

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

JENNIFER ELLER,

Plaintiff,

v.

PRINCE GEORGE’S COUNTY PUBLIC
SCHOOLS, et al.,

Defendants.

Case Number: 18-cv-03649-TDC

**PLAINTIFF’S MOTION *IN LIMINE* REGARDING PRONOUN USAGE AND
MISGENDERING**

Pursuant to Federal Rule of Civil Procedure 7(b) and Local Rule 105(1), Plaintiff Jennifer Eller, by and through her undersigned counsel, respectfully moves this Court for an order regarding pronoun usage and misgendering. Specifically, Plaintiff requests that the Court instruct all participants in this case, including litigants, witnesses, and lawyers, to use the pronouns and honorifics that conform with a person’s identity when referring to that person, including Plaintiff Jennifer Eller. A supporting memorandum of law is filed contemporaneously herewith.

Dated this 7th day of September, 2022.

Respectfully submitted,

/s/ Lori B. Leskin

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CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically with the Clerk of Court using the CM/ECF system which will send notification of such filing to all registered users.

Dated: September 7, 2022

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UNITED STATES DISTRICT COURT
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Defendants.

Case Number: 18-cv-03649-TDC

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION *IN LIMINE*
REGARDING PRONOUN USAGE AND MISGENDERING

Pursuant to Local Rule 105(1), Plaintiff Jennifer Eller ("Plaintiff" or "Ms. Eller"), by and through her undersigned counsel, respectfully submits this memorandum of law in support of her motion *in limine* for an order instructing all participants in this case, including litigants, witnesses, and lawyers, to use the pronouns and honorifics that conform with a person's identity when referring to that person, including Plaintiff Jennifer Eller.¹

I. FACTUAL BACKGROUND

This case involves the constant harassment and misgendering experienced by a transgender woman, Jennifer Eller, while she was working as an English teacher within multiple schools in the Prince George's County Public School system ("PGCPS"). As the Court recognized in its decision

¹ This memorandum cites to documents that have already been filed on the record in this case by reference to their docket number. To the extent that the Court wishes to have these documents appended to this memorandum and motion, Plaintiff will provide them accordingly.

Prior to the filing of this motion, Plaintiff's counsel reached out to Defendant's counsel in an effort to avoid the need for judicial resolution of this issue. Defendant refused to stipulate to the requested relief.

on summary judgment, Ms. Eller was not only “harassed continually by co-workers, students, and parents at three different schools,” but was also “repeatedly misgendered, including being deliberately referred to as ‘he,’ ‘it,’ ‘sir,’ ‘mister,’ ‘guy in a dress,’ and her former name. *Eller v. Prince George’s Cnty. Pub. Sch.*, No. CV TDC-18-3649, 2022 WL 170792, at *10 (D. Md. Jan. 14, 2022)

Misgendering is the misclassification of someone’s gender identity, which includes the use of a gendered pronoun that does not align with a person’s gender identity.² Studies indicate that transgender people are “frequently misgendered by others” and that “these experiences le[a]d them to feel stigmatized.”³ Misgendering is perceived to be a “stigmatizing event because it is associated with psychological distress.”⁴ As the Supreme Court recently made clear in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), misgendering and other forms of discrimination against transgender individuals are unlawful under Title VII, and guidance issued by the U.S. Equal Employment Opportunity Commission (“EEOC”) both before and after *Bostock* has recognized that persistent misgendering can create a hostile work environment. *See, e.g., Lusardi v. McHugh*, EEOC DOC No. 0120133395, 2015 WL 1607756, at *11 (Apr. 1, 2015) (“Persistent failure to use the employee’s correct name and pronoun may constitute unlawful, sex-based harassment”).⁵

² Kevin A. McLemore, *A Minority Stress Perspective on Transgender Individuals’ Experiences With Misgendering*, 3 *Stigma & Health* 53 (2018). To misgender is to “[r]efer to (someone, especially a transgender person) using a word, especially a pronoun or form of address, that does not correctly reflect the gender with which they identify.” *Misgender*, Oxford University Press, www.lexico.com/en/definition/misgender (accessed July 15, 2022).

³ McLemore, *supra* note 1, at 54 (citing Kevin A. McLemore, *Experiences of Misgendering: Identity Misclassification of Transgender Spectrum Individuals*, 14 *Self & Identity* 51 (2014)).

⁴ *Id.* at 61.

⁵ The EEOC’s Sexual Orientation and Gender Identity Discrimination page currently notes that “intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.” Sexual Orientation and Gender Identity (SOGI) Discrimination, U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/sexual-orientation-and-gender-identity-sogi-discrimination> (accessed August 22, 2022).

Thus, Plaintiff requests that the Court instruct all participants in this case, including litigants, witnesses, and lawyers, to use the pronouns that conform with a person's identity when referring to that person, including referring to Plaintiff Jennifer Eller by her proper pronouns and/or "Ms. Eller."

II. ARGUMENT

"All persons involved in the judicial process—judges, litigants, witnesses, and court officers—owe a duty of courtesy to all other participants." *In re Snyder*, 472 U.S. 634, 647 (1985). And transgender individuals, like all litigants, must be able to access the courts free from concerns about bias, prejudice, and discrimination. To permit the misgendering of transgender litigants undermines judicial proceedings, risks sacrificing confidence in the fairness and impartiality of the proceedings, and is contrary to established precedent prohibiting such misgendering against transgender individuals. *See Bostock*, 140 S. Ct. at 1737.

The duty to use the pronouns and honorifics consistent with a litigant's identity is also in keeping with the treatment of litigants required by canons of judicial conduct and rules of professional responsibility. For example, federal courts "should require ... those subject to the judge's control" to "be patient, dignified, respectful, and courteous to litigants." Code of Conduct for U.S. Judges, Canon 3(A)(3). Canon 2 of the American Bar Association's Model Code of Judicial Conduct specifies that judges "shall perform the duties of the judicial office impartially, competently, and diligently," including by "requir[ing] lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment . . . against parties, witnesses, lawyers, or others" based upon attributes including sex and gender under Rule 2.3(C). Similar duties apply to lawyers. The American Bar Association's Model Rules of Conduct state that "it is professional misconduct for a lawyer to ... engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of ... gender identity ... in conduct

related to the practice of law.” Model Rules of Prof’l Conduct R. 8.4(g) (Am. Bar Ass’n 2018). Such harassment and discrimination include “derogatory or demeaning verbal ... conduct.” *Id.* (Comment 3). Moreover, this Court’s own Pretrial and Trial Instructions instruct counsel to “[t]reat witnesses with courtesy and respect, and address them by their surnames.” ECF No. 130, at 6 (Pretrial and Trial Instructions to Counsel (Civil)).

Even before the Supreme Court confirmed in *Bostock* that workplace discrimination on the basis of transgender status was unlawful and actionable, courts recognized the right of litigants not to be misgendered. Indeed, even in cases where gender identity was a central issue, that in no way permitted or excused the misgendering of a litigant. Courts that have used and required other parties to use the pronouns and honorifics consistent with a litigant’s gender identity pre-*Bostock* distinguished between: (1) a substantive ruling on the merits or a legal or factual finding on a litigant’s gender identity, and (2) the respect owed a litigant by using the litigant’s correct pronouns and honorifics. In *Lynch v. Lewis*, No. 7:14-CV-24 HL, 2014 WL 1813725 (M.D. Ga. May 7, 2014), the Court explained that Plaintiff’s requested feminine pronouns would be used “as a matter of courtesy, and because it is the Court’s practice to refer to litigants in the manner they prefer to be addressed when possible.” *Id.* at *2 n.2. See also, e.g., *DeGroat v. Townsend*, 495 F. Supp. 2d 845, 846 n.3 (S.D. Ohio 2007) (“[T]he Court will use feminine pronouns to refer to the Plaintiff. Such use is not to be taken as a factual or legal finding. Rather, the Court considers it to be a matter of courtesy”); *Littleton v. Prange*, 9 S.W.3d 223, 224 (Tex. Ct. App. 1999) (“Throughout this opinion Christie will be referred to as ‘She.’ This is for grammatical simplicity’s sake, and out of respect for the litigant, who wishes to be called ‘Christie’ and referred to as ‘she.’ It has no legal implications”).

Usage of pronouns and honorifics consistent with a litigant's gender identity is in keeping with the U.S. Supreme Court's holding in *Bostock*, where the Court referred to a transgender litigant, Aimee Stephens, by the name and pronouns consistent with her gender identity. *See* 140 S. Ct. at 1738 (“*Aimee Stephens* worked at R.G. & G.R. Harris Funeral Homes When *she* got the job, Ms. Stephens presented as a male”) (emphasis added). Proper pronoun usage is also necessary to ensure an appearance of objectivity, impartiality, and fairness in judicial proceedings. For example, the New York State Advisory Committee on Judicial Ethics has advised that permitting the wrong use of pronouns with regard to transgender litigants “could not only make them feel unwelcome but also distract from the adjudicative process,” noting that “a judge must be careful to avoid any appearance of hostility to an individual's gender identity or gender expression.” N.Y. Adv. Comm. on Jud. Ethics, Op. 21-09 (Jan. 28, 2021), <https://tinyurl.com/yckhtptu>. The Court of Appeals of Indiana admonished a lower court along these lines when it stated:

[W]e are obliged to address the fact that the trial court failed to treat R.E. with the respect R.E. deserves and that we expect from fellow judicial officers. Unfortunately, this is not the first such occasion we have had to publicly admonish one of our trial courts for such derision. In *In re M.E.B.*, we noted: “Throughout its order, the trial court fails or refuses to use [the petitioner's] preferred pronoun. The order is also permeated with derision for [the petitioner]. We would hope that the trial courts of this state would show far greater respect (as well as objectivity and impartiality) to all litigants appearing before them.”

In re R.E., 142 N.E.3d 1045, 1054 (Ind. Ct. App. 2020) (quoting *In re M.E.B.*, 126 N.E.3d 932, 934 n.1 (Ind. Ct. App. 2019)).

One of the most basic forms of courtesy is to address others respectfully and refrain from addressing others in ways that are disrespectful or demeaning. “Considering how big of a social faux pas it is in our culture to misgender someone, and how apologetic people generally become upon finding out that they have made that mistake, it is difficult to view . . . the deliberate

misgendering of [a transgender person]—as anything other than an arrogant attempt to belittle and humiliate.” Chan Tov McNamara, *Misgendering as Misconduct*, 68 UCLA L. Rev. Disc. 40, 43 (2020) (quoting Julia Serano, *Whipping Girl: A Transsexual Woman on Sexism and The Scapegoating of Femininity* 185 (2007)). Intentionally misgendering a transgender litigant is thus “pure meanness.” *T.B., Jr. ex rel. T.B., Sr. v. Prince George’s Cty. Bd. of Ed.*, 897 F.3d 566, 577 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1307 (2019). It is “not a light matter, but one which is laden with discriminatory intent.” *Doe v. City of New York*, 976 N.Y.S.2d 360, 364 (N.Y. Sup. Ct. 2013).

The Court should thus instruct all participants in this case, including litigants, witnesses, and lawyers, to use the pronouns and honorifics that conform with a person’s identity when referring to that person, including Ms. Eller. *See, e.g.*, Letter Order, *Eller v. Prince George’s Cnty. Pub. Sch.*, No. 8:18-cv-03649-TDC (D. Md. Oct. 18, 2019) (Dkt. No. 44) (ordering that independent medical examination “be conducted in a ‘trans-affirmative’ manner and that Ms. Eller’s gender identity be respected through the use of female pronouns”); *Canada v. Hall*, No. 18-CV-2121, 2019 WL 1294660, at *1 n.1 (N.D. Ill. Mar. 21, 2019) (admonishing defendants’ counsel for “careless disrespect for the plaintiff’s transgender identity,” in part through “consistent use of male pronouns to identify the plaintiff” when she did not identify as such); *Ex. A, United States v. Manning*, No. Army 20130739 Order (A. Ct. Crim. App. March 4, 2015) (ordering the use of neutral or feminine pronouns in all legal papers and proceedings in case involving transgender female defendant).

III. CONCLUSION

For the foregoing reasons, the Court should grant this motion and instruct all participants in the case, including litigants, witnesses, and lawyers, to use the pronouns and honorifics that conform with a person’s identity when referring to that person, including when referring to Ms. Eller.

Dated this 7th day of September, 2022.

Respectfully submitted,

/s/ Lori B. Leskin

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CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically with the Clerk of Court using the CM/ECF system which will send notification of such filing to all registered users.

Dated: September 7, 2022

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UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
CAMPANELLA, KRAUSS, and PENLAND
Appellate Military Judges

UNITED STATES, Appellee
v.
Private First Class BRADLEY E. MANNING (nka CHELSEA E. MANNING),
United States Army, Appellant

ARMY 20130739

ORDER

WHEREAS:

A military judge sitting as a general court-martial convicted appellant of various violations of Articles 92 and 134 of the Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 892, 934 (2006). The military judge sentenced appellant to a dishonorable discharge, confinement for 35 years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the adjudged sentence and credited appellant with 1,293 days against the sentence to confinement.

On 4 February 2015, appellant filed a “Motion for Court Order to Use Appellant’s Legal Name and to Preclude the Use of Appellant’s Former Name in All Court Documents.”

On 9 February 2015, appellee filed a “Response to Appellant’s Motion for Court Order to Use Appellant’s Legal Name and to Preclude the Use of Appellant’s Former Name in All Court Documents.”

On 18 February 2015, with leave from this court, appellant filed a “Reply to Government Response to [Appellant’s] Motion for Court Order to Use Appellant’s Legal Name and to Preclude the Use of Appellant’s Former Name in All Court Documents.”

NOW, THEREFORE, IT IS HEREBY ORDERED:

Appellant’s “Motion for Court Order to Use Appellant’s Legal Name and to Preclude the Use of Appellant’s Former Name in All Court Documents” is **GRANTED IN PART** and **DENIED IN PART**. In respect to historic fact and this court’s standard practice, the caption will remain as is. Reference to appellant in all

MANNING —ARMY 20130739

future formal papers filed before this court and all future orders and decisions issued by this court shall either be neutral, e.g., Private First Class Manning or appellant, or employ a feminine pronoun.

DATE: 4 March 2015

FOR THE COURT:



MALCOLM H. SQUIRES, JR.
Clerk of Court

CF:

JALS-DA JALS-CR3
JALS-GA JALS-CCR
JALS-CCZ
Nancy Hollander, Esq.
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UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

JENNIFER ELLER,

Plaintiff,

v.

PRINCE GEORGE'S COUNTY PUBLIC
SCHOOLS, et al.,

Defendants.

Case Number: 18-cv-03649-TDC

[PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION *IN LIMINE*
REGARDING PRONOUN USAGE AND MISGENDERING

Upon consideration of Plaintiff Jennifer Eller's motion *in limine* for an order regarding pronoun usage and misgendering, it is hereby ORDERED:

1. That Plaintiff's motion *in limine* is GRANTED.
2. That all participants in this case, including litigants, witnesses, and lawyers, are to use the pronouns and honorifics that conform with a person's identity when referring to that person, including Plaintiff Jennifer Eller.

Date

THEODORE D. CHUANG
United States District Judge