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## Prisoner Litigation - Notes

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# PRISONER LITIGATION *notes*

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.

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**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.

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## 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 (7<sup>th</sup> 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 7<sup>th</sup> 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 7<sup>th</sup> Circuit has 7 out of 10 Republican appointees, and there is vacancy waiting for Biden to fill it.)

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**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 10<sup>th</sup> Circuit's opinion in *Lamb v. Norwood*, 899 F.3d 1159 (10<sup>th</sup> Cir. 2018), cited by plaintiff as supporting her claim. In that case, the 10<sup>th</sup> 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

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are normally accorded “broad discretion . . . to enable them to manage prisons safely and effectively” and that “the Court should only grant injunctive relief in such a situation under ‘exceptional and compelling circumstances,’” which were not shown here.

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**ILLINOIS** – *Monroe v. Meeks*, 2023 WL 371265, 2023 U.S. Dist. LEXIS 12038 (S.D. Ill., Jan. 24, 2023) – Continuing class action concerning failure to Illinois DOCS top provide appropriate health care to transgender inmates. Chief U.S. District Judge Nancy J. Rosenstengel (Obama appointee) has taken an activist role in supervising the case. In this Order, she set firm deadlines for the defendants providing specific procedures relating to hormone therapy and gender-affirming surgery for class members. Foot-dragging by defendants in complying with more general orders necessitated setting firm deadlines. In addition to addressing care, the opinion deals with transfer requests, commissary, showers, staff training, and monitoring compliance with the court’s orders.

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**KANSAS** – *Schlobohm v. Ash*, 2023 U.S. Dist. LEXIS 10583, 2023 WL 346081 (D. Kans., Jan. 20, 2023), and 2023 WL 1434296 (D. Kans., Feb. 1, 2023) – Gay Jewish inmate *pro se* asserts a range of complaints alleging discrimination, failure to comply with Jewish dietary laws, unequal treatment with other inmates due to his religion and sexual orientation. U.S. District Judge John W. Lungstrum (George W. Bush appointee) issued an order to show cause why the Complaint should not be dismissed, noting that plaintiff had sued some inappropriate plaintiffs and loaded his complaint with generalized assertions but few facts to support his alleged violations of the 1<sup>st</sup>, 5<sup>th</sup>, 8<sup>th</sup> and 14<sup>th</sup> Amendments, ADA and ACA. “Plaintiff’s equal protection claim is

subject to dismissal for failure to allege facts establishing its essential elements,” wrote the judge. “He does not identify specific similarly situated individual who received different treatment. Furthermore, while he alleges that he was treated different due to his religion and he repeatedly mentions that he is gay, he does not allege facts suggesting that he was treated differently because he is Jewish, and sexual orientation has not been found to be a suspect classification under the Equal Protection Clause. Plaintiff submits nothing more than unsupported allegations of improper intent of the defendants, allegations which are deficient in establishing a claim under Section 1983.” The opinion describes the particular pleading shortcomings of the *pro se* complaint. In *pro se* cases, when the initial screening turns up these kinds of deficiencies, the court gives the plaintiff a period of time (in this case, one month, to March 3) to come up with a complaint that can pass muster when it appears possible that he could produce such a document. In the February 1 opinion, the court explains that the plaintiff’s request to add a contractor defendant requires a new complaint alleging facts respecting the objectionable conduct of the contractor. The court also rejects a request for preliminary injunctive relief.

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**MAINE** – *Glady v. Magnusson*, 2023 WL 154951, 2023 U.S. Dist. LEXIS 4710 (D. Maine, Jan. 11, 2023) – Chief U.S. District Judge Jon D. Levy denied gay inmate Nicholas Glady’s motion for temporary restraining order or preliminary injunction in a dispute over his right to receive publications that feature images of nude men. Glady, *pro se*, has been a repeat litigant over this issue. In a previous ruling, *Glady v. Waltz*, 2020 WL 6385618 (D. Me. Oct. 30, 2020), the court upheld restrictions based on content that went beyond male nudity, the objections being that the material in question depicted underage

males, bondage, sexual violence and “penetration.” The current suit, filed on May 9, 2022, concerns intercepted delivery and confiscation of materials that Glady claims do not fall within the categories mentioned in the prior ruling, but instead contain only non-sexual male nudes. He claims that prison authorities had been allowing delivery of these materials, but new personnel had suddenly cracked down without giving any kind of consistent explanation about what he could not receive materials similar to what he had been receiving. He is alleging violation of his equal protection and due process rights, as well as a violation of the Maine Civil Rights Act. Without tipping his hand as to the merits, Judge Levy accepted the recommendation of Magistrate Judge John C. Nivison to deny preliminary relief. Nivison found that Glady “has failed to present a factual record or identified any legal authority to suggest that the impediments to his recovery in *Waltz* are not present here” but, more importantly, “has not shown that he would suffer irreparable harm,” wrote Judge Levy. Glady wants the material delivered and confiscated material returned pending an eventual ruling on the merits of his claim, but Judge Levy concludes: “Glady has not shown that the immediate return of his books is the only adequate legal remedy available to him, and thus has not demonstrated that he is likely to suffer irreparable harm in the absence of a preliminary injunction ordering this relief.”

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**NEVADA** – *Hundley v. Aranas*, 2023 WL 166421 (9<sup>th</sup> Cir., Jan. 12, 2023) – The transgender woman plaintiff, an inmate in a Nevada men’s prison, asserted 8<sup>th</sup> Amendment claims of deliberate indifference for the refusal of Nevada DOC to evaluate her for sex reassignment surgery (SRS), alleging that they have a blanket policy against it, and an equal protection violation for refusing her request for female

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underwear. She sought monetary damages against named defendants. Senior District Judge Robert Clive Jones (a Bush appointee) allowed one amendment or her *pro se* complaint, but then dismissed the amended complaint for failure to state a claim. Plaintiff scored a luck-of-the draw trifecta on appeal, drawing a panel of Senior Circuit Judge Susan Graver (appointed by Clinton), Circuit Judge Ronald Gould (appointed by Clinton), and Circuit Judge Paul Watford (appointed by Obama), and counsel represented her at oral argument. The panel found that 9<sup>th</sup> Circuit precedent supports plaintiff's 8<sup>th</sup> and 14<sup>th</sup> amendment claims. "We should not accept a blanket prison policy against SRS. Rather, the prison must make an individualized decision about whether Hundley should have her gender dysphoria treated by SRS. The district court erred by dismissing this claim and we reverse and remand." Similarly, as to the equal protection claim: "Here, Hundley alleges that Bequette denied her female undergarments because she is a transgender woman. This denial is a violation of her Fourteenth Amendment right to equal protection under the law." Again, the court reversed and remanded. While sustain dismissal of the claims for monetary damages, it held as to other claims that the district court "abused its discretion by dismissing the claims without giving Hundley leave to amend." "At oral argument," wrote the court, "Nevada agreed that Hundley should be given an opportunity to amend her complaint. We vacate and remand the remainder of the issues in this case with instructions to the district court to allow Hundley to amend her complaint."

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**NORTH CAROLINA** – *Inscoc v. North Carolina Department of Public Safety*, 2023 WL 307463, 2023 U.S. Dist. LEXIS 8240 (W.D. N.C., Jan. 18, 2023) – Most of our prisoner cases involve LGBT inmates or inmates living with HIV, but this case is different. The *pro se* plaintiff

identifies as an "intersex woman who with diagnoses of 'hermaphroditism/intersex, cryptorchidism and gender dysphoria'" is "genetically female, but was raised as male, has primary and secondary female sex characteristics, has spend most of her life as a female, has undergone gender affirming surgery, and has been on estrogen hormone replacement therapy for almost 25 years," according to her allegations as summarized by Chief U.S. District Judge Martin Reidinger. She alleges that the NCDPS "failed to properly train health care, custody, and administration staff, has refused to transfer her to a female prison" for the three-year period predating this decision, and "forced her into an unsafe communal living situation with 33 male inmates at Avery-Mitchell Correctional Institution" (although the court notes that as of the time of writing she is incarcerated at Nash Correctional Institution, which is also a male institution, according to its website). "She claims that she has endured constant harassment and sexual propositioning by inmates and staff, unreasonable strip searches by male guards, and a sexual assault by Officer Carver." She is looking for declaratory and injunctive relief, compensatory and punitive damages, prejudgment interest, all fees and costs, a jury trial, and "any further relief the Court deems just and proper." Despite the sorts of mistakes that frequently pop up in *pro se* complaints, such as failing to name some individual defendants, Judge Reidinger decided that liberal construction of the complaint supports allowing her to proceed on a variety of constitutional claims (1<sup>st</sup>, 4<sup>th</sup>, 8<sup>th</sup>, 14<sup>th</sup> amendments) against particular Corrections staff, as well as claims under the Americans With Disabilities Act and, under supplemental jurisdiction, under the North Carolina Constitution, Article 1, Sec. 27 (the state equivalent of the federal 8<sup>th</sup> Amendment). The clerk is instructed to serve the complaint on named defendants, but claims are dismissed without prejudice against

John Doe defendants, some of whom are former employees of NCDPS. No mention of appointing counsel, but perhaps she hasn't request same, as the issue is not mentioned. Chief Judge Reidinger was appointed by President George W. Bush.

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**PENNSYLVANIA** – *Harrison v. Secretary George Little*, 2023 U.S. Dist. LEXIS 373 (W.D. Pa., Jan. 3, 2023) – Transgender inmate Jihaad Amore Harrison has filed numerous motions in her pending *pro se* case against officials of the State Correctional Institution at Albion. This Report & Recommendation by Chief U.S. Magistrate Judge Richard A. Lanzillo faults her for failing to back up her generalized complaints with specifics in her quest for preliminary injunctive relief. For example, she claims that the Albion Superintendent, Lonnie Oliver, "has a known practice of denying Transgender's any help," is does not provide concrete examples. She complains of being misgendered, and claims that prison authorities were "trying to force men to cell up and harm/rape her," "denying her protective custody," and "denying her a razor and barber shop." [Who gives razors to prison inmates?] She wants a camera mounted outside her cell "24/7" or to be transferred to different Pennsylvania state prisons, and also complains about delays in her transition process. Judge Lanzillo says that her "allegations are insufficient to meet her heavy burden of demonstrating that she is likely to succeed on the merits of her claims." The judge continues, "Harrison has yet to provide any details to support the many allegations she has made thus far. These bare, general, and conclusory allegations are therefore insufficient to establish a likelihood of success on the merits," and even if they could, he found, Harrison had not established "the probability of irreparable harm if relief is not granted." In addition, in her amended complaint Harrison had stated "that psychiatry has

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approved her to begin the evaluation process for Gender Dysmorphia, which takes about a year, and that her initial evaluation ‘can happen in the next few months.’” “Finally,” he wrote, “Harrison has not only failed to show that she faces imminent irreparable harm, but that she faces any harm at all,” which is “fatal to her motion.” The recommendation to District Judge Susan Paradise Baxter is to deny the motion.

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**TEXAS** – *Grace v. Smith*, 2023 U.S. Dist. LEXIS 10828 (N.D. Texas, Jan. 23, 2023) – Transgender woman state prisoner is receiving hormones but her requests for gender-affirming surgery have been stymied and she is upset about being transferred from a female facility to a male facility. She filed a petition for habeas corpus. U.S. District Judge Mark Pittman (Trump appointee) found that the court lacked jurisdiction, because the subject matter of her suit did not fall into the habeas corpus category as it related to conditions of confinement rather than claims of unlawful confinement and thus should have been brought under 42 USC 1983. The court also denied inmate’s request for appointment of counsel.

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**WASHINGTON** – *Turner v. Ralkey*, 2023 WL 401931 (W.D. Wash., Jan. 25, 2023) – Transgender woman state prison inmate asserted numerous claims, mainly relating to housing and cellmates, and being misgendered by a corrections officer using inappropriate pronouns to refer to her. District Judge Tana Lin (Biden appointee) accepted the Magistrate Judge’s recommendation to grant summary judgment for the defendants. Plaintiff complained of having been put in situations she considered unsafe, but Magistrate Judge concluded that plaintiff failed to provide evidence showing defendants both knew of and disregarded risk to plaintiff’s safety in making housing

assignments, even when they celled her with a convicted sex offender. She is not alleging that she was actually attacked. As to pronouns, they are held not to rise to the level of 8<sup>th</sup> Amendment violations, and placing her in administrative segregation for 81 days did not violate her due process rights.

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**WISCONSIN** – *Perkins v. Lawrence*, 2023 WL 22631, 2023 U.S. Dist. LEXIS 98 (E.D. Wis., Jan. 3, 2023) – In this opinion, Magistrate Judge Duffin (whom we met above in the 7<sup>th</sup> Circuit case) allows *pro se* plaintiff Gregory Perkins to proceed with several claims against Corrections officials. Perkins alleges he filed a PREA complaint on behalf of another prisoner who Perkins claims was being subjected to sexual harassment by another inmate. He alleges that as a result of this, he was subjected to retaliation, as to which he recites specifics against some defendants and generalities against the others. Magistrate Duffin finds that the specific allegations are sufficient to survive screening, but the general ones fall short of even the very permissive pleading rules afforded *pro se* inmates. The judge does grant leave for Perkins to proceed without prepaying the filing fee, but denies a motion to appoint counsel to represent Perkins, advising that Perkins should first make an effort to obtain counsel, leaving the issue of appointment to be held aside until Perkins provides evidence his efforts to find counsel have been unproductive.

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## LEGISLATIVE & ADMINISTRATIVE NOTES

*By Arthur S. Leonard*

**UNITED STATES FOOD AND DRUG ADMINISTRATION** – The FDA announced late in January that it is revising the rules governing blood donation to remove categorical bans

on donations by gay and bisexual men that were put into place in the 1980s to prevent the entry of HIV into the blood supply. *Associated Press* reported on January 27. The original rules had previously been modified from a lifetime ban to a ban on donations by individuals who had sexual activity within a specified period prior to the proposed blood donation date, tracking evidence about how long it takes from exposure to the development of antibodies that could register on the screening test now required by federal regulations of all donated blood. The new rules will abandon a categorical ban and instead focus on individualized screening and testing.

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**ARIZONA** – On January 2, 2023, newly inaugurated Governor Katie Hobbs, a Democrat, issued Executive Order 2023-01, directing state agencies to establish procedures by April 1 to address employment discrimination by the government on the grounds of race, color, sex, pregnancy, childbirth, medical conditions, political or religious affiliation, culture, creed, social origin, genetic information, sexual orientation, gender identity, national origin, ancestry, age, disability, military service, or marital status. *Thomson Reuters*, Jan. 5.

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**UTAH** – Utah became the first of several anticipated states to pass laws during 2023 banning gender-affirming care for minors. The ban on surgical alteration is partly symbolic, since most specialists in this field will not perform genital-altering surgery on minors. What bites is the ban on medical transition care such as puberty blockers and hormones, both treatments that remain available for other diagnoses, such as premature or delayed puberty among cisgender youth. The statute, which went into effect January 28 upon signing by Governor Spencer Cox