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Civil Litigation Notes (March 2023)

Arthur S. Leonard

CIVIL LITIGATION *notes*

CIVIL LITIGATION NOTES

By Arthur S. Leonard

Arthur S. Leonard is the Robert F. Wagner Professor of Labor & Employment Law Emeritus at New York Law School.

U.S. COURT OF APPEALS, 4TH CIRCUIT – In *White v. Vance County Sheriff*, 2023 WL 2263018 (Feb. 28, 2023) (unpublished opinion), a 4th Circuit panel unanimously affirmed District Judge Terrence W. Boyle's decision dismissing all claims against Vance County, North Carolina, and granting summary judgment to all defendants in a case where a gay African-American man's short tenure as a county sheriff's deputy was notably unsuccessful, leading to termination of his employment. Justin J. White sued the county, the sheriff, the sheriff's office, and various other employees of the sheriff's office, claiming disparate treatment, hostile environment, and retaliation claims under Title VII and asserting various state law claims as well. The Title VII claim against the county was dismissed because of authoritative precedents holding that sheriffs' deputies are not county employees and the county bears no responsibility for the sheriff's personnel decisions. On the merits of the other claims, the *per curiam* decision agreed with Judge Boyle that the summary judgment record showed that White was dismissed because of his poor performance, not in retaliation for complaining about the use of the "n" word by some co-workers and some gentle ribbing from a supervisor because of White's sexual orientation (for which the supervisor promptly apologized when called on it). The court agreed that these allegations were not sufficient to carry a hostile work environment claim based on race and sexual orientation. More significantly, from the description of the facts it sounds like White was just not working out well in that role. The court found any right to appeal as to the state law claims effectively waived because they were not specifically briefed beyond asserting that the trial court erred in its disposition of them. White was represented on appeal by Sharika M. Robinson of Charlotte. The panel consisted of Circuit Judges Paul Niemeyer (appointed by President George H.W. Bush), Allison J. Rushing (appointed by President Donald J. Trump) and Toby J. Heytens (appointed by President Joe Biden).

U.S. COURT OF APPEALS, 6TH CIRCUIT – In *Kilpatrick v. HCA Human Resources, LLC*, 2023 U.S. App. LEXIS 3625, 2023 WL 1961223 (Feb. 13, 2023), Montrell Kilpatrick, a gay man, lost his Title VII discrimination and hostile environment claims when a 6th Circuit panel affirmed a ruling by the U.S. District Court for the Middle District of Tennessee granting summary judgment to the employer. Kilpatrick alleged that he was doing fine on his job until December 2015 when he came out as gay to a high-level official of the company. Word spread and he started finding unwanted "gifts" on his desk and was reassigned to an "isolated corner of the office." (But he messaged a colleague that he loved his new location.) In the past, his applications for tuition reimbursement for college courses had been routinely approved, but shortly after his coming out, a request for the Spring 2016 semester was disapproved, and when he followed up on this, a company investigation concluded that he had been falsifying his reimbursement applications, and he was fired. He claimed violations of Title VII (discrimination and hostile work environment). At first the district court dismissed his claims based on 6th Circuit precedent that Title VII did not cover sexual orientation claims, but the court of appeals remanded as a result of *Bostock*, requiring the district court to evaluate the claim on the merits. The trial court concluded, and the 6th Circuit panel agreed, that although Kilpatrick sharply disputed the company's conclusion that he was submitting falsified reimbursement applications, the company had a good faith belief that he had falsified them, which the court found reasonable based on a close review of the record, and thus Kilpatrick failed to prove the discharge was due to his sexual orientation. As to hostile environment, the court invoked the well-worn meme that the Supreme Court has set a very high bar for finding an actionable hostile environment under Title VII, and cited prior 6th Circuit cases rejecting hostile environment claims by plaintiffs who had arguably experienced even more severe or pervasive hostility incidents than had Kilpatrick. Kilpatrick is represented by Constance Mann, Franklin, TN. The panel opinion is by Circuit Judge John K. Bush, a Trump appointee. The other panel members were Chief Judge Jeffrey Sutton, a George W. Bush appointee, and Circuit Judge Eric Murphy, another Trump appointee. At present the 6th Circuit has a 10-5 Republican/Democratic ratio, with one vacancy to fill. President Biden has successfully appointed two judges to the Circuit, but President Obama had only two, one of whom has retired, and all of President Bill Clinton's appointees are no longer active judges of the 6th Circuit.

U.S. COURT OF APPEALS, 9TH CIRCUIT – The petitioner, a native and citizen of Nicaragua who is a gay man, lost his pro se bid for asylum and withholding of removal when a 9th Circuit panel unanimously upheld the Board of Immigration Appeals' determination in *Neyra-Moncada v. Garland*, 2023 WL 2261406 (February 28, 2023). The petitioner claimed he was raped by a cousin, but he did not know what had motivated the rape, and that "his father never told him that he disapproved of [petitioner's] sexual orientation." He also testified that gang

members tried to recruit him because of his sexual orientation, speculating that they targeted him because the authorities would not view him as dangerous or a criminal. The Immigration Judge concluded that the gang members were more interested in furthering their criminal enterprise than in petitioner's sexual orientation. Although the opinion for the panel acknowledges that discrimination toward LGBTQI individuals in Nicaragua is "pervasive," this was deemed in adequate to make a case for a pattern or practice of persecution, which the courts see as a more demanding standard than mere discrimination. Having denied asylum on these grounds, denial of withholding followed as a matter of course, for the court found no solid evidence of individualized threat against the petitioner. "Given his testimony that he did not know what motivated his cousin's sexual abuse," wrote the court, "the agency permissibly determined that he did not meet his burden of showing that his sexual orientation was 'a reason' for that harm. Although his sexual orientation was 'a reason' motivating some of the other harms he faced, the record does not compel the conclusion that these harms rose to the level of persecution," concluded the court," deeming his expressed fear of future persecution to be "speculative," dismissing his appeal. The panel consisted of Circuit Judges Michelle Friedland (appointed by Barack Obama), Bridget Bade (appointed by Donald Trump), and Lucy Koh (appointed by Joseph Biden). Given the composition of the panel and its unanimity, it is unlikely that the ruling is the result of anti-gay bias, but rather the lack of cumulative persuasive evidence presented by the pro se petitioner.

U.S. COURT OF APPEALS, 9TH CIRCUIT – The petitioner, a lesbian and native of Guatemala, was denied asylum, withholding of removal or protection under the Convention against Torture (CAT) by an order of the Board of Immigration Appeals dismissing her appeal of an Immigration Judge (IJ) ruling against her. *Calmo-Aguilar v. Garland*, 2023 WL 1859841, 2023 U.S. App. LEXS 3159 (Feb. 9, 2023). Petitioner had testified about a woman whose experience suggested that the police would not protect women (including "homosexual women") from sexual assault. She expressed fear that if she was returned to Guatemala she would be raped or killed, and that as a young teen she had experienced community-wide harassment, including death threats and sexual assault. She did not report these to the police because she believed they would not protect her and might "do something" to her, based on her knowledge of the other woman's experience and the lack of legal protection for gay people in Guatemala. The panel concluded that under 9th Circuit precedent in cases such as this, they could not hold against the petitioner her failure to report these incidents to the police, which had apparently been a sticking point for the IJ. In light of the 9th Circuit's ruling in *Bringas-Rodriguez v. Sessions*, 850 F. 3d 1051 (9th Cir. 2017), the panel unanimously ruled in a memorandum decision that the case must be remanded for reconsideration of her withholding and CAT claims consistent with 9th Circuit precedents. The petitioner is represented by Michael Raymond Devitt of University of San Diego Law School, with David Andrew Schlesinger, of Jacobs & Schlesinger LLP, San Diego. This was a very conservative panel, making the decision a bit of a surprise. Circuit Judges Bridget Bade and Kenneth K. Lee were appointed by President Donald Trump, and Senior Circuit Judge D. Brooks Smith of the 3rd Circuit, sitting by designation, was appointed to the 3rd Circuit by President George W. Bush after having served many years as a district judge appointed by President Ronald Reagan.

U.S. COURT OF APPEALS, 11TH CIRCUIT – In *Vazzo v. City of Tampa*, 2023 U.S. App. LEXIS 2678, 2023 WL 1466603 (Feb. 2, 2023), a panel of the 11th Circuit held that it was bound by circuit precedent to affirm the district court's grant of summary judgment in favor of the petitioners, practitioners of conversion therapy, who had successfully challenged the City of Tampa's ordinance banning that practice by licensed health-care professionals. The district court found that conversion therapy practitioners have a 1st Amendment free speech right to perform conversion therapy with methods limited to speech. The *Vazzo* court premised its ruling on *Otto v. City of Boca Raton*, 981 F. 3d 854 (11th Cir. 2020), which had been denied rehearing *en banc* (see 41 F. 4th 1271 (2022), resulting in a mandate finally being issued in that case. The panel had help up deciding the *Vazzo* case until a final mandate issued in *Otto.* Circuit Judge Robin Rosenbaum, a member of the panel who had dissented from the denial of rehearing in *Otto*, concurred, explaining that the panel was bound by precedent to affirm the district court, but that she continued to believe that *Otto* was wrongly decided. The *Vazzo* case was brought by attorneys affiliated with Liberty Counsel, a "public interest" firm dedicated to asserting religious freedom claims.

CALIFORNIA – Herewith, a dispute between a transgender rock musician, Brala Beverly, and a radio station and DJ who refused to play her recordings. *Beverly v. KLOS Radio, LLC*, 2023 WL 2202641, 2023 Cal. App. Unpub. LEXIS 1100 (Cal. App. 2nd Dist., Feb. 24, 2023). Beverly claimed that a sponsorship agreement between KLOS Radio and the LA Music Awards created an implied contractual obligation to play her recordings on the air, since she was nominated for an award. In an exchange of messages through Twitter with KLOS

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DJ Marci Wiser, Beverly claims she had a commitment from Wiser's to play Beverly's music, which she inferred from Wiser's invitation to send the recordings to her. Beverly argued that KLOS would not request recordings unless it intended to air them. When Beverly persisted in asserting her claim in repeated twitter communications with Wiser, Wiser's responses grew increasingly insulting as Beverly would not take no for an answer. Wiser threatened legal action if Beverly persisted in contacting her. In this pro se lawsuit, Beverly sued for breach of contract, intentional infliction of emotional distress, libel and negligence. Los Angeles County Superior Court Judge Gary Y. Tanaka granted motions to dismiss, which were affirmed by the 2nd Department Court of Appeal in an opinion by Brian S. Curry. The court had printouts of twitter feeds to examine in ruling on the motion, and determined that the formal requirements for either express or implied contracts had not been met. Beverly claimed that she was a third-party beneficiary who could sue to enforce KOS's obligation to play nominated songs, but the court found that California third-party beneficiary law requires express intention to benefit a third party, which was not present here. The tort claims were unavailing as well.

CALIFORNIA – The California 4th District Court of Appeal affirmed an order by Orange County Superior Court Judge Martha K. Gooding granting defendant's motion to strike the plaintiff's defamation claim, on the ground that the alleged defamatory statement, asserting that Bell had refused to process two promotions because of the sexual orientation of the individuals, was absolutely privileged as part of an internal investigation. *Bell v. Coast Community College District*, 2023 Cal. App. Unpub. LEXIS 922, 2023 WL 2028933 (Feb. 16, 2023). As recounted in the panel opinion by Judge Thomas A. Delaney, Bell had worked for the District for 13 years. She claimed that after she "reported and refused to engage in improper governmental activities and an illegal misuse of public funds," she was subjected to an internal investigation that accused her of discriminating against fellow employees based on their sexual orientation, and issued her a notice of intent to terminate her employment. She sued them including a defamation claim. In this opinion, having concluded that the contents of the disciplinary charge and associated documents was privileged, the court affirmed Judge Gooding's decision to strike the defamation claim. Statements made in the context of an official disciplinary proceeding are rendered privileged by statute in California under Section 425.16 of the Code of Civil Procedure.

COLORADO – Avalon Nicewonder, described throughout this opinion as a "member of the LGBTQ+ community," alleged that a male coworker who had obtained her contact information after they had discussed her interest in participating in employee basketball games, and then began texting her with sexual propositions, nude pictures of himself, etc. She reported this to supervisors, who did not handle the matter well and despite telling the male co-worker to knock it off, took no steps to juggle schedules so that she would not have to work with him. After this incident, management's attitude towards her changed, she claims. Until then, her work had aroused no adverse comment, but after the incident, things went sharply downhill, with adverse comments, a personal improvement plan, and a reduction of work for her, leading to her layoff in a purported reduction in force when the pandemic hit. (She was the only person in her job category laid off during that time.) She sues under Title VII with claims of discrimination and hostile environment, both under sex and sexual orientation, as well as asserting ADA arising from her emotional distress about the way she was treated, among other things. In *Nicewonder v. Ferguson Enterprises, LLC*, 2023 WL 244830, 2023 U.S. Dist. LEXIS 8715 (Jan. 18, 2023), U.S. Magistrate Judge Kristen L. Mix recommended that the employer's motion to dismiss most of plaintiff's claims be granted. As it relates to her claims of sexual orientation discrimination in particular, the judge pointed out that nothing in her factual allegations showed that her sexual orientation had anything to do with her layoff (discharge) or hostile environment, while concluding that she should be allowed to pursue her sex discrimination claims, but only with respect to incidents that occurred within the 300-day period prior to her filing Title VII charges. Most the judge's discussion went to the statute of limitations issues, all of the incidents recounted in the complaint except for her layoff occurred earlier than that time period. The court rejected plaintiff's argument based on the continuing course of conduct doctrine, which would have required that at least one incident occur during the 300-day period in order for the court to be able to take account of earlier incidents in relation to the hostile environment claim. Plaintiff is represented by Thomas H. Mitchiner, Denver, CO.

CONNECTICUT – Ean King was hired in April 2019 by Strawberry Park Resort Campground as part of its summer work-crew. His direct supervisor, Lacia Euell, had worked with him in his other part-time job at a Panera restaurant and recommended him for this part-time job, while he continued to work at Panera as well. With Euell's consent, a few times King took home cleaning materials from the workplace. Euell's supervisor, Jeremy Klemm, thought King was too loud and profane and unprofessional, and spoke to Euell about considering

discharging him. Several days later, she did so, the day after she found out that King identifies as bisexual, when Euell participated in a conversation involving King and another employee, Racheal Perry, in which there was discussion of another co-worker's problems with her girlfriend. During that conversation, according to Perry' s testimony in this case, Euell had stated that "she has a problem with gay people because of something that happened with her brother while he was incarcerated," and that after that remark, King had "come out and said he was bisexual." Euell walked away then. Perry testified that Euell's treatment of King changed after that revelation, as reflected in her tone of voice: "But it was all just disgust and demeaning. Like he was just so small." Perry testified that she quit her own job at Strawberry Park soon thereafter because she was so upset at how Euell reacted to King's statement. However, when King was notified of his discharge by a text message from Euell, she stated it was 'for taking supplies from the supply closet.'" King sued the employer in Connecticut state court under Title VII and Connecticut's anti-discrimination law, claiming discrimination because of gender and sexual orientation, and the company removed the case to federal court. On motions for summary judgment in *King v. Strawberry Park Resort Campground, Inc.*, 2023 WL 2265948, 2023 U.S. Dist. LEXIS 32747 (D. Conn., Feb. 28, 2023), Senior District Judge Janet C. Hall granted summary judgment to the employer on the gender discrimination claim upon a concession by King that his only claim was for sexual orientation discrimination. At the time he filed his claim after his June 2019 discharge (pre-*Bostock*), the federal claim would be for gender discrimination and the state claim for sexual orientation discrimination, but now *Bostock* controls and, as the court pointed out, it really made no difference and could be treated as a federal sexual orientation discrimination claim. Judge Hall found that facts as presented would not support summary judgment for the employer. The timing of this discharge supported an inference of discriminatory intent, and there was a factual dispute to be resolved whether the reason stated by Euell for the discharge was pretextual. The court granted the employer's motion for s.j. on the lost wages claim, as there was a concession by King that he did not seek alternative employment to make up for the lost hours from his part-time job at Strawberry Park, so he had failed the statutory requirement to mitigate damage. However, he had an emotional distress claim, which the court found sufficiently supported by his deposition testimony to avoid s.j., and of course if he prevails on any of his claims, there is the possibility of a fee award for his attorneys, John Erich Sheer & Lorenzo J. Cicciello, of Cicciello & Cicciello, Norwich CT. Senior Judge Hall was appointed by President Bill Clinton.

DISTRICT OF COLUMBIA – Christopher Lilly, a gay man, served as a D.C. police officer for about six years prior to his involuntary disability retirement which took effect on August 16, 2013. He alleges that nobody in the department knew he was gay until he was spotted leaving a gay club, which led to him being subjected to homophobic remarks, name-calling, and various harassment incidents, only some of which he made the subject of formal complaints. In the course of his service, he incurred various adverse medical and psychological issues, accumulated several instances of not reporting on time for his assigned shifts, was placed on limited duty at various times due to these medical issues, and was ultimately deemed to be incapacitated from further duty. He filed a discrimination charge with a local agency that was cross-filed with EEOC on March 11, 2014. He alleged claims against the District of Columbia under Title VII of the federal Civil Rights Act and the D.C. Human Rights Law. (The D.C. law prohibited sexual orientation discrimination throughout the duration of Lilly's employment by the department.) EEOC found no probable cause on his complaints of hostile environment and sexual orientation discrimination, issuing him a right to sue letter, and he sued in D.C. District Court, where the case was assigned to District Judge Emmet G. Sullivan, who subsequently took senior status in 2021 during the pendency of this case. In *Lilly v. District of Columbia*, 2023 WL 2139319, 2023 U.S. Dist. LEXIS 27988 (D.D.C., Feb. 21, 2023), Judge Sullivan granted the defendant's motion for summary judgment. The court found that Lilly had sat on various of his claims too long before filing charges, as a result of which the hostile environment claim and a retaliation claim were found to be time-barred because the relevant events all occurred more than 300 days before his charge was filed. The court also found that Lilly had failed to produce sufficient evidence in opposition to the motion from which a reasonable jury could conclude that the District's non-discriminatory stated reasons for the alleged discriminatory or retaliatory acts that were not time-barred were pretextual. The court provides a painstakingly detailed account of Lilly's allegations, actions he took, and actions the department took. A reader could easily conclude that Lilly's life was made emotionally quite difficult due to the routine homophobia to which he was subjected by other police officers, and this appears to have likely contributed to him to become unable to continue working as a police officer. One might conclude that he is a victim of the casual homophobia that appears to characterize the police mentality, as exposed in many lawsuits brought by gay officers, and this case shows the limitations of existing employment law doctrine in dealing with this kind of low-grade but repetitively oppressive conduct that fails to impress federal judges as serious

enough to meet the high bar set by the Supreme Court in hostile environment cases. Lilly is represented by Sameera Ali, of Ali, White & Coleman, PLLC, Washington, D.C. Senior District Judge Sullivan was appointed by President Bill Clinton.

FLORIDA – Gregory Orr, Jr., was hired by Franco Meloni, the Bar Manager at Trattoria Romana, on September 20, 2018. By December 2019, Meloni was aware that Orr was gay. In March 2020, the state required bars to close due to the COVID pandemic and Orr was furloughed with the rest of the staff. On May 11, restaurants could reopen at reduced capacity with no bar seating or service, so the bartenders were not brought back. On September 18 Meloni informed Orr that his employment was terminated, and that the restaurant's general manager decided not to bring back all furloughed employees. Sixteen employees, including three bartenders, were not brought back to work. Sometime later in the year, the restaurant hired a new bartender, a heterosexual man, who was a qualified "mixologist," which Orr was not. Orr sued under Title VII and the Florida Civil Rights Act claiming he was terminated because of his sexual orientation. On February 21, 2023, in *Orr v. Trattoria Romana, Inc.*, 2023 U.S. Dist. LEXIS 29361 (S.D. Fla.), U.S. District Judge Donald M. Middlebrooks granted summary judgment to the employer, having found that Orr failed to show a prima facie case. The court's analysis focused on the fourth prong of the McDonnell-Douglas proof requirements for indirect evidence of discriminatory intent, and found that Orr had failed to establish that he was "replaced" by a non-gay person. The court reasoned that Orr failed to develop the facts necessary to show that the new bartender was a "replacement" for him, in light of the new man's superior qualifications and the employer's assertion that he was looking for a "mixologist" with a following to draw new business to the restaurant. Even if the court had decided there was a prima facie case, it asserted that Orr had failed to show that the reasons cited for his termination were a pretext for discrimination. The court also point out that Orr could not pinpoint when Meloni learned that Orr was gay, but it appeared that Orr's termination occurred at least nine months after that, with the COVID furloughs intervening, giving rise to the inference that Meloni was not acting based on Orr's sexual orientation. Meloni denied having made remarks attributable to him that might be deemed offensive to gay people that were discovered in a text message in which Meloni described a non-gay person as "not best-wristed" and referring to two gay men as "two Gregs." Wrote the judge, "Simply put, there is no evidence from which a jury could conclude that Plaintiff was treated differently than any other person in his same situation, and that the reason for that differential treatment was due to Plaintiff's sexual orientation." The judge also wrote that Orr had not shown a "convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination." Orr is represented by Alessandro James D'Amico and Mase Mebane Seitz, Miami, FL; Christopher Gerard Lyons, Mase Mebane & Briggs PA, Miami, FL; Curtis Jay Mase, Mase Mebane & Briggs P.A., Miami, FL. Judge Middlebrooks as appointed by President Bill Clinton.

FLORIDA – The Supreme Court of Florida, acting *sua sponte*, amended the Florida rules governing continuing education requirements for judges by, according to dissenting Justice Jorge Labarga, expressly removing the terms "fairness" and "diversity" from "the course topics that Florida's state court judges may use to satisfy their continuing judicial education ethics requirement." He argued that this "unilateral action potentially eliminates vital educational content from our state courts' judicial education curriculum and does so in a manner inconsistent with this Court's years-long commitment to fairness and diversity education. Moreover, it paves the way for a complete dismantling of all fairness and diversity initiatives in the State Courts System." One wonders whether the court, all of whose members were appointed by Republican governors (and a majority appointed by Ron DeSantis) is reacting to the current governor's campaign to vanquish diversity training in the state? *See In re: Amendments to Florida Rule of General Practice and Judicial Administration*, 2023 WL 1456851, 2023 Fla. LEXIS 197 (Feb. 2, 2023). Justice Labarga was appointed by Governor Charlie Crist when he was a Republican. In 2022, then-U.S. Representative Crist, serving as a Democrat, won the Democratic nomination for governor but lost to Governor DeSantis.

GEORGIA – Stephen R. Collett developed symptoms characteristic of early-stage HIV infection a few weeks after undergoing a colonoscopy that was performed using an Olympus CF-H180AL model colonoscope in October 2011. The symptoms could have been due to a variety of infections, and it took some time for the doctors to decide to test for HIV and when other tests turned up negative and Collett had been hospitalized with more severe symptoms. This was in June 2013. His wife, who did not exhibit symptoms, tested positive for HIV shortly after her husband received his test result. Collett, himself a research scientist, began to research the possible cause of his infection, and came to believe that it was associated with the colonoscopy, and particularly the possibilities that the colonoscope was defectively designed and the manufacturer had not adequately warned users about the risks of cross infection if the colonoscope was not

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appropriately cleaned between uses. The case of *Collett v. Olympus Medical Systems Corp.*, 2023 WL 2190171, 2023 U.S. Dist. LEXIS 30461 (M.D. Ga., Feb. 23), will eventually come down to a battle of the experts, and particularly expert opinion testimony that it was reasonably likely that Collett contracted his infection during the performance of the colonoscopy. In this February 23, 2023, opinion, U.S. District Judge Clay D. Land deals with defendants' motions to exclude various plaintiffs' expert testimony and for summary judgment by defendants – the manufacturer of the Colonoscope and the facility where the colonoscopy was performed. The court rejected a time-bar argument, finding that under the "discovery rule" the lawsuit had been filed promptly after Collett had reason to believe that the colonoscopy was implicated in his infection. The judge's careful evaluation of the exert testimony leads him to conclude that much, although not all, of the expert testimony should be admissible, and – more importantly – that there are several questions of material fact that require that the case be tried and not decided on summary judgment. Judge Land set the case for trial to begin during the May 2013 term of the district court. The Colletts are represented by James W. Hurt, Jr., Watkinsville, GA, and Richard A. Wingate and Francis E. Hallman, Jr., Marietta, GA. Defendant Olympus is represented by Richard C. Beaulieu and Jennifer R. Burbine, Atlanta, GA' Davis Walsh, Richmond, VA, and Valyce M. David, Raleigh, NC. Co-defendant Athens Gastroenterology Endoscopy Center is represented by Beth Wendy Kanik, Atlanta, GA. Judge Land, who is Chief Judge for the Middle District of Georgia, was appointed by President George W. Bush.

ILLINOIS – In *Arriaga v. Dart*, 2023 WL 1451526, 2023 U.S. Dist. LEXIS 16802 (N.D. Ill., Feb. 1, 2023), U.S. District Judge Virginia M. Kendall ruled on a discovery dispute in a case where a transgender employee who had kept her transgender status secret at her job as a transit police officer, sued her employer (the transit agency), the county, the sheriff, and various other named defendants for "revealing her transgender status and failing to prevent the discrimination and harassment that followed." In the disputed discovery request in the form of interrogatories, one of the defendants sought descriptions of "the nature of plaintiff's relationship with" eleven social media "users with whom she communicated," the approximate length of time she knew the users at the time the communication occurred, and whether she "has personal knowledge whether the user was an acquaintance of, or had a personal relationship with, (1) any Cook County Sheriff's Police Academy recruit, or (2) Cook County Sheriff's Office police officer at any time prior to Plaintiff's attendance at the Police Academy." Plaintiff objected to these requests on grounds of proportionality, relevance, and invasion of privacy, claiming that she and other Facebook users have an "expectation of privacy" in their messages, and asserting that none of the users covered by the interrogatory have any connection to the Cook County police academy or the sheriff's office. She had also refused to respond to a request asking her to admit whether "the provision of Exhibit 24 to the Cook County Sheriff's Office Training Academy served the significant government interest of determining whether Plaintiff should attempt the POWER test pursuant to male or female testing standards," which she claimed called for a "legal conclusion" rather than a factual response. Judge Kendall rejected the plaintiff's objections to the interrogatories, finding that they were relevant and proportional to the issues in dispute in the case. As to the "legal conclusion" objection, Judge Kendall wrote that the request for admission "does not call for a pure legal conclusion by requesting that Arriaga admit or deny whether she believes the government has a significant interest in asking the gender of law enforcement recruits for testing purposes." The court said it was "proper under Rule 36" to ask the plaintiff to "apply law to fact," and that Arriaga had not cited any case law to support her position. Thus, this objection was overruled, and the court ordered Arriaga to amend her response to that interrogatory. Arriaga is represented by Cass Thomas Casper and other attorneys from Disparti Law Group, P.A., Chicago. Judge Kendall was appointed by President George W. Bush.

MISSOURI – In *L.H. v. Independence School District*, 2023 WL 2192234, 2023 U.S. Dist. LEXIS 29996 (W.D. Mo., Feb. 23, 2023), a group of parents sued the local school district on behalf of their minor children who attend schools in the district, challenging the constitutionality of a district policy under which anybody can formally challenge school library materials as unsuitable. Upon filing of a challenge, the materials in question are removed from the collection while a process of evaluation takes place involving the appointment of a committee with a variety of people (including parents, teachers, librarians) that reports to a committee of the Board of Education, which has the ultimate unappealable vote about whether the materials are permanently withdrawn from the school library collection. No notice is given to the public, parents, or children that particular materials are under challenge and have been withdrawn, and there is no mechanism for allowing persons who oppose the challenge to have formal input in the decision. Plaintiffs, asserting 1st and 14th Amendment claims on behalf of the minor children, moved for a preliminary injunction against operation of this system while the case is under

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appropriately cleaned between uses. The case of *Collett v. Olympus Medical Systems Corp.*, 2023 WL 2190171, 2023 U.S. Dist. LEXIS 30461 (M.D. Ga., Feb. 23), will eventually come down to a battle of the experts, and particularly expert opinion testimony that it was reasonably likely that Collett contracted his infection during the performance of the colonoscopy. In this February 23, 2023, opinion, U.S. District Judge Clay D. Land deals with defendants' motions to exclude various plaintiffs' expert testimony and for summary judgment by defendants – the manufacturer of the Colonoscope and the facility where the colonoscopy was performed. The court rejected a time-bar argument, finding that under the "discovery rule" the lawsuit had been filed promptly after Collett had reason to believe that the colonoscopy was implicated in his infection. The judge's careful evaluation of the exert testimony leads him to conclude that much, although not all, of the expert testimony should be admissible, and – more importantly – that there are several questions of material fact that require that the case be tried and not decided on summary judgment. Judge Land set the case for trial to begin during the May 2013 term of the district court. The Colletts are represented by James W. Hurt, Jr., Watkinsville, GA, and Richard A. Wingate and Francis E. Hallman, Jr., Marietta, GA. Defendant Olympus is represented by Richard C. Beaulieu and Jennifer R. Burbine, Atlanta, GA' Davis Walsh, Richmond, VA, and Valyce M. David, Raleigh, NC. Co-defendant Athens Gastroenterology Endoscopy Center is represented by Beth Wendy Kanik, Atlanta, GA. Judge Land, who is Chief Judge for the Middle District of Georgia, was appointed by President George W. Bush.

ILLINOIS – In *Arriaga v. Dart*, 2023 WL 1451526, 2023 U.S. Dist. LEXIS 16802 (N.D. Ill., Feb. 1, 2023), U.S. District Judge Virginia M. Kendall ruled on a discovery dispute in a case where a transgender employee who had kept her transgender status secret at her job as a transit police officer, sued her employer (the transit agency), the county, the sheriff, and various other named defendants for "revealing her transgender status and failing to prevent the discrimination and harassment that followed." In the disputed discovery request in the form of interrogatories, one of the defendants sought descriptions of "the nature of plaintiff's relationship with" eleven social media "users with whom she communicated," the approximate length of time she knew the users at the time the communication occurred, and whether she "has personal knowledge whether the user was an acquaintance of, or had a personal relationship with, (1) any Cook County Sheriff's Police Academy recruit, or (2) Cook County Sheriff's Office police officer at any time prior to Plaintiff's attendance at the Police Academy." Plaintiff objected to these requests on grounds of proportionality, relevance, and invasion of privacy, claiming that she and other Facebook users have an "expectation of privacy" in their messages, and asserting that none of the users covered by the interrogatory have any connection to the Cook County police academy or the sheriff's office. She had also refused to respond to a request asking her to admit whether "the provision of Exhibit 24 to the Cook County Sheriff's Office Training Academy served the significant government interest of determining whether Plaintiff should attempt the POWER test pursuant to male or female testing standards," which she claimed called for a "legal conclusion" rather than a factual response. Judge Kendall rejected the plaintiff's objections to the interrogatories, finding that they were relevant and proportional to the issues in dispute in the case. As to the "legal conclusion" objection, Judge Kendall wrote that the request for admission "does not call for a pure legal conclusion by requesting that Arriaga admit or deny whether she believes the government has a significant interest in asking the gender of law enforcement recruits for testing purposes." The court said it was "proper under Rule 36" to ask the plaintiff to "apply law to fact," and that Arriaga had not cited any case law to support her position. Thus, this objection was overruled, and the court ordered Arriaga to amend her response to that interrogatory. Arriaga is represented by Cass Thomas Casper and other attorneys from Disparti Law Group, P.A., Chicago. Judge Kendall was appointed by President George W. Bush.

MISSOURI – In *L.H. v. Independence School District*, 2023 WL 2192234, 2023 U.S. Dist. LEXIS 29996 (W.D. Mo., Feb. 23, 2023), a group of parents sued the local school district on behalf of their minor children who attend schools in the district, challenging the constitutionality of a district policy under which anybody can formally challenge school library materials as unsuitable. Upon filing of a challenge, the materials in question are removed from the collection while a process of evaluation takes place involving the appointment of a committee with a variety of people (including parents, teachers, librarians) that reports to a committee of the Board of Education, which has the ultimate unappealable vote about whether the materials are permanently withdrawn from the school library collection. No notice is given to the public, parents, or children that particular materials are under challenge and have been withdrawn, and there is no mechanism for allowing persons who oppose the challenge to have formal input in the decision. Plaintiffs, asserting 1st and 14th Amendment claims on behalf of the minor children, moved for a preliminary injunction against operation of this system while the case is under

various factual assertions, which the court mentions as being largely non-specific about when they occurred. Given the passage of time, amendment would not cure these problems, so the court denied a request by plaintiff to file an amended complaint naming "proper defendants." Ms. Molz also wanted to add a tort claim and an ADEA claim but had failed to undertake the procedural prerequisites for filing such claims against a federal government agency, and, as to federal employees, sovereign immunity would bar a common law tort claim against the defendants, as federal immunity is waived only with respect to claims under federal statutes such as Title VI or ADEA (age discrimination). The court also saw no basis in the papers on file at this point to apply the doctrine of equitable tolling, saying "it would be futile due to the passage of time," explaining: "Ultimately, when a court lacks jurisdiction to hear the case it 'a fortiori lacks jurisdiction to rule on the merits.'" As a result of which, the court never analyzed the merits of Molz's claims. In addition to granting the motion to dismiss, the court granted the government's motion to seal the record of the case. From the court's description of the complaint and other papers, this sounds like a pro se case, but the opinion lists Mark J. Molz of Hainesport, N.J., as counsel for Molz. Related? Judge Hillman was appointed by President George W. Bush.

NEW YORK – On March 3, 2022, President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (EFAA) (see 9 USC secs. 401-02), which amended the Federal Arbitration Act to provide that a person alleging "conduct constituting a sexual harassment dispute" (a term defined elsewhere in the Act) may elect to litigate rather than submit the dispute to arbitration, despite any arbitration agreement to which they are a party. Answering what is likely a question of first impress under the new law in *Johnson v. Everyrealm, Inc.*, 2023 WL 2216173, 2023 U.S. Dist. LEXIS 31242 (S.D.N.Y., Feb. 24, 2023), U.S. District Judge Paul A. Engelmayer held that the election to litigate extends to the entire case, not just the sexual harassment aspect of the case. The claims asserted by Johnson in the first amended complaint include race discrimination [Section 1981], pay discrimination [NY Labor Law], sexual harassment, hostile work environment and discrimination based on gender, race and ethnicity [NY State Human Rights Law and New York City Human Rights Law], whistleblower protection [N.Y. Labor Law], and common-law intentional infliction of emotional distress. The employer moved to compel arbitration in response to Johnson's suit, relying on a broad arbitration provision in his contract of employment, and Johnson claimed that his right of election under EFAA extends to the entire case, not just the harassment claim. The employer argued that the harassment cause of action was spurious and included solely to avoid arbitrating Johnson's other claims, but after a thorough analysis, Judge Engelmayer concluded that the complaint stated facts sufficient to ground a plausible sexual harassment claim, and then proceeded to find that the text of EFAA supported Johnson's contention that so long as the claims were interrelated, they were treated as a package for this purpose and he was entitled to litigate them free of the arbitration provision. Johnson's counsel is Shane Seppinni, Seppinni LLP, New York City. Everyrealm, Inc. is represented by Lloyd Blades Chinn, Proskauer Rose LLP, New York City. Judge Engelmayer was appointed by President Barack Obama. Given the importance and the involvement of a major national law firm representing the employer, we expect this to go to the 2nd Circuit and perhaps, eventually, to the Supreme Court. * * * By contrast, in the companion case of *Yost v. Everyrealm, Inc.*, 2023 WL 2224450, 2023 U.S. Dist. LEXIS (S.D.N.Y., Feb. 24, 2023), Judge Engelmayer faced the further question whether the allegations of the complaint had to be sufficient to make the sexual harassment claim plausible in order for the EFAA election to apply. (This case, incidentally, involved a bisexual plaintiff.) The court found that when the arbitrability issue is raised, it is a matter of law for the court to evaluate whether there is a *plausible* harassment claim asserted in the complaint; failing that, EFAA would not apply, and the company could insist on directing the entire case to the arbitral forum instead of litigation. * * * We would expect that Johnson and Yost may both be appealed to the 2nd Circuit and would be treated as a package deal.

NEW YORK – In *Aponte v. Clinton Street Pizza*, 2023 WL 1795189, 2023 U.S. Dist. LEXIS 20767(S.D.N.Y., Feb. 7, 2023), plaintiffs are two employees of a pizza parlor, Nancy Aponte and Angelo Gabriel Alves Marques, who is a gay man. They sued, apparently pro se at first, alleging violations of their rights under federal and state wage/hours laws and sexual harassment/hostile work environment. Their initial complaint was defective in not including the necessary factual allegations about the business, and was dismissed with leave to file an amended complaint. They then appear to have obtained counsel – Jesse Curtis Rose, Astoria NY – and submitted an amended complaint that cured the jurisdictional problems. The defendants are the business and its three co-owners, only two of whom were served. Once counsel was in the picture, settlement negotiations were successful as to two of the named defendants, but neither the company nor the other co-owner were responsive, not even responding to plaintiffs' motion for a default judgment, which was granted in this opinion by Senior U.S. District Judge

Kimba Wood. Of particular interest to Law Notes readers will be Judge Wood's description and holding regarding the gay man's sexual harassment complaint. "Plaintiff Marques, a homosexual male, claims that Defendants violated NYCHRL [New York City Human Rights Law] by discriminating against him and 'harassing him on a daily basis' on account of his sexual orientation. Specifically, Plaintiff Marques alleges that Defendants Orlando and Taormina often 'made fun of [his] sexual orientation' and 'made sexual and homophobic comments about him in the kitchen to other staff.' When male customers were present, they would 'ask Plaintiff marques if he wanted to have sex with them or date them.' Additionally, Defendant Orlando would 'frequently tell Plaintiff Marques' male co-workers to "watch out" or "be careful" because Marques like men and he would like to have sex with [them].'' Plaintiff Marques alleges that Defendants' conduct made him 'feel extremely uncomfortable and mistreated' and 'made it impossible for [him] to complete his work tasks.' Such allegations show that Plaintiff Marques was 'treated less well than other employees' because of his sexual orientation. Hence, the Court concludes that Plaintiff Marques has successfully pled a hostile work environment claim under NYCHRL." The application for default judgment against the business and co-owner Orlando was granted, and the case referred to a magistrate judge for an inquest on damages and attorneys' fees. Judge Wood was appointed by President Ronald Reagan, and is well known to many who studied Contracts law in an American law school as the author of the famous case of *Leonard v. Pepsico*, 88 F. Supp 2d 116 (S.D.N.Y. 1996).

PENNSYLVANIA – JoAnn Edwards, a white lesbian who was not initially "out" in her job as Executive Director of the Pennsylvania Human Relations Commission (!!), was forced out, allegedly over performance issues, by a unanimous vote of the Human Relations Commission. She alleges that the vote was tainted, pointing in particular to Commissioner Gerald Robinson, a black heterosexual man who was a *former* chair of the Commission with whom she had some run-ins after Robinson learned about Edwards' sexual orientation and marriage to a woman. But Robinson was replaced with a new chair whose conduct towards Edwards did not replicate Robinson's. Edwards filed a Title VII charge with the EEOC, which "could not determine whether the Commission had violated federal law," so it closed the file and gave Edwards her right to sue letter. In the ensuing lawsuit filed in December 2018, she relied on Title VII and the Pennsylvania Human Relations Act (which does not expressly cover sexual orientation discrimination). She also alleged violation of the Family and Medical Leave Act, arising out of criticism she caught from the agency's legal counsel for granting unusually long FMLA leave to an employee. In *Edwards v. Pennsylvania Human Relations Commission*, 2023 WL 1929998, 2023 U.S. Dist. LEXIS 23417 (M.D. Pa., Feb. 10, 2021), Chief U.S. District Judge Christopher C. Conner granted summary judgment to the Commission. The Commission conceded that Edwards established a prima facie case of discrimination because of race and sex, but Judge Conner concluded that "Edwards has not demonstrated improper motives drove a majority of votes, provided the decisive margin, or tainted a significant bloc of commissioners." That Robinson may have been biased against her would be significant if the vote was close, but Robinson was the only commissioner against whom Edwards was able to produce evidence of discriminatory intent. The court found that "the record is replete with evidence that the primary motivations of the commissioners' decision was Edwards' inappropriate delegation of personnel matter to her subordinate and her contributions to a toxic work environment." The court reached a similar conclusion regarding Edwards' FMLA claim, which the court found to be based on an isolated incident that occurred more than two years prior to her forced resignation. As to her hostile environment claim, the court found that it relied on incidents that occurred when Robinson had been chair of the Commission, but he had been replaced as chair several years earlier, and no relevant incident occurred within 300 days before she filed her discrimination charge, so this claim was effectively time-barred under Title VII. Edwards is represented by Patrick G. Murphy, of Murphy & Associates, Blue Bell, PA. Judge Conner was appointed by President George W. Bush.

UTAH – Given the sway that the Mormon church (Church of Jesus Christ of Latter-day Saints, with LDS the usual acronym) holds over the state government in Utah, perhaps a *pro se* litigant could plausibly believe that programs provided under the auspices of the church are "state actors" that could be sued in federal court for violation of constitutional rights. Well, not so, ruled U.S. Magistrate Judge Dustin B. Pead (D. Utah) in *Brundage v. Vandam*, 2023 WL 2221087, 2023 U.S. Dist. LEXIS 31546 (Feb. 24, 2023). Brundage, an LDS member, had been "working with his bishop for homosexual behavior," according to the court's opinion. Brundage's bishop referred him to the Ogden LDS Family Services organization to attend a "Men's Pornography Treatment Workshop" to deal with his "addiction" to pornography. He reported for an "assessment" to determine whether he could participate in the workshop. He told the therapist, Michael Lee Vandam, that he had been referred for "out of control pornography use." But when he "reported" that he had been working with his bishop

"for homosexual behavior," Vandam informed him that he would not be the "right fit for the group" because he would be "the only person there who had done something like that." He was removed from the group, and subsequently received a bill for the assessment. "These circumstances created mental distress for Plaintiff wherein he 'cried for 7 hours the day this happened' and it has been hard since this time," wrote Judge Pead, summarizing the allegations of the complaint. Brundage was seeking $3 million in compensatory damages and $3 million in punitive damages. What cloud is he living on?? Anyway, Judge Pead granted Vandam's motion for dismissal for failure to state a claim, finding that a 42 USC 1983 claim requires that the defendant be a "state actor" and neither the LDS Family Services nor Vandam are "state actors." Brundage had argued that since the program was licensed by the state as a service provider, it should be considered a "state actor," but that argument got him nowhere, as the court had decisions to cite in cases where LDS entities had won dismissals of constitutional claims on this basis and, in general, courts have ruled that state licensure of a private facility does not turn it into a public facility. There is no applicable federal civil rights law that would apply to this situation, so no jurisdiction for the court to entertain Brundage's claim. Maybe LDF Family Services needs to set up a separate workshop for Mormon men who are addicted to gay porn.

VIRGINIA – Senior U.S. District Judge Anthony J. Trenga granted a motion for summary judgment in *Romano v. Verisign, Inc.*, 2023 WL 1797890, 2023 U.S. Dist. LEXIS 20870 (E.D. Va., Feb. 7, 2023), in which Michelle Romano, who was laid off in a "structural reorganization" by the employer announced in 2020 and implemented in 2021, alleged violations of Title VII and the Virginia Values Act (the state's anti-discrimination law, which prohibits sexual orientation discrimination in employment). The court found that there was no evidence in the summary judgment record showing a nexus between the 2021 termination and any discrimination or retaliation against the plaintiff. The court noted that the relevant management decision-maker was not shown to have any relevant knowledge about Romano's sexual orientation when making the layoff decision, and rejected Romano's claim that a different management official in the Human Resources Department, whom she claimed made or influenced the decision, did know about Romano's sexual orientation. In other words, Romano was unable to make any factual allegations that would be probative of actions taken based on gender or sexual orientation. She alleged earlier incidents as a basis for her claim that the layoff was retaliatory, but the court was unpersuaded due to their timing. The court also found no evidence from which a fact-finding could conclude that the company's non-discriminatory justifications for its actions were pretextual. The court also found a lack of factual support for Romano's hostile environment claim, noting that almost all of her factual allegations related to discrete incidents that occurred too early to be counted in this case due to the statute of limitations on filing discrimination claims, invoking the "high bar" set by the Supreme Court in its hostile environment decisions. Romano is represented by Carlos Denette Brown, of Charlson Bredehoft Cohen Brown & Nadelhall, PC, Reston VA. Judge Trenga was appointed by President George W. Bush.

WASHINGTON – Alaska Airlines has issued statements supporting the Equality Act, pending federal legislation that would explicitly ban discrimination because of sexual orientation, gender identity or gender expression. This public stance bothered two of its employees, Marli Brown and Lacey Smith, who posted comments of opposition to the Equality Act on the company-wide intranet site called "Alaska's World," which would be accessible to all of the company's employees. Each of the two women posted independently of the other, each citing their religious beliefs as the basis for their comments. The court quotes Brown's post, which accuses the company of supporting "endangering the Church, encouraging suppression of religious freedom, obliterating women rights and parental rights, and forcing Americans to agree with controversial government-imposed ideology, and goes on in similar vein . . . . The company, which evidently was unhappy about being thus accused in a medium open to all its employees, suspended Brown and Smith to investigate and then discharged them, claiming a violation of the company's anti-discrimination policies. The case is now pending in the Western District of Washington before Senior U.S. District Judge Barbara Jacobs Rothstein. In *Brown v. Alaska Airlines, Inc.*, 2023 WL 2242000, 2023 U.S. Dist. LEXIS 32100 (Feb. 27, 2023), Judge Rothstein dealt with motions by Alaska Airlines to reign in the questioning of its employees during discovery, Plaintiffs wanted to ask questions such as "Have you ever known anybody terminated for attendance reasons" and "Do you know the names of anybody who was terminated due to drug or alcohol tests?" Alaska airlines proposed narrowing these to questions directly related to the issues in the case, focused on "comparator" disciplinary actions to those brought against the plaintiffs, which Alaska describes as "employees who faced discipline or termination for allegedly violating the company's policies covering harassment and/or discrimination, or violations of Section 6.3000 or Section 7.100 of the flight Attendant Manual covering 'personal conduct'; and/or Alaska

CIVIL LITIGATION *notes*

Airlines employees who faced discipline or termination because of their online posts or comments on Alaska's World or other social media platform." The court found this limitation reasonable, and adopted it. The court decided to rule out questioning concerning COVID vaccination status as being "invasive and potentially inflammatory," but ruled that plaintiffs "may ask questions that relate to Alaska's policies on same-sex marriage and/or the Equality Act, but only to the extent such subjects have a direct connection to Alaska's policies and Plaintiffs' claims of religious discrimination. Plaintiffs may not inquire into a witness's personal views on the Equality Act or same-sex marriage, and the inquiries shall be carefully calculated to elicit information, not to trick, harass, or inflame the witness. Questions on those subjects that are not directly related to claimed discrimination on the grounds of religion and/or the reasons for Plaintiffs' discharge will not be permitted." The court also cautioned the plaintiffs about wasting their allocated discovery time by asking "loaded and tangential questions that are unlikely to elicit relevant evidence." We are not surprised that plaintiffs are represented by attorneys affiliated with First Liberty Institute, which as its name implies considers religious rights as the "first liberty" protected by the Bill of Rights and thus of primary and overriding importance. Judge Rothstein was appointed by President Jimmy Carter.

WASHINGTON – Screening a *pro se* complaint citing an array of MAGA-style grievances against President Biden, Vice-President Harris, the Democratic National Committee and the governor of Oregon, U.S. District Judge Ricardo S. Martinez found that it should be dismissed, but pursuant to 9th Circuit practice concerning pro se civil complaints, with leave to amend. The plaintiff, Susan Marco-Chavel, sues under 42 USC Section 1983, asserting claims of gender harassment, "political party ideology," "support of due process," and "Black Lives Matter." She also brings a Bivens claim for "free speech," right to vote, right to religion, "right to live peaceful." She alleges that the defendants are liable by acting under color of state law when they promoted "trans culture," "LGBTQ+" and the Black Lives Matter Movement. "Rife with homophobic slurs," wrote Judge Martinez, "Plaintiff's complaint fails to assert any cognizable claims, fails to connect Defendants to any specific actionable conduct, and is the seventh case Plaintiff has filed in this court within the last year." The judge instructs the plaintiff what she must include in an amended complaint if it is not to be dismissed out of hand, and instructs her to "refrain from using any slurs or curse words – this Court finds offensive language to be gratuitous and unpersuasive." *Marcos-Chavela v. Biden*, 2023 U.S. Dist. LEXIS 22466 (W.D. Wash., Feb. 9, 2023). We wonder how many complaints of this ilk are filed regularly in the district court by general aggrieved citizens who feel compelled to sue the President, et al, about their social discontents?

WISCONSIN – A group of parents of public-school students in Eau Claire formed an unincorporated group called "Parents Protecting Our Children, UA" for the purpose of challenging a policy adopted by the Eau Claire Area School District concerning transgender students. None of the parents claim that their children are transgender. They assert that the plan violates their constitutional rights on various grounds, particularly because their children might be treated as transgender without the parents being informed. They raised claims under Substantive Due Process (care, custody and control of their children), Free Exercise of religion and the Wisconsin Constitution, and the Protection of Pupil Rights Amendment, 20 U.S.C. sec. 1232h, giving parents the right to certain information and to opt their children out of specific public school activities. In *Parents Protecting Our Children, UA v. Eau Claire Area School District*, 2023 WL 2139501, 2023 U.S. Dist. LEXIS 28836 (W.D. Wis., Feb. 21, 2023), U.S. Magistrate Judge Stephen L. Crocker granted defendants' motion to dismiss, having concluded that the Parents group did not have Article III standing. The opinion provides a detailed description of the school district's policy, which is titled "Administrative Guidance for Gender Identity Support," who shows that some of the allegations made by the Parents group clearly misstates the scope and details of the policy. The court finds that plaintiffs have not suffered an injury in fact. "Plaintiff's entire standing argument is premised on a speculative chain of possibilities," wrote Crocker, "including future choices made by individuals who have not yet been identified, indeed who *cannot* yet be identified because they have *not* acted, and they might *never* act." The court cited to other district courts that had similarly dismissed challenges to school district transgender policies on the same basis, and quoted a such a case to the effect that "the mere existence of a statute [or in this case a policy] adverse to plaintiff's interests is not sufficient to show justiciability." And, wrote Crocker, "Although plaintiff argues that parents may choose to withdraw their children from school or abandon their rights to public education in order to avoid the policy, that scenario also is speculative and is not based on any realistic or impending action by district staff." The plaintiff is represented by Nicholas Barry, affiliated with America First Legal Foundation, the litigation group recently formed by alumni of the Trump Administration for the purpose of litigation on MAGA agenda issues, one of which is apparently to oppose policies that support transgender students in public schools.

litigation. U.S. District Judge Roseann A. Ketchmark denied the motion on two grounds: she found that plaintiffs failed to show a fair chance of prevailing on their claim that the policy violates 1st and 14th Amendment rights of students, and failed to show a threat of irreparable harm if the policy is not enjoined. While acknowledging that a deprivation of constitutional rights is generally considered to be an irreparable harm, the judge insisted that her conclusion that plaintiffs are unlikely to succeed on their constitutional claims means there is, in her view, no constitutional deprivation. The court premises this conclusion on a narrow interpretation of the Supreme Court's decision in *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853 (1982). The reality of the situation is that the existence of such a policy facilitates the removal of books on LGBTQ issues that are being targeted nationwide for conservative groups to remove from school libraries. Plaintiffs are represented by two lawyers from the ACLU of Missouri Foundation, Gillian R. Wilcox and Jessie Steffan. Judge Ketchmark was appointed by President Barack Obama.

NEW JERSEY – In *C.W. and K.W. v. Manasquan Board of Education*, 2023 WL 2264464, 2023 U.S. Dist. LEXIS 33501 (D. N.J., Feb. 28, 2023), U.S. District Judge Georgette Castner, a Biden appointee who took the bench during 2022, partially granted and partially denied a motion to dismiss a case brought by parents on behalf of their teenage son who was a student in the Manasquan public schools for several years until the parents decided to withdraw him due to his adverse experiences at school. Called "Billy Roe" in the opinion, the boy was diagnosed with Asperger's Syndrome as a toddler and later with attention deficit hyperactivity disorder and attention deficit disorder. The complaint alleges that he was the victim of discrimination, bullying, intimidation and harassment beginning when he attended elementary school and continuing, both because of these his various diagnosed conditions and because he was perceived by other students as gay, bringing civil rights law claims into play. Most of the factual recitation concerns incidents involving other students, but some of them involve teachers and other school employees, including failure of school authorities to take action when informed of misconduct by other students. The complaint asserts claims for common law negligence and violation of the NJ Law Against Discrimination, the New Jersey Civil Rights Act, and 42 U.S.C. 1983 (providing the basis for federal jurisdiction). Those concerned with or interested in litigation seeking to impose liability on a school district and its personnel for their conduct with respect to this kind of situation could read Judge Castner's careful opinion with profit, but there is too much detail to cover in this brief account. Many of the claims against individual named defendants were dismissed because the complaint failed to plead their involvement with specificity in particular actionable incidents, running afoul of the principle that vicarious liability can't be the basis of a constitutional claim against an individual, and the opinion points out the limits of liability under current laws, regulations, and constitutional doctrine, for these kinds of cases. However, the court refused to dismiss a negligence claim against one particular named defendant, and although dismissing a hostile educational environment claim under state law as to individual defendants, the court denied the motion as to the Board of Education and the school. The court dismissed a retaliation claim, as well as a claim for violation of Billy's First Amendment rights (the rather conservative memes he was wont to spout in class were stifled by teachers, whose identity was not clearly specified in the complaint) and a *Monell* claim. However, the court decided that plaintiff's allegations were sufficient to sustain a claim under 42 USC 1983 for state-created danger based on the conduct of school officials in response to various incidents recounted in the complaint, thus preserving federal court jurisdiction. Plaintiffs are represented by Patrick J. Whelan, Trenton, NJ.

NEW JERSEY – This one is a total puzzle. Maureen Molz, a former employee of the Federal Aviation Administration (FAA), filed suit in federal court accusing the FAA and certain supervisors of a violation of the New Jersey Law Against Discrimination (NJLAD) for discrimination based on sex, sexual orientation, and age, and a hostile environment created by two named supervisors between 2017 and 2019, when she claims she was constructively discharged (but formally retired). In *Molz v. Federal Aviation Administration*, 2023 WL 2238108, 2023 U.S. Dist. LEXIS 31855 (D.N.J., Feb. 27, 2023), Senior U.S. District Judge Noel L. Hillman granted the defendants' motion to dismiss on various grounds, including jurisdiction, statute of limitations, and failure to exhaust administrative remedies. As summarized by Judge Hillman in the decision, the factual allegations would not likely meet the pleading bar for a hostile environment claim, but the procedural flaws in her case took precedence in mandating dismissal. For one thing, a federal employee cannot sue the federal government for employment discrimination under state law. The state of New Jersey has no authority to regulate or interfere in federal government personnel actions. Mentions of federal discrimination law do pop up in the discussion, but neither federal statute is mentioned in the court's Background paragraph summarizing the case, which mentions only the NJLAD. Furthermore, there are serious timing issues regarding the

various factual assertions, which the court mentions as being largely non-specific about when they occurred. Given the passage of time, amendment would not cure these problems, so the court denied a request by plaintiff to file an amended complaint naming "proper defendants." Ms. Molz also wanted to add a tort claim and an ADEA claim but had failed to undertake the procedural prerequisites for filing such claims against a federal government agency, and, as to federal employees, sovereign immunity would bar a common law tort claim against the defendants, as federal immunity is waived only with respect to claims under federal statutes such as Title VI or ADEA (age discrimination). The court also saw no basis in the papers on file at this point to apply the doctrine of equitable tolling, saying "it would be futile due to the passage of time," explaining: "Ultimately, when a court lacks jurisdiction to hear the case it 'a fortiori lacks jurisdiction to rule on the merits.'" As a result of which, the court never analyzed the merits of Molz's claims. In addition to granting the motion to dismiss, the court granted the government's motion to seal the record of the case. From the court's description of the complaint and other papers, this sounds like a pro se case, but the opinion lists Mark J. Molz of Hainesport, N.J., as counsel for Molz. Related? Judge Hillman was appointed by President George W. Bush.

NEW YORK – On March 3, 2022, President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (EFAA) (see 9 USC secs. 401-02), which amended the Federal Arbitration Act to provide that a person alleging "conduct constituting a sexual harassment dispute" (a term defined elsewhere in the Act) may elect to litigate rather than submit the dispute to arbitration, despite any arbitration agreement to which they are a party. Answering what is likely a question of first impress under the new law in *Johnson v. Everyrealm, Inc.*, 2023 WL 2216173, 2023 U.S. Dist. LEXIS 31242 (S.D.N.Y., Feb. 24, 2023), U.S. District Judge Paul A. Engelmayer held that the election to litigate extends to the entire case, not just the sexual harassment aspect of the case. The claims asserted by Johnson in the first amended complaint include race discrimination [Section 1981], pay discrimination [NY Labor Law], sexual harassment, hostile work environment and discrimination based on gender, race and ethnicity [NY State Human Rights Law and New York City Human Rights Law], whistleblower protection [N.Y. Labor Law], and common-law intentional infliction of emotional distress. The employer moved to compel arbitration in response to Johnson's suit, relying on a broad arbitration provision in his contract of employment, and Johnson claimed that his right of election under EFAA extends to the entire case, not just the harassment claim. The employer argued that the harassment cause of action was spurious and included solely to avoid arbitrating Johnson's other claims, but after a thorough analysis, Judge Engelmayer concluded that the complaint stated facts sufficient to ground a plausible sexual harassment claim, and then proceeded to find that the text of EFAA supported Johnson's contention that so long as the claims were interrelated, they were treated as a package for this purpose and he was entitled to litigate them free of the arbitration provision. Johnson's counsel is Shane Seppinni, Seppinni LLP, New York City. Everyrealm, Inc. is represented by Lloyd Blades Chinn, Proskauer Rose LLP, New York City. Judge Engelmayer was appointed by President Barack Obama. Given the importance and the involvement of a major national law firm representing the employer, we expect this to go to the 2nd Circuit and perhaps, eventually, to the Supreme Court. * * * By contrast, in the companion case of *Yost v. Everyrealm, Inc.*, 2023 WL 2224450, 2023 U.S. Dist. LEXIS (S.D.N.Y., Feb. 24, 2023), Judge Engelmayer faced the further question whether the allegations of the complaint had to be sufficient to make the sexual harassment claim plausible in order for the EFAA election to apply. (This case, incidentally, involved a bisexual plaintiff.) The court found that when the arbitrability issue is raised, it is a matter of law for the court to evaluate whether there is a *plausible* harassment claim asserted in the complaint; failing that, EFAA would not apply, and the company could insist on directing the entire case to the arbitral forum instead of litigation. * * * We would expect that Johnson and Yost may both be appealed to the 2nd Circuit and would be treated as a package deal.

NEW YORK – In *Aponte v. Clinton Street Pizza*, 2023 WL 1795189, 2023 U.S. Dist. LEXIS 20767(S.D.N.Y., Feb. 7, 2023), plaintiffs are two employees of a pizza parlor, Nancy Aponte and Angelo Gabriel Alves Marques, who is a gay man. They sued, apparently pro se at first, alleging violations of their rights under federal and state wage/hours laws and sexual harassment/hostile work environment. Their initial complaint was defective in not including the necessary factual allegations about the business, and was dismissed with leave to file an amended complaint. They then appear to have obtained counsel – Jesse Curtis Rose, Astoria NY – and submitted an amended complaint that cured the jurisdictional problems. The defendants are the business and its three co-owners, only two of whom were served. Once counsel was in the picture, settlement negotiations were successful as to two of the named defendants, but neither the company nor the other co-owner were responsive, not even responding to plaintiffs' motion for a default judgment, which was granted in this opinion by Senior U.S. District Judge

Kimba Wood. Of particular interest to Law Notes readers will be Judge Wood's description and holding regarding the gay man's sexual harassment complaint. "Plaintiff Marques, a homosexual male, claims that Defendants violated NYCHRL [New York City Human Rights Law] by discriminating against him and 'harassing him on a daily basis' on account of his sexual orientation. Specifically, Plaintiff Marques alleges that Defendants Orlando and Taormina often 'made fun of [his] sexual orientation' and 'made sexual and homophobic comments about him in the kitchen to other staff.' When male customers were present, they would 'ask Plaintiff marques if he wanted to have sex with them or date them.' Additionally, Defendant Orlando would 'frequently tell Plaintiff Marques' male co-workers to "watch out" or "be careful" because Marques like men and he would like to have sex with [them].'' Plaintiff Marques alleges that Defendants' conduct made him 'feel extremely uncomfortable and mistreated' and 'made it impossible for [him] to complete his work tasks.' Such allegations show that Plaintiff Marques was 'treated less well than other employees' because of his sexual orientation. Hence, the Court concludes that Plaintiff Marques has successfully pled a hostile work environment claim under NYCHRL." The application for default judgment against the business and co-owner Orlando was granted, and the case referred to a magistrate judge for an inquest on damages and attorneys' fees. Judge Wood was appointed by President Ronald Reagan, and is well known to many who studied Contracts law in an American law school as the author of the famous case of *Leonard v. Pepsico*, 88 F. Supp 2d 116 (S.D.N.Y. 1996).

PENNSYLVANIA – JoAnn Edwards, a white lesbian who was not initially "out" in her job as Executive Director of the Pennsylvania Human Relations Commission (!!), was forced out, allegedly over performance issues, by a unanimous vote of the Human Relations Commission. She alleges that the vote was tainted, pointing in particular to Commissioner Gerald Robinson, a black heterosexual man who was a *former* chair of the Commission with whom she had some run-ins after Robinson learned about Edwards' sexual orientation and marriage to a woman. But Robinson was replaced with a new chair whose conduct towards Edwards did not replicate Robinson's. Edwards filed a Title VII charge with the EEOC, which "could not determine whether the Commission had violated federal law," so it closed the file and gave Edwards her right to sue letter. In the ensuing lawsuit filed in December 2018, she relied on Title VII and the Pennsylvania Human Relations Act (which does not expressly cover sexual orientation discrimination). She also alleged violation of the Family and Medical Leave Act, arising out of criticism she caught from the agency's legal counsel for granting unusually long FMLA leave to an employee. In *Edwards v. Pennsylvania Human Relations Commission*, 2023 WL 1929998, 2023 U.S. Dist. LEXIS 23417 (M.D. Pa., Feb. 10, 2021), Chief U.S. District Judge Christopher C. Conner granted summary judgment to the Commission. The Commission conceded that Edwards established a prima facie case of discrimination because of race and sex, but Judge Conner concluded that "Edwards has not demonstrated improper motives drove a majority of votes, provided the decisive margin, or tainted a significant bloc of commissioners." That Robinson may have been biased against her would be significant if the vote was close, but Robinson was the only commissioner against whom Edwards was able to produce evidence of discriminatory intent. The court found that "the record is replete with evidence that the primary motivations of the commissioners' decision was Edwards' inappropriate delegation of personnel matter to her subordinate and her contributions to a toxic work environment." The court reached a similar conclusion regarding Edwards' FMLA claim, which the court found to be based on an isolated incident that occurred more than two years prior to her forced resignation. As to her hostile environment claim, the court found that it relied on incidents that occurred when Robinson had been chair of the Commission, but he had been replaced as chair several years earlier, and no relevant incident occurred within 300 days before she filed her discrimination charge, so this claim was effectively time-barred under Title VII. Edwards is represented by Patrick G. Murphy, of Murphy & Associates, Blue Bell, PA. Judge Conner was appointed by President George W. Bush.

UTAH – Given the sway that the Mormon church (Church of Jesus Christ of Latter-day Saints, with LDS the usual acronym) holds over the state government in Utah, perhaps a *pro se* litigant could plausibly believe that programs provided under the auspices of the church are "state actors" that could be sued in federal court for violation of constitutional rights. Well, not so, ruled U.S. Magistrate Judge Dustin B. Pead (D. Utah) in *Brundage v. Vandam*, 2023 WL 2221087, 2023 U.S. Dist. LEXIS 31546 (Feb. 24, 2023). Brundage, an LDS member, had been "working with his bishop for homosexual behavior," according to the court's opinion. Brundage's bishop referred him to the Ogden LDS Family Services organization to attend a "Men's Pornography Treatment Workshop" to deal with his "addiction" to pornography. He reported for an "assessment" to determine whether he could participate in the workshop. He told the therapist, Michael Lee Vandam, that he had been referred for "out of control pornography use." But when he "reported" that he had been working with his bishop

"for homosexual behavior," Vandam informed him that he would not be the "right fit for the group" because he would be "the only person there who had done something like that." He was removed from the group, and subsequently received a bill for the assessment. "These circumstances created mental distress for Plaintiff wherein he 'cried for 7 hours the day this happened' and it has been hard since this time," wrote Judge Pead, summarizing the allegations of the complaint. Brundage was seeking $3 million in compensatory damages and $3 million in punitive damages. What cloud is he living on?? Anyway, Judge Pead granted Vandam's motion for dismissal for failure to state a claim, finding that a 42 USC 1983 claim requires that the defendant be a "state actor" and neither the LDS Family Services nor Vandam are "state actors." Brundage had argued that since the program was licensed by the state as a service provider, it should be considered a "state actor," but that argument got him nowhere, as the court had decisions to cite in cases where LDS entities had won dismissals of constitutional claims on this basis and, in general, courts have ruled that state licensure of a private facility does not turn it into a public facility. There is no applicable federal civil rights law that would apply to this situation, so no jurisdiction for the court to entertain Brundage's claim. Maybe LDF Family Services needs to set up a separate workshop for Mormon men who are addicted to gay porn.

VIRGINIA – Senior U.S. District Judge Anthony J. Trenga granted a motion for summary judgment in *Romano v. Verisign, Inc.*, 2023 WL 1797890, 2023 U.S. Dist. LEXIS 20870 (E.D. Va., Feb. 7, 2023), in which Michelle Romano, who was laid off in a "structural reorganization" by the employer announced in 2020 and implemented in 2021, alleged violations of Title VII and the Virginia Values Act (the state's anti-discrimination law, which prohibits sexual orientation discrimination in employment). The court found that there was no evidence in the summary judgment record showing a nexus between the 2021 termination and any discrimination or retaliation against the plaintiff. The court noted that the relevant management decision-maker was not shown to have any relevant knowledge about Romano's sexual orientation when making the layoff decision, and rejected Romano's claim that a different management official in the Human Resources Department, whom she claimed made or influenced the decision, did know about Romano's sexual orientation. In other words, Romano was unable to make any factual allegations that would be probative of actions taken based on gender or sexual orientation. She alleged earlier incidents as a basis for her claim that the layoff was retaliatory, but the court was unpersuaded due to their timing. The court also found no evidence from which a fact-finding could conclude that the company's non-discriminatory justifications for its actions were pretextual. The court also found a lack of factual support for Romano's hostile environment claim, noting that almost all of her factual allegations related to discrete incidents that occurred too early to be counted in this case due to the statute of limitations on filing discrimination claims, invoking the "high bar" set by the Supreme Court in its hostile environment decisions. Romano is represented by Carlos Denette Brown, of Charlson Bredehoft Cohen Brown & Nadelhall, PC, Reston VA. Judge Trenga was appointed by President George W. Bush.

WASHINGTON – Alaska Airlines has issued statements supporting the Equality Act, pending federal legislation that would explicitly ban discrimination because of sexual orientation, gender identity or gender expression. This public stance bothered two of its employees, Marli Brown and Lacey Smith, who posted comments of opposition to the Equality Act on the company-wide intranet site called "Alaska's World," which would be accessible to all of the company's employees. Each of the two women posted independently of the other, each citing their religious beliefs as the basis for their comments. The court quotes Brown's post, which accuses the company of supporting "endangering the Church, encouraging suppression of religious freedom, obliterating women rights and parental rights, and forcing Americans to agree with controversial government-imposed ideology, and goes on in similar vein . . . . The company, which evidently was unhappy about being thus accused in a medium open to all its employees, suspended Brown and Smith to investigate and then discharged them, claiming a violation of the company's anti-discrimination policies. The case is now pending in the Western District of Washington before Senior U.S. District Judge Barbara Jacobs Rothstein. In *Brown v. Alaska Airlines, Inc.*, 2023 WL 2242000, 2023 U.S. Dist. LEXIS 32100 (Feb. 27, 2023), Judge Rothstein dealt with motions by Alaska Airlines to reign in the questioning of its employees during discovery, Plaintiffs wanted to ask questions such as "Have you ever known anybody terminated for attendance reasons" and "Do you know the names of anybody who was terminated due to drug or alcohol tests?" Alaska airlines proposed narrowing these to questions directly related to the issues in the case, focused on "comparator" disciplinary actions to those brought against the plaintiffs, which Alaska describes as "employees who faced discipline or termination for allegedly violating the company's policies covering harassment and/or discrimination, or violations of Section 6.3000 or Section 7.100 of the flight Attendant Manual covering 'personal conduct'; and/or Alaska

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Airlines employees who faced discipline or termination because of their online posts or comments on Alaska's World or other social media platform." The court found this limitation reasonable, and adopted it. The court decided to rule out questioning concerning COVID vaccination status as being "invasive and potentially inflammatory," but ruled that plaintiffs "may ask questions that relate to Alaska's policies on same-sex marriage and/or the Equality Act, but only to the extent such subjects have a direct connection to Alaska's policies and Plaintiffs' claims of religious discrimination. Plaintiffs may not inquire into a witness's personal views on the Equality Act or same-sex marriage, and the inquiries shall be carefully calculated to elicit information, not to trick, harass, or inflame the witness. Questions on those subjects that are not directly related to claimed discrimination on the grounds of religion and/or the reasons for Plaintiffs' discharge will not be permitted." The court also cautioned the plaintiffs about wasting their allocated discovery time by asking "loaded and tangential questions that are unlikely to elicit relevant evidence." We are not surprised that plaintiffs are represented by attorneys affiliated with First Liberty Institute, which as its name implies considers religious rights as the "first liberty" protected by the Bill of Rights and thus of primary and overriding importance. Judge Rothstein was appointed by President Jimmy Carter.

WASHINGTON – Screening a *pro se* complaint citing an array of MAGA-style grievances against President Biden, Vice-President Harris, the Democratic National Committee and the governor of Oregon, U.S. District Judge Ricardo S. Martinez found that it should be dismissed, but pursuant to 9th Circuit practice concerning pro se civil complaints, with leave to amend. The plaintiff, Susan Marco-Chavel, sues under 42 USC Section 1983, asserting claims of gender harassment, "political party ideology," "support of due process," and "Black Lives Matter." She also brings a Bivens claim for "free speech," right to vote, right to religion, "right to live peaceful." She alleges that the defendants are liable by acting under color of state law when they promoted "trans culture," "LGBTQ+" and the Black Lives Matter Movement. "Rife with homophobic slurs," wrote Judge Martinez, "Plaintiff's complaint fails to assert any cognizable claims, fails to connect Defendants to any specific actionable conduct, and is the seventh case Plaintiff has filed in this court within the last year." The judge instructs the plaintiff what she must include in an amended complaint if it is not to be dismissed out of hand, and instructs her to "refrain from using any slurs or curse words – this Court finds offensive language to be gratuitous and unpersuasive." *Marcos-Chavela v. Biden*, 2023 U.S. Dist. LEXIS 22466 (W.D. Wash., Feb. 9, 2023). We wonder how many complaints of this ilk are filed regularly in the district court by general aggrieved citizens who feel compelled to sue the President, et al, about their social discontents?

WISCONSIN – A group of parents of public-school students in Eau Claire formed an unincorporated group called "Parents Protecting Our Children, UA" for the purpose of challenging a policy adopted by the Eau Claire Area School District concerning transgender students. None of the parents claim that their children are transgender. They assert that the plan violates their constitutional rights on various grounds, particularly because their children might be treated as transgender without the parents being informed. They raised claims under Substantive Due Process (care, custody and control of their children), Free Exercise of religion and the Wisconsin Constitution, and the Protection of Pupil Rights Amendment, 20 U.S.C. sec. 1232h, giving parents the right to certain information and to opt their children out of specific public school activities. In *Parents Protecting Our Children, UA v. Eau Claire Area School District*, 2023 WL 2139501, 2023 U.S. Dist. LEXIS 28836 (W.D. Wis., Feb. 21, 2023), U.S. Magistrate Judge Stephen L. Crocker granted defendants' motion to dismiss, having concluded that the Parents group did not have Article III standing. The opinion provides a detailed description of the school district's policy, which is titled "Administrative Guidance for Gender Identity Support," who shows that some of the allegations made by the Parents group clearly misstates the scope and details of the policy. The court finds that plaintiffs have not suffered an injury in fact. "Plaintiff's entire standing argument is premised on a speculative chain of possibilities," wrote Crocker, "including future choices made by individuals who have not yet been identified, indeed who *cannot* yet be identified because they have *not* acted, and they might *never* act." The court cited to other district courts that had similarly dismissed challenges to school district transgender policies on the same basis, and quoted a such a case to the effect that "the mere existence of a statute [or in this case a policy] adverse to plaintiff's interests is not sufficient to show justiciability." And, wrote Crocker, "Although plaintiff argues that parents may choose to withdraw their children from school or abandon their rights to public education in order to avoid the policy, that scenario also is speculative and is not based on any realistic or impending action by district staff." The plaintiff is represented by Nicholas Barry, affiliated with America First Legal Foundation, the litigation group recently formed by alumni of the Trump Administration for the purpose of litigation on MAGA agenda issues, one of which is apparently to oppose policies that support transgender students in public schools.