UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Court Minutes

DATE:	September 19, 2016
JUDGE:	Pamela Pepper
CASE NO:	2016-cv-943
CASE NAME:	Ashton Whitaker v. Kenosha Unified School District No. 1 Board of Education, *et al.*
NATURE OF HEARING:	Oral decision on motion to dismiss
APPEARANCES:	Joseph J. Wardenski – Attorney for the plaintiff Ilona Turner – Attorney for the plaintiff Alison Pennington – Attorney for the plaintiff Michael Allen – Attorney for the plaintiff Robert Pledl - Attorney for the plaintiff Ronald S. Stadler – Attorney for the defendants Jonathan E. Sacks - Attorney for defendants
COURTROOM DEPUTY:	Kristine Wrobel
TIME:	3:34 p.m. – 4:38 p.m.

The court began by reviewing the standard for determining whether to grant a motion to dismiss under Fed. R. Civ. P. 12(b)(6). A motion to dismiss challenges the sufficiency of the complaint, not its merits. Fed. R. Civ. P. 12(b)(6); Gibson v. City of Chicago, 910 F.2d 1510, 1520 (7th Cir. 1990). When evaluating a motion to dismiss under Rule 12(b)(6), the court accepts as true all well-pleaded facts in the complaint and draws all reasonable inferences from those facts in the plaintiff's favor. AnchorBank, FSB v. Hofer, 649 F.3d 610, 614 (7th Cir. 2011). To survive a Rule 12(b)(6) motion, the complaint must provide the defendant with fair notice of the basis for the claim and also must be facially plausible. Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937 (2009); see also Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678.

The court then moved on to analyze the plaintiff's claim under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681. This statute provides that "[n]o person in the United States 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 receiving Federal financial assistance . . . ." 20 U.S.C. §1681.

The court noted that Count One alleged that defendant Kenosha Unified School District ("KUSD") is a federal funding recipient, and thus is covered by Title IX. Dkt. No. 1 at 30. Count One of the complaint alleged that KUSD discriminated against the plaintiff by treating him differently from other students "based on his gender identity, the fact that he is transgender, and his non-conformity to male stereotypes." Id.

The court noted that during oral argument on the motion to dismiss, the parties had each discussed what the word "sex" meant in the context of Title IX. No court in this circuit has decided that question. The court recalled that KUSD had argued that "sex" referred to the gender on one's birth certification, while the plaintiff had argued that "sex" was more than biological, birth gender. The court told the parties that it had looked in three different dictionary definitions of the word "sex." The *Merriam-Webster Dictionary* defined "sex" as "the state of being male or female." It defined the word "male" as being "a man or a boy: a male person." *Webster's New World College Dictionary ("Your Dictionary")* defined "sex" as "either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions." It provided a secondary definition: "the character of being male or female; all the attributes by which males and females are distinguished." That dictionary defined the word "male" as being "someone of the sex that produces sperm, or is something that relates to this sex . . . ." The secondary definition added, "as opposed to a female who produces an egg." The on-line dictionary *Dictionary.com* defined "sex" as "either the male or female division of a species, especially as differentiated with reference to the reproductive functions." It defined the word "male" as "a person bearing an X and Y chromosome pair in the cell nuclei and normally having a penis, scrotum, and testicles, and developing hair on the face at adolescence; a boy or man."

In noting the variations among these definitions, the court looked at the Fourth Circuit's decision in G.G. v. Gloucester County School Board, 822 F.3d 709 (4th Cir. April 19, 2016). The court stated that it was not relying on the G.G. decision; the Supreme Court has stayed the issuance of the preliminary injunction the district court issued as a result of that decision. But the court pointed out that that court, like this one, had found varying definitions of the word "sex":

> Two dictionaries from the drafting era inform our analysis of how the term "sex" was understood at that time. The first defines "sex" as "the character of being either male or female" or "the sum of those anatomical and physiological differences with reference to which the male and female are distinguished . . . ." *American College Dictionary* 1109 (1970). The second defines "sex" as "the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change, that in its typical dichotomous occurrence is usu[ally] genetically controlled and associated with special sex chromosomes, and that is typically manifested as maleness and femaleness . . . ." *Webster's Third New International Dictionary* 281 (1971).

Id. at 721.

Given this array of differing definitions of the word sex, the court agreed with the G.G. court's reasoning that

> the definitions . . . suggest that a hard-and-fast binary division on the basis of reproductive organs—although useful in most cases—was not universally descriptive. The dictionaries, therefore, used qualifiers such as reference to the "*sum* of" various factors, "*typical* dichotomous occurrence," and "*typically* manifested as maleness and femaleness."

Id. None of these definitions are helpful when some of those various factors—genes, or chromosomes, or character, or attributes—point toward male identity, and others toward female. And, the court noted, none of those definitions describe "sex" as the gender on a person's birth certificate.

The court opined that some of the Seventh Circuit's decisions have acknowledged the difficulties of trying to cram the analysis of the word "sex" in the Title VII context into the binary construct. For example, in Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997), Judges Ripple, Manion and Rover (Rovner writing) struggled with the question of why, in a case where a plaintiff claimed to have been harassed under circumstances involving sexual overtones (as in the act of sex), it should matter whether the victim was harassed because of his or her sex. (That decision was vacated and remanded; the final disposition is sealed. City of Belleville v. Doe, 523 U.S. 1001 (1998).) In Hively v. Ivy Tech Community College, South Bend, Case No. 15-1720, 2016 WL 4039703 at *15 (7th Cir., July 28, 2016), the court stated in the context of discrimination under Title VII based on sexual orientation that it "does not condone" "a legal structure in which employees can be fired, harassed, demeaned, singled out for undesirable tasks, paid lower wages, demoted, passed over for promotions, and otherwise discriminated against solely based on who they date, love, or marry."

Some cases have discussed the absurd results of trying to cabin people into categories based on gender at birth. In Schroer v. Billington, 577 F.Supp.2d 293, 306-307 (D. D.C. 2008), the court reasoned that a "plain-language" reading of the word "sex" in the Title VII context would, under certain circumstances, mandate a strange result:

> Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only "converts." That would be a clear case of discrimination "because of religion." No court would take

> seriously the notion that "converts" are not covered by the statute. Discrimination "because of religion" easily encompasses discrimination because of a *change* of religion. But in cases where the plaintiff has changed her sex, and faces discrimination because of the decision to stop presenting as a man and to start appearing as a woman, courts have traditionally carved such persons out of the statute by concluding that "transsexuality" is unprotected by Title VII. In other words, courts have allowed their focus on the label "transsexual" to blind them to the statutory language itself.

The court turned to the Seventh Circuit's decision in Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984), upon which the defendants had relied in their moving papers and at oral argument. In finding that Title VII did not provide protection to people who had "sex identity disorder," the court stated:

> It is a maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning. *Perrin v. United States*, 444 U.S. 37, 42 . . . (1979). The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, *i.e.*, a person born with a male body who believes himself to be female, or a person born with a female body who believes herself to be male; a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born.

Id.at 1085.

The court agreed with the defendants that neither the Supreme Court nor the Seventh Circuit had overruled Ulane. But in the context of the struggles the court had outlined above with defining "sex" in evolving contexts, the court noted several things. First, the Ulane conceded that there was little legislative history regarding the decision to include protections against discrimination based on "sex." The Ulane court explained that the statute originally was "primarily concerned" with race discrimination, and that "sex" was "added as a floor amendment one day before the House approved Title VII, without prior hearing or debate." Id., quoting Holloway v. Arthur Anderson & Co., 566 F.2d 659, 662 (9th Cir. 1977). The court stated that "[t]his sex amendment was the gambit of a congressman seeking to scuttle adoption of the Civil Rights Act. The ploy failed and sex discrimination was abruptly added

to the statute's prohibition against race discrimination." Id. (citing Bradford v. Peoples Natural Gas Co., 60 F.R.D. 432, 434-35 & n.1 (W.D. Pa. 1973)).

This court observed that Title IX does not share the same legislative history (or lack thereof), and that there may be reasons why a court may interpret the word "sex" more broadly in a Title IX context than in Title VII. The court also stated that the defendants' argument that, because Congress not shed light on the definition of the word "sex" in Title VII in the years since its passage was not necessarily determinative, noting the plaintiffs' reference, in argument and in their supplemental authority, to recent efforts by members of Congress to, among other things, pass the Student Non-Discrimination Act. (Dkt. No. 23).

Second, the court pointed out, as the plaintiffs had discussed at oral argument, that the decision in Ulane predated the Supreme Court's decision in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) by five years, as well as other decisions the parties had discussed at oral argument. As the Seventh Circuit acknowledged in Hively, the Supreme Court stated in Price Waterhouse that "Congress intended to strike at the *entire* spectrum of disparate treatment of men and women resulting from sex stereotypes." Hively, 2016 WL 4039703 at *13 (emphasis the Seventh Circuit's) (quoting Price Waterhouse, 490 U.S. at at 251).

Third, the court stated, Ulane held that Title *VII* does not protect trans-gender persons; it did not interpret Title IX. As the court noted above, at the motion to dismiss stage, the court cannot conclude that there may not be reasons to interpret the word "sex" in the Title IX context differently.

Finally, the court pointed out that the Ulane court had stated that even if it had accepted the district court's finding that the plaintiff was female, the district court had not made factual findings relating to whether the defendant had discriminated against her on that basis. Ulane, 742 F.2d at 1087. The court emphasized that at the motion-to-dismiss stage, it had made no finding as to whether the plaintiff (Ash Whitaker) was male or female, a determination that would need to be made after further litigation before addressing the question of discrimination.

Thus, the court summarized, (1) there was no case providing definition of word "sex" as it appear in Title IX, and the statute does not define the word; (2) no court in the Seventh Circuit has specifically addressed whether Title IX's prohibition of discrimination on the basis of sex encompasses transgender students; (3) the case law considering whether "sex" in the Title VII context includes transgender persons is contradictory; (4) there clearly are factual and legal disputes between the parties, and support for each parties claims in the case law; (5) Ulane does not gut the Title IX cause of action, because it did not interpret the word "sex" under Title IX, it provided no basis for its definition of

the word "sex," and it does not take into account cases such as Price Waterhouse and Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998).

The court acknowledged that the plaintiffs had argued that Texas v. USA, 2016 WL 4426495 (N.D. Tex. August 21, 2016) may cast doubt on the reasoning the Fourth Circuit employed in G.G. (although the court opined that that case was unusual in its broad scope of the defendant's request for national injunctive relief, and noted the fact that it was a district court decision, while G.G. is an appellate decision). The court again emphasized, however, that at the motion-to-dismiss stage, the court need only determine whether the plaintiff's claims are plausible, not whether the plaintiffs eventually will succeed.

The court also reminded the parties that at oral argument, it had asked the plaintiff about how a student's inability to use a restroom constituted a denial of educational opportunities. The court stated that, since argument, it had determined that there is support in the case law for the conclusion that a student's inability to use the restroom of his/her choice impacts his/her educational opportunities. The court reiterated that the facts around that claim would be fleshed out in further litigation, but concluded that there was a sufficient basis for the plaintiffs to make that claim under the law.

The court touched on the defendants' argument that it owed no deference to the Department of Education's "Dear Colleague" letter (Dkt. No. 10-6). The court agreed with the defendants that the letter was not a statute (and therefore was not binding law), and that it wasn't entitled to deference under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), because it did not constitute an agency regulation. The court agrees with the G.G. court's reasoning, however, that the letter should be accorded deference under Auer v. Robbins, 519 U.S. 452 (1997). G.G., 822 F.3d at 720.

The defendants first argued that the regulation providing schools with the discretion to segregate bathrooms based on sex was unambiguous. (While the defendants did not specifically identify that regulation, the court expects that they referred to 34 C.F.R. §106.33, which states that "[a] recipient [of federal funding] may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.") A court does not grant Auer deference to an agency which interprets an unambiguous regulation. G.G., 822 F.3d at 719-720.

The court disagreed, finding that, for the reasons discussed above, the word "sex" in the regulation was ambiguous. It does not address how schools must consider or treat transgender students within the discretionary scheme it provides. Once the court determined that the regulation was ambiguous, the

court then turned to whether the Department of Education's interpretation of that regulation in the "Dear Colleague" letter was plainly erroneous or inconsistent with the regulation or with Title IX. Id. at 721 (citing Auer, 519 U.S. at 461). The "Dear Colleague" letter stated that, "A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identities," and that schools "may not require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so." Dkt. No. 10-6 at 5. The court stated that it could not conclude that the Department's interpretation requiring schools to allow transgender persons to use the restroom comporting with their gender identities would prevent schools from exercising their discretion to provide separate bathrooms. Rather, the court indicated, it allowed students identifying as boys to use the bathroom segregated for boys, and those identifying as girls to use the bathroom segregated for girls.

The defendants also argued that the only way the Department's letter would not be at odds with the regulation would be to change Title IX's definition of the word "sex," and that that task was reserved to Congress. The court disagreed, noting—as it had throughout its ruling-that neither the statute nor the regulation define the word "sex."

The defendants argued that to defer to the Department's interpretation would leave schools in the position of trying to "assume gender identity based on appearances, social expectations or explicit declarations of identity," citing the dissent in G.G. The court stated that whether or not that turned out to be the case was not relevant to whether the Department's letter was inconsistent with the regulation, and the court determined that it was not. For those reasons, the court found, it was appropriate to accord the letter Auer deference.

The court also stated that regardless of whether Title IX provides protection for transgender persons, the plaintiffs have alleged sufficient facts to sustain a gender stereotyping claim. See Price Waterhouse, 490 U.S. at 251 ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "'[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'") (citations omitted). See also, Kastl v. Maricopa Count, 325 F. Appx. 492, 493 (9th Cir. 1009) (finding that after Price Waterhouse and Schwenk v. Harford, 204 F.3d 1187, 1201-02 (9th Cir. 2000), "it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women.")

In regard to sex stereotyping, the court stated, the defendants clearly treated the plaintiff differently because he did not conform to the gender stereotypes associated with being a biological female. The school suggested that he use bathrooms that other students were not required to use, endure surveillance to police his bathroom use, and initially refused to allow him to stand for prom king (although it later changed that decision).

For all of the above reasons, the court concluded that the plaintiffs had submitted sufficient factual evidence to survive a motion to dismiss, and sufficient legal authority to overcome the defendants' argument that they had no possibility of prevailing as a matter of law. Thus, the court denied the motion to dismiss as to Count One.

The court then turned to the claim in Count Two—that the defendants had violated 42 U.S.C. §1983 by violating the plaintiffs' Fourteenth Amendment right to equal protection. The court began to stating that to state a claim for relief under §1983, a plaintiff must allege that (1) he was deprived of a right secured by the Constitution or laws of the United States; and (2) the deprivation was visited on him by a person or persons acting under color of state law. Buchanan-Moore v. Cnty. of Milwaukee, 570 F.3d 824, 827 (7th Cir. 2009) (citing Kramer v. Village of North Fond du Lac, 384 F.3d 856, 861 (7th Cir. 2004)). The court found that the plaintiff had satisfied these elements—he had alleged that his equal protection rights under the Fourteenth Amendment had been violated by the defendants, who are state actors.

With regard to the Fourteenth Amendment claim, the court stated that "[i]n order to make out an equal protection claim . . . [the plaintiff] had to present evidence that the defendants treated [him] differently from others who were similarly situated. [He] also had to present evidence that the defendants intentionally treated [him] differently because of [his] membership in the class to which [he] belonged." Hedrich v. Bd. of Regents of Univ. of Wisconsin Sys., 274 F.3d 1174, 1183 (7th Cir. 2001) (citing Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979); Nabozny v. Podlesny, 92 F.3d 446, 453 (7th Cir. 1996). The plaintiff alleged in the complaint that the defendants treated him differently from the "other male students based on his gender identity, the fact that he is transgender, and his nonconformity to male stereotypes . . . ." Dkt. No. 1 at 32-33. The court stated that, if one assumed for the purposes of the argument that Ash is male, he had alleged sufficient facts to indicate that he was discriminated against relative to other males, because he had alleged that he was not allowed to use the facilities that the defendants allow other males to use. In the alternative, the court stated, the plaintiff is transgender, and if the court concludes at a later stage in the proceedings that transgender persons constitute a suspect class, then the plaintiff has alleged sufficient facts to show discrimination on that basis. Finally, the court again concluded that the plaintiff had alleged sufficient facts to show discrimination based on gender stereotypes.

The court pointed out that it did not have to decide, at the motion to dismiss stage, whether transgender persons constituted a suspect class. Durso v. Rowe, 579 F.2d 1365, 1372 (7th Cir. 1978) ("A state prisoner need not allege the presence of a suspect classification or the infringement of a fundamental right in order to state a claim under the Equal Protection Clause. The lack of a fundamental constitutional right or the absence of a suspect class merely affects the court's standard of review; it does not destroy the cause of action.") The court noted that the defendants argued that the court should employ a rational basis standard of review, while the plaintiffs had argued for heightened scrutiny, but the court reiterated that it did not need to make a decision on that issue in order to conclude that the complaint contained sufficient allegations to survive the motion to dismiss.

For all of these reasons, the court also denied the motion to dismiss Count Two.

In light of its decision to deny the motion to dismiss, the court turned to the motion for a preliminary injunction. Counsel for the plaintiff told the court that the plaintiff's application for a legal name change had been granted, and that the relief the plaintiffs were seeking in the injunction consisted of enjoining the defendants from prohibiting the plaintiff from using the boys' restrooms, enjoining the defendants from calling the plaintiff by female names and female pronouns, and enjoining the defendants from identifying the plaintiff as transgender (in ways such as requiring him to wear a colored arm band). Counsel for the defendants acknowledged that the defendants were aware of the official name change and were in the process of changing school records, but indicated that he'd need time to talk with his clients before acceding to any request never to refer to the plaintiff by a female pronoun. He also told the court that there was no wristband policy, that there never had been, and that the plaintiffs' request for relief on that ground was speculative.

Counsel for the plaintiff asked if the court would hear argument right away on the request for injunctive relief as to the restrooms, and reserve for a later time the request regarding pronoun reference. The court, after conferring with counsel for the defense, agreed. The court also stated that it would not entertain a request for injunctive relief regarding the armband at this time, given that no such policy appeared to be in force.

The court scheduled a hearing on the motion for preliminary injunction for September 20, 2016 at 1:00 p.m. in Room 225. Parties wishing to appear by phone may do so by calling the court's conference line at 888-557-8511 and using the access code 4893665#. The hearing will address only the plaintiffs' request for injunctive relief as to the prohibition against his using the boys' restrooms.