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10th Circuit to Consider Oklahoma Case Denying Sex-Designation Changes on Birth Certificates

Arthur S. Leonard

whether the courts of appeals will agree with the trial judges. Judge Zipp's opinion gives a detailed rationale for its conclusions and can be an important source of analysis and arguments as attorneys for transgender girls bring challenges in other states. How the case will fare in the 9th Circuit, at least initially, may well depend on the composition of the three-judge panel that first gets the case. In light of the number of such laws enacted and now being challenged in the courts, it seems likely that this issue will eventually rise to the Supreme Court.

Judge Zipp was appointed by President Barack Obama. ■



10th Circuit to Consider Oklahoma Case Denying Sex-Designation Changes on Birth Certificates

By Arthur S. Leonard

On June 8, U.S. District Judge John W. Broomes issued a decision dismissing a constitutional challenge to the refusal of Oklahoma to issue new birth certificates to transgender people with sex designations consistent with their gender identity. *Fowler v. Stitt*, 2023 WL 4010694, 2023 U.S. Dist. LEXIS 105481 (N.D. Okla.). On July 7, plaintiffs filed an appeal in the 10th Circuit Court of Appeals. Somehow, the district court decision eluded us in time for inclusion in the July issue of *Law Notes*.

The developments around this issue in Oklahoma are complicated. Before April 2022, an Oklahoma statute, 63 O.S. Sec. 1-321, authorized the state's Health Department to amend a birth certificate in the following situations: (1) to reflect a person's new legal name change; (2) to show paternity, if paternity was not shown on the original birth certificate; (3) to change the surname of a child born out of wedlock; (4) "in accordance with regulations adopted by the State Commissioner of Health." The regulations then in effect allowed for changes as follows: (1) "Name added to certificate if item blank"; (2) erroneous entries"; (3) to "correct an error or misstatement of fact as to any non-medical information." All other amendments were expressly prohibited. However, from 2007 until late in 2021, Oklahoma state courts and the Health Department had allowed more than 100 transgender people to get amended birth certificates showing a sex identification matching their gender identity, perhaps under the view that once a person had transitioned, the entry on their original birth certificate was "erroneous."

The origin of this lawsuit involved three transgender people who got state court orders to have their birth certificates amended incident to legal name changes, but a lawsuit involving a non-binary person seeking an X

gender marker, which had been settled by the Health Department to issue the requested birth certificate, had achieved sufficiently notoriety in local media that Governor Kevin Stitt got involved, issuing an executive order, noting that there was no statutory authorization in Oklahoma to change the sex designation on a birth certificate or use an X gender marker, and ordering that the Health Department stop its prior practices in this regard. When the three plaintiffs in this case presented their court orders to the Health Department, their request to change the sex designation on their birth certificates was denied, leading to this lawsuit.

The case was originally assigned to a different district judge, who denied the motion by one plaintiff to proceed anonymously. Then the case was reassigned to Judge Broomes, and the state filed a motion to dismiss. The lawsuit asserted that the current policy of the state violates the First Amendment Free Speech Clause and the Fourteenth Amendment Due Process and Equal Protection Clauses.

Judge Broomes ruled against the plaintiffs on all their theories. He found that the state's refusal to amend sex designations on birth certificates did not in any way impair the ability of transgender people to express their gender identity, and that it did not compel them to speak any message. Plaintiffs contended that by refusing to make the sex designation change, the state was compelling them to express or endorse the government's ideological position as to gender identity, but the court disagreed, embracing the state's argument that the contents of the birth certificate constituted speech by the state, not by the individual, and the state speech is not subject to the First Amendment. Furthermore, the court observed that the state continues to allow transgender people to get

driver's licenses matching their gender identity, which can serve as a means of identification responding to many of the examples the plaintiffs gave of difficulties they could encounter because their birth certificate does not match their gender identity.

Turning to the Due Process argument, the court leaned heavily on the recent developments concerning unenumerated rights under the doctrine of substantive due process, specifically focusing on *Glucksberg* and *Dobbs*. The bottom line here, taking the historical approach that the Supreme Court has now embraced under which constitutional provisions have static meanings dating from the time of their enactment, Judge Broomes found that there is no historical precedent for recognizing a right for individuals to compel the government to change the sex designation on their birth certificate. The birth certificate is government speech, and individuals cannot compel the government to speak. Judge Broomes produced a rather lengthy discussion of the history of substantive due process, quoting at length from Alexander Hamilton's contribution to *The Federalist Papers* and Justice Story's constitutional law treatise, both of which disclaimed any power by the federal courts to find "new rights" in the Constitution, and leaning heavily on the approach endorsed by Justice Samuel Alito in *Dobbs*, and frequently expounded by Justice Clarence Thomas in dissenting opinions. As to substantive due process, if a specific right was not recognized and well established as of 1868, when the 14th Amendment was ratified by the states, then it is not covered as part of substantive due process at all, and claimed rights must have been established at a rather specific level. That is, a generalized right of liberty or privacy is not sufficient to decide this case; the proper question, under the *Dobbs* framework, is to ask whether transgender people in 1868 could as a matter of course get new birth certificates matching their gender identity, just as the Court asked in *Dobbs* whether an individual claimed right to have an abortion would have been well recognized and established as of 1868.

As to Equal Protection, Judge Broomes noted that neither the Supreme Court nor the 10th Circuit has recognized transgender status as a "protected class" for purposes of equal protection, both courts having shied away from doing so even when addressing the issue might be consistent with deciding a particular case. He noted that the Supreme Court last recognized a "new" suspect classification in 1977. Thus, as a district judge, he held that he was bound by existing 10th Circuit precedent, *Brown v. Zavaras*, 63 F. 3d 967 (10th Cir. 1995), to apply the rationality test, and he concluded that it was rational for Oklahoma to view the birth certificate as a record of a particular event and to consider the sex designation on the birth certificate as final and immutable unless it was shown that a mistake had been made at the time the document was created. (This approach to equal protection has not been followed by many courts that have considered the question of equal protection rights of transgender people. For example, several other circuits have taken a view similar to the Supreme Court's Title VII approach in *Bostock* and treated gender identity discrimination claims as a category of sex discrimination claims getting heightened scrutiny.)

Having reached the conclusion that none of the plaintiff's constitutional claims were valid, the judge granted the state's motion to dismiss.

Plaintiffs are represented by Lambda Legal with local Oklahoma counsel. Judge Broomes was appointed by President Donald J. Trump. ■



Transgender Title VII Discrimination Case Survives Motion to Dismiss in Pennsylvania U.S. District Court

By Jason Miranda

On July 17, U.S. District Judge John M. Gallagher issued an opinion denying in part and granting in part the defendant's motion to dismiss an employment discrimination case brought by an African-American transgender woman. The case, *T.D.H. v. Kazi Foods of New Jersey, Inc.*, 2023 WL 4567722, 2023 U.S. Dist. LEXIS 122195 (E.D. Pa.), deals with a former employee of a Kentucky Fried Chicken franchise where, as a transgender woman, she was allegedly subjected to multiple instances of discrimination, sexual harassment, and battery. She alleges violations of Title VII of the Civil Rights Act of 1964 and related state laws.

The plaintiff, referred to in the opinion as Ms. Henderson, brings a whopping total of nine counts against her former employer, Kazi Foods, as well as individual employees Nereida "Gigi" Garcia, Wanda Rivera, and Yomi Santana. Ms. Henderson's first seven counts are addressed against all defendants and include unlawful discrimination, disparate treatment, harassment quid pro quo, hostile work environment, and unlawful retaliation under Title VII, as well as violation of 42 U.S.C. § 1981 and intentional infliction of emotional distress. Counts VIII and IX are for assault and battery, both against Defendant Garcia in her individual capacity. The court, cautious to dismiss the complaints at this early stage, opts instead to dismiss the Title VII claims against the individual employees as well as the 42 U.S.C. § 1981 claim against all defendants.

Ms. Henderson first interviewed with Rivera, a general manager for a local Kentucky Fried Chicken (KFC) restaurant owned and operated by

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