Wardlaw (a Bill Clinton appointee) and Patrick Bumatay (a Donald Trump appointee) and U.S. District Judge Sharon L. Gleason, Chief U.S. District Judge for the District of Alaska, sitting by designation (a Barack Obama appointee).

ALABAMA – Small town soap opera? The mayor of City of Lanett, Alabama, Kyle McCoy, was a gay man who was married to another man. It seems this was a part-time job for McCoy, who also ran an antiques business. David DeLee, the plaintiff in this case, was the longtime utilities superintendent for the city, overseeing operations of the city's gas and electric systems. The relationship between McCoy and DeLee was strained, in part because DeLee perceived that McCoy coveted his full-time position, which presumably he could hold simultaneously with being the mayor, and was plotting to set him up for a discharge. McCoy was aware that DeLee and his department's employees referred to McCoy as "fag" and "faggot." DeLee concluded that McCoy was engaging in various unethical activities, including letting his husband use a city vehicle, and filed an ethics complaint against him. McCoy claimed that the first he learned of this was around March of 2020 when an ethics investigator visited McCoy's business, and McCoy subsequently received a letter informing him that the ethics complaint had been filed, but it did not identify who filed the complaint, and there was some reason to believe that McCoy suspected somebody other than DeLee. DeLee encountered various obstacles to performing his job once the COVID-19 epidemic hit and restrictions on access to the City Hall were put into place, under which DeLee was excluded, and thus unable to access mail directed to him there, which resulted in him being "written up" for failing to follow up on some work items. DeLee experienced COVID symptoms in April, and felt that the Human Resources Director was harassing him about not reporting for work while he was awaiting test results and isolating. The city hired a consultant to evaluate its operations in June 2020, and the consultant labeled DeLee's department as "inefficient" and commented that DeLee and McCoy had a "toxic relationship." DeLee submitted his retirement papers to the state on July 30, 2020, but he claims this was really a constructive discharge, making it the basis of his retaliation claim against the city in this case, *DeLee v. City of Lanett*, 2023 U.S. Dist. LEXIS 183 (M.D. Alabama, Jan. 3, 2023). He claimed he was forced out by the mayor because of his ethics complaint, which should be accorded First Amendment protection. Chief U.S. District Judge Emily C. Marks found that DeLee had failed to establish that any of the treatment he found objectionable was a response by McCoy and the City to his ethics complaint, and further that McCoy, as a named defendant, enjoyed qualified immunity. The court granted summary judgment to the defendants and against DeLee. DeLee was represented by Kyle David Sawyer of McPhillips Shinbaum LLP, Montgomery; McCoy and the City were represented by Robbie Alexander Hyde of Auburn.

CALIFORNIA – Jonathan Stanley, who identifies as "an LGBTQ individual," was a graduate student in Art History at California State University at Fresno. According to his complaint against the university, he had an excellent academic record but ran into trouble at the beginning of his last semester in the master's program when he met with the Coordinator and Chairperson of the program at their request to discuss his progress in the program. At that meeting on January 30, 2019, Stanley decided to raise a host of complaints and criticisms about the program, which so perturbed those with whom he was meeting that he found himself trouble, accused of being threatening and violent, and ended up incurring discipline, delay to his graduation, and adverse comments placed in his academic records. His description of

the process he encountered sounds as if it was woefully deficient in terms of due process. His state court complaint in *Stanley v. Board of Trustees of the California State University*, 2023 WL 21809, 2023 Cal. App. Unpub. LEXIS 13 (Cal. App., 5th Dist., Jan. 3, 2023), alleged six causes of actions, including federal civil rights claims and state law torts claims. The trial court found his claims barred, the principal reason being a failure to exhaust "judicial remedies" and governmental immunity for various individual defendants, and upheld the trial court's dismissal of his first amended complaint. The opinion is worth reviewing for anybody contemplating filing suit about procedural errors in an academic disciplinary system in California. Stanley is represented by the Shirin Buckman and Keith Altman.

CALIFORNIA – The California 4th District Court of Appeal affirmed a decision by Orange County Superior Court Judge Deborah C. Servino to sustain the City of Newport Beach's demurrer to an 8-count *pro se* civil complaint filed by Brala Beverly, a transgender woman, objecting to her arrests in two shop-lifting incidents by Newport Beach police. *Beverly v. Newport Beach Police Department*, 2023 WL 354739, 2023 Cal. App. Unpub. LEXIS 436 (Jan. 23, 2023). The opinion for the appellate panel by Judge Thomas M. Goethals provides a detailed factual recitation about the shop-lifting incidents, which Beverly attempted to minimize or explain away. She asserted that she was being persecuted because of her transgender status by the police, but the court found no error in Judge Servino's conclusion, based on the record before her, that the police had probable cause to make the arrests in question, eliminating any liability on the part of the officers (qualified immunity, in any event, for performing their job) or the City. When Judge Servino first ruled on the demurrers, she offered an opportunity to Beverly to file an amended complaint, but Beverly declined to do so, asserting that she would stand on her original complaint, which was promptly dismissed. Could Beverly have done better with counsel? Perhaps, although based on the facts as related by the court, this case did not sound particularly meritorious.

CALIFORNIA – Sharalyn Lawrence, a lesbian, lived with her daughter across the street from Kimberly Pinson-Lethermon and Lethermon's son. Each of the women filed seeking civil harassment restraining orders against the other. The trial court took evidence, granted Lawrence's petition and denied Pinson-Lethermon's. Pinson-Lethermon had also sought a retraining order against Robbie Wilson, Lawrence's ex-partner. The Alameda Country Superior Court judge found that Pinson-Lethermon had expressed "disdain" for lesbians and that Lawrence's account of ongoing harassment by Pinson-Lethermon was more credible than Pinson-Lethermon's claims against Lawrence and her ex. On appeal in *Pinson-Lethermon v. Lawrence*, 2023 WL 543084, 2023 Cal. App. Unpub. LEXIS 560 (Cal. Ct. App., Jan. 27, 2023), the court found no reason to upset the trial court's decision. Wrote Judge Therese Stewart for the unanimous panel, "Were, we are unable to discern a meaningful appellate argument in Pinson-Lethermon's appellate briefing." She had just reargued the facts and made "conclusory points that are not developed in any way or supported by any discussion of California law." Both parties were *pro se*.

CALIFORNIA – U.S. District Judge Josephine L. Staton found that plaintiff Kevin Wilcox, a person living with HIV who claimed to be "totally disabled," could not avail himself of a premium waiver for continued life insurance coverage provided through an insurance contract by Dearborn Life Insurance Company because he failed to prove that he was still totally disabled after a period of years during which he had been receiving benefits. Under the insurance policy, totally disabled means unable to perform any work, not just unable to perform the work he was doing before he became disabled. *Wilcox v. Dearborn Life Insurance Co.*, 2023 WL 424256, 2023 U.S. Dist. LEXIS 13852 (C.D. Calif., Jan. 26, 2023). Wilcox was the Director of Employee Benefits at co-defendant Amgen Corporation when he stopped working in 2012. He had been there eight years. He was covered under Amgen's employee benefits plan through a policy provided by Dearborn. His initial claims for benefits were approved for several years, but coverage was terminated as of February 5, 2020, when Dearborn claiming that Wilcox no longer met its definition of "totally disabled" under the policy, because, it claimed, he "retained a level of function that would permit him to perform other, less demanding work in another occupation," relying on reports from reviewing physicians who had access to Wilcox's medical records. He exhausted administrative appeals under the employee benefit plan and then filed suit. The court characterized the administrative record in the case as "voluminous," with the case having extended over eight years. The court reviewed the medical evidence in detail, finding that coverage was properly terminated because Wilcox failed to submit "sufficient proof" that he continued to be totally disabled after the medical evidence in the record showed that should be able to work. Wilcox is represented by Ronald Dean, Pacific Palisades, CA. Judge Staton was appointed by President Barack Obama.

CONNECTICUT – Candice Mumma was employed by THRIVE Affordable Vet Care as a "support staff talent

acquisitions recruiter," and was evidently good at her job. She identifies as a conservative Christian. She was discharged after a meme she posted to her Facebook page stirred controversy in the workplace. The meme, headlined "No Wonder Liberals Are So Confused," showed pictures of political and cultural figures with a single word under each, presumably showing liberal confusion. Under a photo of Senator Elizabeth Warren was the word "Indian" and under a photo of Caitlyn Jenner was the word "Woman." Several employees complained that the meme was offensive to Native Americans and Transgender People. THRIVE officials met with Mumma and asked her to make her post private, which she refused to do, and ultimately they fired her, concededly because of the Facebook post. She sued them in federal court, invoking Section 31-51q of Connecticut General Statutes, which confers on private sector employees in Connecticut the same free speech rights that are enjoyed by government employees under the 1st Amendment of the U.S. Constitution and the Connecticut Constitution. She also asserted several state law contract and tort claims. The parties agreed that the employer's motion for summary judgment could be decided by a magistrate judge, and it was assigned to U.S. Magistrate Judge Thomas O. Farrish, who denied summary judgment on the Section 31-51q claim but granted it on the contract and tort claims. *Mumma v. Pathway Vet Alliance, LLC*, 2023 WL 34666, 2023 U.S. Dist. LEXIS 848 (D. Conn., Jan. 4, 2023). Judge Farrish concluded that federal question jurisdiction was appropriate because the Connecticut statute incorporates 1st Amendment protection and thus requires interpretation and application of federal free speech precedents. He rejected diversity jurisdiction, finding that Mumma's pleading that the employer was incorporated in other states was insufficient by itself to meet the diversity test. He found that in this case, the meme constituted protected speech on issues of public concern, so under federal precedents the employer would have the burden of showing that Mumma was discharged not because of the content of the meme but rather because of potential disruption that posting of the meme would cause to the employer's business, and that this remained a question of fact in the current posture of the lawsuit. Since he was not dismissing the free speech claim, he retained jurisdiction to decide the s.j. motion on the state contract and tort claims, but he granted summary judgment to the employer on those claims. Mumma was resting the contract claims on an employee handbook, but the handbook has a conspicuous non-contractual disclaimer, and the court found that Mumma as an at-will employee could not invoke the covenant of good faith and fair dealing in a discharge case. Mumma claimed that the employer's toleration of a range of social media postings by other employees constituted a "representation" concerning employee social media postings that could ground a misrepresentation claim, but Judge Farrish disagreed, and observed that Mumma's factual claims were insufficient to ground the intentional and negligent infliction of emotional distress claims she was asserting. Mumma is represented by Theodore W. Heiser, of Suisman Shapiro, New London, CT.

MARYLAND – The "John Doe" plaintiff is suing Catholic Relief Services in federal court under the Maryland Equal Pay for Equal Work Act (MEPWA) for discrimination on the basis of sexual orientation (terminating spousal health insurance for his husband), and also has a claim for sexual orientation discrimination under the Maryland Fair Employment Practices Act (MFEPA) regarding the same issue. *Doe v. Catholic Relief Services*, 2023 WL 15524, 2023 U.S. Dist. LEXIS 5889 (D. Md., Jan. 11, 2023). The MEPWA prohibits wage and benefit discrimination on the basis of "sex" or "gender identity," but doesn't mention sexual orientation. The MFEPA prohibits employment discrimination more broadly, including on the basis of "sex," "gender identity," and "sexual orientation." MEPWA has no express exception for religious employers, but MFEPA does, exempting certain religious organizations "with respect to the employment of individual of a particular sexual orientation or gender identity" but not sex. But since those statutes were passed, the U.S. Supreme Court has ruled, in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), that when an employer intentionally discriminates against an employee based on sexual orientation, it also "necessarily and intentionally discriminates against that individual in part because of sex." In a prior summary judgment ruling in this case (2022 U.S. Dist. LEXIS 138848, 2022 WL 3083439) Senior U.S. District Judge Catherine C. Blake held that the ban on "sex" discrimination under the MFEPA would cover sexual orientation discrimination claims against the defendant, because the religious exception language of this statute does not apply to claims of discrimination because of "sex" that, under *Bostock*, would logically include sexual orientation claims. The defendant Catholic Relief Services filed a motion seeking reconsideration on this point and suggested referring the question to Maryland's highest court for an advisory ruling. The judge had already agreed to refer to Maryland's highest court the question of whether the MEPWA should be construed to extend to "sexual orientation" claims in light of *Bostock*. In this January 11 ruling, Judge Blake agreed to make the second referral, seeking a definitive ruling under state law, commenting that it made sense to refer both questions simultaneously, as they would require the Maryland court to consider issues

of public policy as well as statutory interpretation. In this decision, Judge Blake refers to Maryland's highest court as the Supreme Court of Maryland, which surprised us because we had never heard of such a court; as long as we have been reporting about Maryland cases, the highest court of the state has been the Court of Appeals. But the court explains in a footnote that Maryland has adopted a constitutional amendment renaming courts, and the highest court is henceforth the Maryland Supreme Court. The plaintiff is represented by Shannon Clare Leary of Gilbert Employment Law, P.C., Silver Spring, Md., and Anthony J. May, Eve Lynne Hiill, and Regina Kline, of Brown, Goldstein & Levy, LLP, Baltimore. Judge Blake, who served for several years as Chief Judge of the Maryland District Court, was appointed by President Bill Clinton.

MINNESOTA – Senior U.S. District Judge Ann D. Montgomery has granted a motion to dismiss by defendants in *Norgren v. Minnesota Department of Human Services*, 2023 U.S. Dist. LEXIS 786, 2023 WL 35903 (D. Minn., Jan. 4, 2023), in which Joseph Norgren, who retired after working for 27 years as a security counselor at the Minnesota Security Hospital, claimed that he was actually constructively discharged when his supervisors denied his request for a religious exemption from having to take anti-racism and gender identity training required of all employees. He claimed that the requirement that he take the training created a hostile working environment, and that he suffered retaliation due to his opposition to the training. He said that he equates anti-racism training to Critical Race Theory, which he views as violating "the traditional view of equality under Title VII," and that gender identity training, and particularly the concept of nonbinary gender, is "contrary to his sincerely held religious belief." He alleged that he "endured months of reviewing weekly communications and videos sent by DHS" that contradicted his views on equality, and that he was "forced to retire early due to the hostile work environment resulting from his opposition" to the anti-racism training. Judge Montgomery was not impressed: "Requiring all employees to undergo diversity training does not amount to abusive working conditions," she wrote, "and does not plausibly show that DHS imposed across-the-board training with the intention of forcing Norgren to quit." Furthermore, she found that Norgren's complaint "does not include any factual allegations of objectionable conduct by DHS following Norgren's opposition, let alone conduct that would support a hostile work environment so intolerable that a reasonable person would feel compelled to resign." Furthermore, DHS showed that Norgren had notified supervision of his intention to retire months before his request to be excused on religious grounds from completing the training was turned down. (A little common sense would have avoided this lawsuit, of course. Knowing that Norgren had already designated his retirement date to be just a few months down the line, why could they not have excused him from the training since he wasn't going to be around much longer anyway? But bureaucracies can be inflexibly short on common sense in making such decisions, so they bought themselves a lawsuit.) Judge Montgomery was appointed by President Bill Clinton.

NEBRASKA – The Court of Appeals of Nebraska affirmed a decision by Judge Kevin R. McManaman (Lancaster County District Court) to award custody of the three young children to Shalaia Stevison in her divorce from Nathan Stevison. *Stevison v. Stevison*, 2023 WL 1129720, 2023 Neb. App. LEXIS 34 (Jan. 31, 2023). A major issue in the case was Nathan's attitude and conduct involving the two older children, Kyra (born 2004) and Mohalla (born 2007). Kyra had identified as transgender for more than eight years prior to the divorce proceeding, and Mohalla had identified as non-binary for two or three years prior to the trial. Nathan, who sustained a traumatic brain injury in 2016 rendering him unemployable and dependent on public benefits, claimed that he should have joint custody and much more parenting time with the two older children than was allocated by the trial court, but the Court of Appeals found that the trial court's award was supported by the record. Similarly, the court affirmed the trial court's decision not to require Shalaia to make any child support payments to Nathan. The social worker/mental health counselor who was working with the two older children testified in support of minimizing their contact with their father because of his continuing misgendering of them and his opposition to their gender identities. At trial, Nathan testified that "he loves his children regardless of their sexual orientation, but he wants Kyra and Mohalla to wait under they are adults before making any permanent changes to their bodies *or names*. He further stated that anytime he does not use Kyra or Mohalla's preferred name or pronouns it is not intentional, it is because he either misspoke or forgot." In support of the later assertion, there was testimony that one effect of Nathan's traumatic brain injury was very poor short-term memory. Appellate courts are generally loath to substitute their judgment for the trial judge in a contested custody case like this where there is plenty of evidence in the record supporting the trial judge's judgment, and so it proves here. Significantly, both of the older children were old enough by the time of trial to state preferences, and the visitation order responded, at least in part, to Kyra and Mohalla's objection to having overnight visitation with Nathan, about whom Kyra had called the police on several occasions and

alleged acts of physical abuse. Nathan claimed that Shalaia had "alienated" the children from him. The court provided more extensive parenting time for the youngest child, Lisette (born 2011), who was found to have a good relationship with her father, and who did not raise any gender identity issues. The opinion for the unanimous panel is by Chief Judge Michael W. Pirtle.

NEW YORK – *Small v. New York City Department of Education*, 2023 U.S. Dist. LEXIS 2099, 2023 WL 112546 (S.D.N.Y., Jan. 5, 2023). Tyrell Small was dismissed from his position as a fourth-grade teacher at P.S. 312 on March 20, 2020, just as the NYC public schools were closing down due to the COVID19 pandemic. He had been hired as a general education teacher in the fall of 2016 and received "highly effective" or "effective" evaluations during his first three years of teaching. His downfall came after he voluntarily transferred to P.S. 312, where his principal was Valerie Paul. He started off Fall 2019 teaching third-grade, but was reassigned to a fourth- grade class at Paul's request early in the school year. Paul observed his teaching in November 2019 and January 2020 and rated him as "effective." Small claims that he was perceived as gay by administrators and other teachers "because he displays feminine qualities in the classroom and does not have a deep voice. Other teachers told Small that his sexuality was often discussed by teachers and administrators in the teachers' lounge." At least one student in his fourth-grade class, A.B., evidently had a similar perception in October and began to taunt Small about it. Small complained to the principal, but nothing was done, and it appeared that she did not want to be involved in disciplining this student, whose harassment of Small escalated over the next few months, resulting in several confrontations with the principal and what Small alleges are false charges that he had subjected A.B., who had slapped Small in the face, with corporal punishment and verbal abuse. Small claims that parents told him that Paul said she did not like him because he was gay. His union was not particularly receptive, although when he appealed its initial decision not to take up his case complaining about A.B.'s misconduct, a grievance was filed. Paul sat in on a class, gave Small an "ineffective rating," and then he received a notice of "employment discontinuance." Small sues *pro se* under Title VII, the NY State Human Rights Law (NYSHRL), and the NYC Human Rights Law (NYCHRL), alleging discrimination because of "perceived sexual orientation," hostile environment, and retaliation. District Judge Gregory H. Woods granted a motion to dismiss the entire case with leave to file an amended complaint. Small, still without representation, filed an amended complaint. The judge found that this addressed some of the problems with the original complaint, but not all. He found that Small had stated a case of discrimination under all three statutes, but that Principal Paul could not be sued individually under Title VII, so that part of the complaint was dismissed again. As to hostile environment, Woods concluded that Small failed to meet the pleading requirements under Title VII and the NYSHRL, but that his claim was sufficient under the NYCHRL, which has a much broader definition of employer liability for a hostile environment, not requiring the "severe or pervasive" standard of the other statutes. The court's rationale on Title VII and the State law was that the factual allegations suggested a hostile environment created *by the student*, not by the principal or the school. Finally, the court rejected the retaliation claims in full. The court denied further leave to amend, finding that Small had already benefited from the first critical review of his complaint and that further amendment was unlikely to be "productive." "The Court certifies, pursuant to 28 U.S.C. sec. 1915(a)(3), that any appeal from this order would not be taken in good faith, and therefore IFP status is denied for the purpose of appeal." Having survived, in part, the motion to dismiss, Small would do well to obtain counsel rather than attempt to try this case before Judge Woods on his own. But perhaps, since he survived in significant part the motion to dismiss, a settlement might be negotiated. Judge Woods was appointed by President Barack Obama.

OHIO – In *Doe v. Bethel Local School District Board of Education*, 2023 WL 348272, 2023 U.S. Dist. LEXIS 10733 (S.D. Ohio, Jan. 20, 2023), "Anne Roe," a 14-year-old transgender girl who attends Bethel High School, was granted intervenor status in a suit by parents of students who are challenging the school district's policy of allowing transgender students to use restrooms corresponding to their "identified gender." Roe transitioned to her "identified gender" as female through "medical treatment," according to her motion to intervene, and is using the girls' restroom facilities under the challenged policy. District Judge Michael J. Newman found that "Roe" met all four requirements: her motion is timely, she has a substantial legal interest in the case, her absence from the case would impair that interest, and they bring a personal element distinct from the defendants' desire to follow its interpretation of the law. Judge Newman also granted anonymity to "Roe," commenting, "Considering the sensitive nature of these proceedings – coupled with this Court's recent order permitting Plaintiffs to file under pseudonyms, this measure is warranted." Roe is represented by attorneys associated with the ACLU of Ohio Foundation and the national ACLU's LGBT Rights Project, as well as local counsel Michael Meuti, of Benesch Friedlander Copan & Aronoff, Cleveland, OH. The parent

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plaintiffs are represented by lawyers associated with America First Legal Foundation, a conservative litigation group. Judge Newman was appointed by President Donald Trump.

OHIO – U.S. District Judge Sarah D. Morrison granted summary judgment to the employer in *Porter v. Two Guys and a Calculator, LLC*, 2023 WL 423508, 2023 US. Dist. LEXIS 13973 (S.D. Ohio, Jan. 26, 2023), a Title VII employment discrimination suit brought by Kaitlyn Porter, a lesbian who as not "out" in the hiring process. Two Guys and a Calculator (TGAC) is a tax preparation service. Porter was hired as a receptionist in their West Gate location in January 2021. She expressed interest in taking a better-paying tax preparer position. TGAC gave her access to on-demand training, and said once she passed the test at the end of the course, she would be given work in the Reynoldsburg office. She finished the course, passed the test, but was unhappy about the idea of shifting to the other office. When TGAC insisted that's where they needed her service as a tax preparer, she reluctantly went, but was unhappy there and complained that the experienced employee whom she was assigned to "shadow" before taking up the tax prep work with clients was not rounding figures correctly on returns. Her then-girlfriend dropped off lunch for her, which prompted a question from the supervisor, in effect outing her. Then ensued a lengthy e-mail exchange with the supervisor about Porter's desire to return to her previous office and her objection to being assigned to shadow someone "who's not doing this right." TGAC had already replaced her as a receptionist at West Gate. When she insisted on not continuing at Reynoldsburg, they fired her and she filed a Title VII charge, claiming she was fired because of her sexual orientation. Despite the coincidence that she was fired within days of the supervisor learning that she had a same-sex partner, Judge Morrison found that Porter failed to meet her burden of showing that the reasons cited by the company for the discharge were pretextual. In addition to Title VII, she asserted a whistleblower claim, citing an Ohio statute, but the court concluded that it would not deal with state law claims having granted summary judgment to the company on the only federal claim in the case. Porter is represented by Robert DeRose II, of Barkan Meizlish DeRose Cox, LLP, Columbia. Judge Morrison was appointed by President Donald Trump.

PENNSYLVANIA – Dijon Summers, a transgender man, was employed as a security guard by a subcontractor for the City of Philadelphia's subway system. He claims that his supervisor "outed" him to coworkers, and a sad tale of abuse by co-workers followed. As common in such cases, Summers' complaints to management essentially got him nowhere, and one altercation with another employee got him fired. Now he sues under Title VII (discrimination because of transgender status) with various supplementary state law claims, including intentional infliction of emotional distress and civil conspiracy. Chief District Judge Joan R. Sanchez (appointed by President George W. Bush) granted defendants' partial motion to dismiss in *Summers v. Extrity, LLC*, 2023 WL 1102334, 2013 U.S. Dist. LEXIS 14924 (E.D. Pa., Jan. 30, 2023), thus dispensing with the IIED claim and the civil conspiracy claim, finding that Summers failed to allege facts sufficient to state an IIED claim and "because there can be no civil conspiracy without a valid underlying tort claim." The motion was granted without prejudice, so the claims could be reasserted if appropriate facts are pleaded in an amended complaint. Summers is represented by Peter C. Wood, Jr., of Mobilio Wood, Forty Fort, PA.

PENNSYLVANIA – U.S. Magistrate Judge Patricia L. Dodge granted the employer's motion for summary judgment and denied the pro se discharged employee's motion for summary judgment in a race and sexual orientation discrimination case that invoked Title VII and the Pennsylvania Human Rights Act. *Moses v. United Parcel Service, Inc*., 2023 WL 24075 (W.D. Pa., Jan. 3, 2023). Moses was discharged on July 1, 2019, after working for UPS in its New Stanton, Pennsylvania, facility as a package handler in the Sort Department. He was on sick leave from June 3, 2019, to June 7, 2019, and then took approve vacation leave from June 10, 2019, through June 14, 2019. He was supposed to return to work on June 17, but did not show up. The company sent him a 72-Hour Notice of Recall on June 18, advising him that if he did contact a specific supervisor (Ian Hopkins) within an hour of his normal starting time on June 21, he would be discharged. He neither contacted Hopkins nor returned to work on June 21, but they gave him a second chance with another 72-Hour Notice of Recall sent on June 25, directing him to contact a different supervisor, Kevin Welsh, within an hour of his normal starting time on June 28, but he did not respond to Welsh or show up for that shift, so they sent him a discharge notice on July 1, 2019. Moses is a black, gay man. He filed his suit pro se, making various allegations of race and sex discrimination, hostile environment and retaliation. He obtained counsel, who filed a first amended complaint for him, but then he discharged counsel and has proceeded on his own. The company sent him request for admissions to which he never responded, so he was deemed to have admitted everything they proposed. He sought summary judgment, as did the company, but his pro se suit papers failed to comply with the pleading rules. In other words, a total disaster, so it is not surprising that Judge Dodge granted the company's

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motion and denied Moses's motion. Along the way, Moses complained that he had been subjected to racial and homophobic slurs and been assigned excessive tasks, but he contradicted his own pleadings on these points. Might he have had a decent case? Who knows? This is the kind of opinion that is so frustrating to read.

WEST VIRGINIA – *Page v. Chemours Co. FC, LLC*, 2023 U.S. Dist. LECIS 1118, 2023 WL 36083 (S.D. W.Va., Jan. 4, 2023), is a Title VII suit by John "Jada" Page alleging "gender identity/sexuality discrimination" under Title VII, hostile work environment, and wrongful termination. In the cited decision, Senior U.S. District Judge John T. Copenhaver, Jr., deals with a discovery dispute. Plaintiff and defendant have been negotiating about plaintiff's demand for information about defendants' employees that plaintiff, a transgender woman, argues that she needs in order to make her case. Counsel have been negotiating a protective order concerning the information. The judge asserted that at this stage in the litigation, the names of defendant's employees "are not relevant, as the names are not needed to prove plaintiff's claim." Plaintiff asserts that names are needed to prove that she "was treated disparately from those in a similar position to hers," and without getting names, she would be unable to identify who "were transgender or gay." But plaintiff's counsel had previously agreed that employees could be designated by numbers or initials, and the judge added language to the proposed protective order that plaintiff objected was "added to limit what information [defendant] would be required to provide" by specifying: "The protected health information of any and all current or former employees of The Chemours Company, FC, LLC, shall be shielded from public disclosure by use of coded names or numbers unless otherwise ordered by the court." The judge did not back down, stating that he would issue the protective order with the added language he had proposed. He also denied plaintiff's demand that defendant produce the mental health records of employees. Plaintiff is represented by Erika Klie Kolenich, Buckhannon, W.V. Senior Judge Copenhaver was appointed by President Gerald Ford.

PRISONER LITIGATION NOTES

By Arthur S. Leonard

U.S. COURT OF APPEALS, SEVENTH CIRCUIT – *Foley v. Scott*, 2023 WL 111873, 2023 U.S. App. LEXIS 293 (7th Cir., Jan. 5, 2023) – *Pro se* Wisconsin inmate David Foley filed grievances against corrections officers and claims they retaliated by "spreading rumors about his sexual orientation, confiscating his property, tampering with his food, and transferring him to a cell with a known violent prisoner. After the transfer, Foley warned other prison staff that the cellmate might attack him. He was right: he was physically and sexually assaulted by that cellmate in 2020." Sounds like a good case? Here is a problem with *pro se* litigation – Magistrate Judge William E. Duffin found that when Foley's grievances were filed and denied, he did not file one appeal within the 14-day time limit, and the second appeal was rejected because it exceeded the page and word limit. Foley appealed Duffin's ruling to the 7th Circuit. A panel of Circuit Judges Ilana Rovner, Michael Scudder, and Amy St. Eve decided they could dispense with a hearing and affirmed the Magistrate's ruling to dismiss the case based on the papers submitted. Foley had argued that under the Prison Rape Elimination Act (PREA), prisons "shall not impose a time limit on when an inmate may submit a grievance regarding an allegation of sexual abuse." But, the court found, neither of the two grievances Foley filed related to the sexual assault, which the court found had not been made the subject of a formal complaint, so this claim wasn't exhausted as well. Judge Rovner was appointed by President George H.W. Bush, and Scudder and St. Eve were appointed by Trump. (Between Trump and the Bushes, the 7th Circuit has 7 out of 10 Republican appointees, and there is vacancy waiting for Biden to fill it.)

COLORADO – *Melnick v. Williams*, 2023 WL 179930 (D. Colo., Jan. 13, 2023) – The inmate, a transgender woman who has been diagnosed with gender dysphoria, is seeking to be transferred to a female prison for the period remaining before her anticipated release on parole later this year. She asserts that such a transfer would be beneficial for treating her gender dysphoria, but has not requested hormone treatment or other gender-affirming care specifically. U.S. Magistrate Judge Kristen L. Mix recommended against granting her request, point out that she had not shown any irreparable injury and had not demonstrated or discussed the elements required to obtain an injunction ordering Colorado DOC to transfer her. Accepting the Magistrate Judge's recommendation to dismiss without prejudice, U.S. District Judge Charlotte N. Sweeney (appointed by Biden) noted the 10th Circuit's opinion in *Lamb v. Norwood*, 899 F.3d 1159 (10th Cir. 2018), cited by plaintiff as supporting her claim. In that case, the 10th Circuit listed the ways in which gender dysphoria can be treated, but, wrote Judge Sweeney, "Nowhere in Lamb did the court state that a change in 'gender expression and role' equated to transferring an incarcerated person to another facility," and that the Magistrate Judge "correctly ruled that Plaintiff does not identify an irreparable injury that warrants a preliminary injunction." The judge pointed out that prison administrators