

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Court Minutes

DATE: September 6, 2016
JUDGE: Pamela Pepper
CASE NO: 2016-cv-943
CASE NAME: Ashton Whitaker v. Kenosha United School District No. 1 Board of Education, *et al.*
NATURE OF HEARING: Oral arguments on the motion to dismiss and motion for preliminary injunction
APPEARANCES: Joseph J. Wardenski, Ilona Turner, Robert Theine Pledl - Attorneys for the plaintiff
Ronald S. Stadler, Jonathan E. Sacks - Attorneys for defendants
COURTROOM DEPUTY: Becky Ray
TIME: 3:33:50 – 5:20:41
ADJOURNED DATE: Oral decision on motion to dismiss—September 19, 2016 at 3:30 p.m. by telephone

The court told the parties that it thought it best to start with the arguments on the motion to dismiss (Dkt. No. 14), given that the resolution of that motion might determine the need for further proceedings on the motion for preliminary injunction. The court then allowed the parties to argue the motion to dismiss, starting with the defendants.

Counsel for the defendant told the court that the plaintiffs' argument revolved around the claim that one has a right to declare one's own gender, and then to demand Title IX protection based on that declaration. He argued that there was no precedent to support this claim, and said it was clear that transgender individuals are not protected under Title IX. Counsel began with the language of Title IX, which stated that educational institutions could not discriminate based on "sex," and that it made no mention of gender identity. While acknowledging the Fourth Circuit's Title VII decision to the contrary in *G.G. v. Gloucester City School Board*, counsel argued that the Northern District of Texas had cast doubt whether *G.G.* would be able to stand. He also argued that *Carcaño v. McCrory*, which the plaintiffs cited in their moving papers, did not have persuasive authority.

Counsel argued that Title VII and IX both prohibit discrimination based on sex, and that "sex" equals the biological gender reflected on one's birth certificate. and states you cannot treat men differently than women because sex equals gender. Counsel discussed in detail cases such as *Hively v. Ivy Tech Community College*, in which courts (in that case, the Seventh Circuit) had found that sexual orientation was not encompassed by the word "sex," or protected under Title VII. Counsel argued that if the meaning of the word "sex" was to be expanded to include gender identity, then it was up to Congress to

make that expansion. Counsel also argued that Title IX and its regulations allow schools to segregate bathrooms, locker rooms, and living facilities by gender; a ruling including under its protection transgender persons would be contrary to that authority.

Counsel also addressed the Department of Education’s “dear colleague” letter. He argued that it was just that—a letter—and constituted neither a regulation or a law. As such, he argued that it was entitled to neither *Chevron* deference nor *Auer* deference. He told the court that there was no ambiguity in the statute, and so no need for administrative deference, and reiterated that the “dear colleague” letter contradicted statutory and regulatory authority to segregate based on sex.

Counsel conceded that individuals who identify as transgender have had success arguing sex stereotyping in the context of Title VII, but told the court that the plaintiffs had not alleged sex stereotyping. The sole issue under Title IX, he argued, was whether its protection against discrimination based on “sex” included a prohibition on discrimination against transgender individuals.

With regard to the equal protection claim, counsel told the court that the Supreme Court has never held that transgender is entitled to higher scrutiny. He argued that the standard of review applicable under the circumstances of this case was rational basis, and that *Johnston v. University of Pittsburgh of the Commonwealth System of Higher Education* outlined the rational reasons behind policies and rules segregating men and women when it comes to bathrooms, locker rooms and living facilities.

Counsel for the plaintiffs began by sharing some personal information about plaintiff Ash Whitaker. Counsel explained that while Ash’s assigned sex at birth was female, and while he was, for a time, raised as a female, he is a boy. According to his pediatrician, counsel said, Ash is a transgender boy who should be treated as such in all aspects of his life.

Counsel argued that under Title IX, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity by a federal funding recipient. He told the court that the defendant was a federal funding recipient.

While the defendants had argued that Title IX’s reference to “sex” refers to males versus females, counsel argued that case law had broadened the definition to encompass gender identity. The plaintiffs referred the court to several gender stereotyping cases, and to Justice Scalia’s opinion in *Oncale v. Sundowner Offshore Services, Inc.* Justice Scalia, counsel argued, had noted that Congressional intent must be disregarded in favor of the broad sweep of the statutory text to include all forms of sex and gender based discrimination.

Counsel told the court that the plaintiffs were not asking the court to create a third sex (transgender); they were asking the court to find that Ash should be treated as what he is--a boy.

Counsel went into detail about how Ash had been treated by the defendants—he had been denied access to the boys’ restroom at school, and told either to use a single occupancy restrooms to which only he has a key or to use the girls’ restroom. Counsel stated that some staff members refuse to identify Ash by that name, and call him by his birth name. Counsel stated that the burden has been placed on Ash to inform substitute teachers to call him by Ash instead of his birth name. He also argued that the defendant had refused to follow Ash’s pediatrician’s recommendation that, because Ash is a boy who suffers from gender dysphoria, proper treatment would be to allow him to use the boys’ restroom.

Counsel told the court that five circuit courts have held that transgender people are protected by the nation’s sex discrimination laws, including Title VII and Title IX. Counsel stated that these courts have held that a transgender person is protected if he or she is discriminated against due to gender identity or a perceived failure to fit sex stereotypes. Turning to the Seventh Circuit’s decision in *Ulane v. Eastern Airlines, Inc.*, upon which the defendants rely, counsel asserted that the defendants were relying on a thirty-two-year-old case that did not define transgender in the same manner we do today, and did not reflect the current knowledge regarding transgender individuals. He argued that gender dysphoria does not mean that being transgender is a disorder, but that being transgender can result in issues such as anxiety, depression, etc. Counsel argued that at that time (the 1980s), the Seventh Circuit had a fundamental misunderstanding of what a transgender person was, in comparison to the contemporary understanding of who transgender people are. Counsel argued that such views had changed in the last thirty-five years or so, asserting that the Fair Housing Act, the Affordable Care Act, and other statutes, as well as agencies of the federal government, have started to consider gender identity discrimination as a form of sex discrimination based on the premise that gender identity is a fundamental part of one’s sex.

Counsel stated that the text of Title IX revolves around whether a student has been treated differently based on sex and has suffered educational and/or other consequences. He argued that the answer to both of those questions in Ash’s case was yes. There are ample examples in the complaint to survive a motion to dismiss.

With regard to the equal protection claim, counsel argued that the appropriate standard of review was heightened scrutiny. He told the court that the Eighth Circuit had found that a transgender woman’s presence in a

women's restroom did not violate another woman's privacy interests; the second woman's privacy interests did not trump a transgender individual's rights. Counsel argued that, rather than protecting the privacy rights of others, requiring a transgender man to use a women's restroom could raise privacy concerns for the women using that bathroom. Counsel argued that the defendants had yet to explain how excluding a transgender boy from the boys' restroom effected any other students' privacy interests, and told the court that Ash's presence in a boys' restroom was not a *de facto* privacy violation.

Counsel concluded with the fact that the Seventh Circuit never has revisited the question of whether gender identity discrimination or discrimination against a transgender person is actionable under any sex discrimination statute.

Counsel for the defendants reminded the court that this case involves a Title IX claim, not a claim under Title VII. He argued that in a school with 700+ students, having someone who was a biological girl use the boys' restrooms raised a host of privacy issues. With regard to the plaintiffs' criticisms of the *Ulane v. Eastern Airlines, Inc.* decision, counsel argued that the age of case didn't change the fact that it was still good law, and had not been overturned.

The court asked several questions. It noted that the defendants had argued that sex or biological gender was what was reflected on the birth certificate, while the plaintiffs had argued that gender consisted of more than chromosomes/genitalia. The court asked the defendants whether they could point to any case that defined "sex" as the gender reflected on one's birth certificate. Counsel for the defendants responded that he had not found such a case. He did point out one case in which an individual who had undergone a sex change operation had officially changed the person's birth certificate. The court also asked whether counsel believed that *Ulane* would be decided the same way today. Counsel for the defendants stated that it would be, because the language of the statute which *Ulane* interpreted has not changed.

The court enquired, in the context of deference, whether the word "sex" was ambiguous if Congress did not define it in the statute, given some of the recent case law the parties had been discussing. Counsel for the defendants responded that when Congress passed Title IX, the word "sex" was not ambiguous—it was understood to mean the biological gender one possessed at birth. The court followed up by asking how counsel squared that legislative intent argument with Justice Scalia's opinion in *Oncale v. Sundowner Offshore Services, Inc.* that legislative intent should be disregarded if the entire text of the statute warranted a broader reading. Counsel for the defendants argued that *Oncale* involved a claim of a male sexually harassing another male—a

claim that was based on “sex” as he had defined it today, and as he believed Congress had understood it at the time it passed Title VII.

The court asked counsel for the plaintiffs whether he could cite to any cases in which the word “sex” had been defined more broadly than one’s biological gender at birth—in other words, that defined “sex” as something other than chromosomes or the genitalia with which a person is born. Counsel stated that he believed that the Seventh Circuit’s 1997 case, *Doe v. City of Belleville* did so, but asked to be allowed to confirm that.

In response to the court’s question regarding congressional intent, counsel for the plaintiffs argued that Congress’ failure to change its law is not necessarily indicative of its intent. He told the court that members of Congress had filed *amicus* briefs in several of the cases he’d cited, and that there was legislation pending which pointed to a general congressional intent to broaden the definition of sex.

The court noted that Title IX and its regulations gave schools discretion to create segregated restrooms, and asked whether the relief the plaintiffs requests would not gut that discretion. Counsel for the plaintiffs responded that such relief would not prohibit schools from having segregated bathrooms; it simply allow all boys to use the boys’ bathroom, and all girls to use the girls’ bathrooms. The court asked, referring to *Joe v. Clark County*, how the inability to use the restroom of one’s choice thwarted a student’s educational opportunities. Counsel responded that in this case, it reduced Ash’s class time, partly because the individual restroom is further than boys’ and girls’ restrooms, and partly because the defendants take him out of class to discuss his bathroom usage with him. He also argued that the attention and stigma to which Ash is subject as a result of the defendants’ actions impact his school work and focus. He also stated that the *Joe* case was distinguishable, because in that case, the student had yet to enroll in the school.

Counsel for the plaintiffs commented that the issue of locker rooms was not involved in this case. Counsel for the defendants responded that it was relevant, because Ash planned to play tennis in the 2016-17 school year. Counsel for the plaintiffs told the court that Ash does not want to use the boys’ lockers rooms and does not intend to use them. Counsel for the defendants responded that the plaintiffs could not pick and choose; a ruling regarding bathroom use would necessarily have implications for locker room use, shared housing on trips away from school, and other issues.

Given the lateness of the hour, the court proposed that it find a time at a later date to give the parties an oral decision on the motion to dismiss, so the parties would know whether they needed to prepare to argue the motion for a preliminary injunction. The court scheduled its oral decision on the motion to

dismiss for **September 19, 2016 at 3:30 PM**. Any party wishing to appear by phone may do so by calling the court's conference line at 888-557-8511 and use access code 4893665#.

Counsel for the plaintiffs asked whether the court would consider hearing argument on a request for a temporary restraining order until the September 19 date. Counsel for the defendants opposed that request. The court indicated that, while it in no way meant to trivialize the stress Ash was experiencing, given the fact that the oral decision on the motion to dismiss was forthcoming shortly, it would wait until September 19th to discuss issues regarding the injunction. The court denied the plaintiffs' request to hear argument on a motion for a temporary injunction.