Art Leonard Observations, NY, USA

Federal District Court Denies Preliminary Injunction Requiring School District to Segregate Restroom and Locker Facilities by Biological Sex of Students

Posted on: December 31st, 2017 by Art Leonard

Accepting a report and recommendation from U.S. Magistrate Judge Jeffrey T. Gilbert, U.S. District Judge Jorge L. Alonso ruled on December 29, 2017, that a group of parents and cisgender students are not entitled to a preliminary injunction blocking Illinois's Township High School District 211 from allowing transgender students to use restrooms and locker rooms consistent with their gender identity. Students and Parents for Privacy v. United States Department of Education, 2017 U.S. Dist. LEXIS 213091 (N.D. Ill., E.D.).

The dispute grew out of prior legal action by a transgender girl at William Fremd High School in Palatine, Illinios, a suburb of Chicago, seeking to use the girls' facilities. During the Obama Administration, the U.S. Education Department responded to the student's complaint by negotiating a settlement agreement with the school district under which Student A, as she was identified, would be allowed to use these facilities. The school district's willingness to settle turned on a formal Guidance issued by the U.S. Education and Justice Departments construing Title IX to require such a policy.

Reacting to the settlement, an ad hoc group of parents of students at Fremd High School, together with some girls who attend the high school, brought this suit in May 2016, represented by Alliance Defending Freedom, asserting that the girls had a constitutional and statutory right not to have "biological boys" present in their restroom and locker room facilities where they could see girls in a state of undress. The lawsuit targeted the U.S. Departments of Education and Justice for issuing the Guidance and negotiating the settlement. The school district was also named as a defendant. Student A, together with two other transgender students in the district and their parents, were granted intervenor status as defendants.

Magistrate Judge Gilbert, to whom the motion for preliminary injunction had been referred by Judge Alonso, issued his report on October 18, 2006, concluding that plaintiffs were unlikely to prevail on their claims, and recommending that the motion be denied. Plaintiffs filed objections with Judge Alonso.

While the objections were pending there were several developments significantly affecting the case. Donald J. Trump was elected president a few weeks after the Magistrate Report was issued, and he then appointed new leadership to the two Departments after his term began on January 20, 2017. The two Departments then jointly withdrew the Obama Administration Title IX Guidance, opining that it had not been properly issued and that the matter required more study, but not taking any position on whether transgender students had such protection under Title IX, commenting that these issues should be decided at the local

level. Thus, the Trump Administration was, at least as of then, "neutral" on the question, although since then Attorney General Sessions and the Justice Department have gone on record as opposing an expansive interpretation of Title IX to embrace gender identity (and sexual orientation) discrimination claims.

However, shortly after the withdrawal of the Guidance, the 7th Circuit Court of Appeals ruled in a similar case, Whitaker v. Kenosha Unified School District No. 1 Board of Education, 858 F.3d 1034 (7th Cir. 2017) (petition for certiorari pending), that Title IX does extend to gender identity discrimination claims, and upheld an injunction ordering a Wisconsin school district to allow a transgender boy to use the boys' restroom facilities at a public high school.

The Trump Administration actions mooted the part of the lawsuit against the federal government defendants, as the policy the plaintiffs are challenging was no longer federal executive branch policy. Thus, the plaintiffs agreed to drop the federal defendants from the case. Also, because Student A has graduated, the plaintiffs' specific objection to District 211's agreement with the Education Department concerning facilities access for that student was mooted as well. However, Intervenor Students B and C and their parents, and possibly other transgender students in District 211, would present the same access issues, so the plaintiffs' claims against the District under Title IX and the Constitution continue so long as the District does not disavow the access policy to which it had agreed.

In essence, Plaintiffs' Title IX complaint relies on a long-standing Title IX regulation that authorizes schools to maintain sex-separate restroom and locker room facilities, provided that the facilities are comparable in scope and quality. Plaintiffs argue that this authorization of sex-segregated facilities recognizes the privacy concerns of the students (and their parents), and that requiring students to have to share such facilities with transgender students of a different "biological" sex contradicts those privacy concerns. The Magistrate had rejected this argument in October 2016, and the 7th Circuit's Whitaker decision subsequently confirmed the Magistrate's understanding of this issue.

Wrote Judge Alonso, "Discrimination against transgender individuals is sex discrimination under Price Waterhouse, the 7th Circuit explained, because 'by definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.' Following Price Waterhouse and its progeny, the Court reasoned that a 'policy that requires an individual to use a restroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance which in turn violates Title IX. Providing a gender-neutral alternative was insufficient to relieve the school district from liability under Title IX, the Seventh Circuit explained, because it was 'the policy itself which violates the Act."

The plaintiffs tried to distinguish the Whitaker case because it addressed only restrooms, not locker rooms, and because, they insisted, the decision was so "astonishingly wrong" that its reasoning undercuts its "worth even as persuasive authority." The problem with that, of course, is that Illinois is in the same 7th Circuit as Wisconsin, so Whitaker is not just persuasive authority; it is binding on Judge Alonso.

The judge insisted that nothing in Whitaker "suggests that restrooms and locker rooms should be treated differently under Title IX or that the presence of a transgendered student in either, especially given additional privacy protections like single stalls or privacy screens, implicates the constitutional privacy rights of others with whom such facilities are shared. Plaintiffs' critiques notwithstanding," he continued, "Whitaker reflects a straightforward application of the long-standing line of sex stereotyping decisions, fully in line with the Supreme Court's guidance on sex discrimination claims." Thus, under Whitaker, plaintiffs could not meet the first test for preliminary injunctive relief: showing the probability that they would prevail on the merits of their claim. Judge Alonso devoted several paragraphs to explaining why the plaintiffs' attempts to distinguish or disparage Whitaker were unavailing in meeting their burden under the motion.

"Furthermore," he wrote, "even if Plaintiffs had shown a likelihood of success on the merits, they would still not be entitled to a preliminary injunction because they have not shown they are likely to suffer irreparable harm in the absence of an injunction, or that they lack an adequate remedy at law in the event that they ultimately succeed on their claims." Indeed, as far as demonstrating harm goes, "the only specific harm to which they point is the risk of running late to class by using alternate restrooms to avoid sharing with a transgender student and the 'embarrassment, humiliation, anxiety, fear, apprehension, stress, degradation , and loss of dignity' allegedly felt by Student Plaintiffs arising from such sharing." The Magistrate [Judge Gilbert] had found that these were insufficient to establish irreparable injury, because courts routinely award monetary damages for emotional distress, and "the risk of being late to class has not been shown to have any meaningful impact on Student Plaintiffs' education."

Judge Alonso considered it worth nothing that the District's practice of letting transgender students use appropriate facilities had been going on for nearly three years when this lawsuit was filed, but "either Student Plaintiffs did not notice that transgender students were using restrooms consistent with their gender identity, or they knew and tolerated it for several years," as no examples of actual incidents were proffered in support of their motion. "The passage of time therefore further undermines Plaintiffs' claim of irreparable harm," wrote Alonso. "This Court agrees with the Magistrate Judge's assessment, 'there is no indication that anything has negatively impacted Girl Plaintiffs' education." Judge Alonso overruled the objections, and accepted the Magistrate's recommendation to deny the preliminary injunction.

Now that pretrial motions have been disposed of, the court gave the defendants until January 30, 2018, to file an answer to the complaint, and set a status hearing for February 8. In light of the Whitaker case and Judge Alonso's strongly-worded opinion, one would expect the school district to promptly file a motion for summary judgment, if ADF does not decide within the next few weeks to fold up its tent and steal away. Of course, what could change the situation dramatically would be a grant of certiorari by the Supreme Court of the school district's petition in the 7th Circuit Whitaker case. But the parties in that case were reportedly close to a settlement and had asked the Supreme Court to extend the time for Whitaker's counsel to file a response to the cert petition, so it appears likely that a cert grant will not be forthcoming during the month of January leading up to School District 211's court-imposed deadline to respond to the complaint in this case.

The transgender student Intervenors are represented by the ACLU of Illinois and the national ACLU Foundation, with pro bono attorneys from Mayer Brown LLP.

http://www.artleonardobservations.com/federal-district-court-denies-preliminary-injunction-requiring-school-district-segregate-restroom-locker-facilities-biological-sex-students/

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Oregon Court of Appeals Rules against Baker in "Gay Wedding Cake" Case

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A unanimous three-judge panel of the Court of Appeals of Oregon affirmed a ruling by the Oregon Bureau of Labor and Industries (BOLI) that Melissa and Aaron Klein, doing business as Sweetcakes by Melissa, violated the state's public accommodations law by refusing to provide a wedding cake for Rachel and Laurel Bowman-Cryer. The ruling upheld an award of $135,000 in damages, rejecting the Kleins' argument that this application of the state law to them violates their 1st Amendment rights. However, the court overruled the BOLI's determination that the Kleins' public remarks in connection with this case had also violated a separate section of the law forbidding businesses to announce in advance that they will discriminate in the future. Judge Chris Garrett wrote for the panel.

This case is, for all practical purposes, a virtual clone of the Colorado case, Masterpiece Cakeshop, which was argued at the U.S. Supreme Court on December 5, 2017.

Rachel and Laurel first met in 2004 and decided to marry in 2012. Rachel and her mother, Cheryl, went to a Portland bridal show as part of their wedding planning, and visited Melissa Klein's booth at the show. Sweetcakes by Melissa had designed, created and decorated a wedding cake for Cheryl's wedding two years before, and Rachel and Cheryl told Melissa that they would like to order a cake from her. A cake-testing appointment was set up for January 17, 2013. Rachel and Cheryl visited the bakery shop, in Gresham, for their appointment. Melissa was at home performing child care, so the appointment was with her husband and co-proprietor, Aaron. During the tasting, Aaron asked for the names of the bride and groom, and was told there were two brides, Rachel and Laurel. "At that point," wrote Judge Garrett, "Aaron stated that he was sorry, but that Sweetcakes did not make wedding cakes for same-sex ceremonies because of his and Melissa's religious convictions. Rachel began crying, and Cheryl took her by the arm and walked her out of the shop. On the way to their car, Rachel became 'hysterical' and kept apologizing to her mother, feeling that she had humiliated her."

In their car, Cheryl assured Rachel that they would find somebody else to make the cake. After driving a short distance, Cheryl turned back and re-entered the bakery by herself to talk with Aaron. "During their conversation," wrote Judge Garrett, "Cheryl told Aaron that she had previously shared his thinking about homosexuality, but that her 'truth had changed' as a result of having 'two gay children.' In response, Aaron quoted a Bible passage from the Book of Leviticus, stating, 'You shall not lie with a male as one lies with a female; it is an abomination.' Cheryl left and returned to the car, where Rachel had remained, 'holding [her] head in her hands, just bawling." Cheryl telling Rachel that Aaron had called her an "abomination" didn't make things any better. Rachel later stated that "it made me feel like they were saying God made a mistake when he made me, that I wasn't supposed to be, that

I wasn't supposed to love or be loved or have a family or live a good life and one day go to heaven." When they got home and told Laurel what had happened, she recognized the "abomination" reference from Leviticus and "felt shame and anger. Rachel was inconsolable, which made Laurel even angrier." It was Laurel who filed an online complaint with the Oregon Department of Justice, but later she filed a complaint with BOLI, as did Rachel.

News of the complaints generated a wave of media attention, which resulted in death threats and adverse attention to Rachel and Laurel as well as to the Kleins. Ultimately, BOLI's investigation concluded that the Kleins violated two sections of the public accommodations law, one forbidding discrimination by businesses in providing goods and services because of the sexual orientation of customers, the other, based on statements that the Kleins had made about the case, as well as a sign they posted in their bakery, that they violated a provision making it unlawful for a business to announce its intent to discriminate against customers because of their sexual orientation. An administrative law judge (ALJ) sustained the first but not the second, finding that the comments in question related to the Klein's position on this case and was not a general announcement of intent to discriminate in the future. At the agency level, however, BOLI, disagreeing with the ALJ on this point, ruled that both provisions had been violated, and the Kleins appealed to the Court of Appeals. The ALJ and BOLI agreed on an award of $135,000 in damages to Rachel and Laurel, to compensate them for the mental, emotional or physical suffering sustained because of the discrimination. The agency rejected a claim for additional damages for mental, emotional or physical suffering stemming from the media and public response to their filing of the discrimination charges against the Kleins.

The first issue for the court was to determine whether the Kleins were correct in arguing that they had not violated the statute because, as they contended, their business does not discriminate against people because of their status as gay, but rather, in this instance, was declining to "facilitate the celebration of a union that conveys a message about marriage to which they do not subscribe and that contravenes their religious beliefs." The court rejected this attempt to skirt the issue, commenting that "there is no reason to believe that the legislature intended a 'status/conduct' distinction specifically with regard to the subject of 'sexual orientation.'"
Judge Garrett pointed to the state's passage of the Oregon Family Fairness Act, which specifically provides that same-sex couples should be entitled to the same rights and privileges of different-sex couples. "The Kleins have not provided us with any persuasive explanation for why the legislature would have intended to grant equal privileges and immunities to individuals in same-sex relationships while simultaneously excepting those committed relationships from the protections of" the public accommodations law. The court pointed out that "under the distinction proposed by the Kleins, owners and operators of businesses could continue to oppress and humiliate black people simply by recasting their bias in terms of conduct rather than race. For instance, a restaurant could refuse to serve an interracial couple, not on account of the race of either customer, but on account of the conduct – interracial dating – to which the proprietor objected. In the absence of any textual or contextual support, or legislative history on that point, we decline to construe [the law] in a way that would so fundamentally undermine its purpose."

Indeed, wrote the court, “The Kleins refused to make a wedding cake for the complainants precisely and expressly because of the relationship between sexual orientation and the conduct at issue (a wedding). And, where a close relationship between status and conduct exists, the Supreme Court has repeatedly rejected the type of distinction urged by the Kleins.” Judge Garrett cited the Supreme Court’s 2010 ruling, upholding the University of California-Hasting’s refusal to extend official recognition to a Christian Legal Society chapter whose membership policies excluded gay people, in which Justice Ruth Bader Ginsburg, writing for the Court, made this point, as well as Lawrence v. Texas, the Texas sodomy law case, where Justice Kennedy wrote for the Court that making gay conduct a crime was “an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”

Turning to the constitutional challenges, the court rejected both the free speech and free exercise of religion arguments. For one thing, the court found, while conceding there would be an element of artistic expression and creativity in the process of making a wedding cake, this did not present the type of free speech issues that would merit strict scrutiny from the court. Rather, the court found, the Supreme Court’s public accommodations jurisprudence treated such laws as neutral laws intended to achieve a legitimate purpose of extending equal rights to participate in the community, and not specifically targeted on particular political or religious views held by a particular business person. The Kleins premised their arguments largely on the Supreme Court’s Hurley (St. Patrick’s Day Parade) and Dale (Boy Scouts) cases, in which the Supreme Court held that application of a public accommodations law to require an organization or association to include gay people would have to yield to the free expression rights of an organization that has a particularly expressive purpose. They also focused on the famous flag salute cases from World War II and other cases in which the Supreme Court ruled that the government cannot compel private individuals to express a message dictated by the government.

Wrote Judge Garrett, “We must decide whether the Kleins’ cake-making activity is sufficiently expressive, communicative, or artistic so as to implicate the First Amendment, and, if it is, whether BOLI’s final order compelling the creation of such expression in a particular circumstance survives First Amendment scrutiny.” Reviewing the way the Kleins produced customized wedding cakes for their customers, the court found, “the Kleins’ argument that their products entail artistic expression is entitled to be taken seriously. That being said, we are not persuaded that the Kleins’ wedding cakes are entitled to the same level of constitutional protection as pure speech or traditional forms of artistic expression. In order to establish that their wedding cakes are fundamentally pieces of art, it is not enough that the Kleins %believe% them to be pieces of art. For First Amendment purposes, the expressive character of a thing must turn not only on how it is subjectively perceived by its maker, but also on how it will be perceived and experienced by others. Here, although we accept that the Kleins imbue each wedding cake with their own aesthetic choices, they have made no showing that other people will necessarily experience %any% wedding cake that the Kleins create predominantly as ‘expression’ rather than as food.”

Further, the court found that it would be a different case “if BOLI’s order had awarded damages against the Kleins for refusing to decorate a cake with a specific message

requested by a customer ('God Bless This Marriage,' for example) that they found offensive or contrary to their beliefs." Then an articulated message would be conveyed, and the First Amendment issue would be much stronger. Responding to the Kleins' concern that the wedding cake communicates a "celebratory message" about the wedding, which they did not wish to communicate, the court pointed out that "the Kleins have not raised a nonspeculative possibility that anyone attending the wedding will impute that message to the Kleins." In short, wedding guests will not respond to seeing the cake at the reception by thinking that the baker is "celebrating" or "approving" this wedding. There is nothing in the law that requires the Kleins to formally endorse same-sex marriages.

However, having found that there is at least some First Amendment free speech interest involved, the court applied "intermediate scrutiny" and found that the state had a compelling interest "both in ensuring equal access to publicly available goods and services and in preventing the dignitary harm that results from discriminatory denials of service. That interest is no less compelling with respect to the provision of services for same-sex weddings," wrote Garrett. "Indeed, that interest is particularly acute when the state seeks to prevent the dignitary harms that result from the unequal treatment of same-sex couples who choose to exercise their fundamental right to marry," as established in Obergefell, the Supreme Court's marriage equality decision.

The court concluded that "any burden imposed on the Kleins' expression is no greater than essential to further the state's interest," pointing out that "BOLI's order does not compel the Kleins to express an articulable message with which they disagree. … Given that the state's interest is to avoid the 'evil of unequal treatment, which is the injury to an individual's sense of self-worth and personal integrity,'" wrote Garrett, quoting from a prior Oregon Supreme Court case, "there is no doubt that interest would be undermined if businesses that market their goods and services to the 'public' are given a special privilege to exclude certain groups from the meaning of that word."

Turning to the free exercise of religion point, the court noted that the Supreme Court held in Employment Division v. Smith that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribed (or prescribes) conduct that his religion prescribes (or proscribes)." The "incidental effect" on religion of such laws does not violate the 1st Amendment.

The court devoted most of its analysis on this point to distinguishing cases offered by the Kleins as exceptions to this rule. All of those cases involved special circumstances where it could be shown that although the laws in question were neutral on their face, they had been intended by the legislature to apply to particular religious practices and were thus not really "neutral to religion." The Kleins also pushed a "hybrid rights" theory, mentioned in passing in the Smith case, under which when a party's claim arises under two different constitutional rights guarantees (in this case speech and religious exercise) the burden of justification on the state should be raised to strict scrutiny. The court observed that apart from the passing mention in Smith, that concept had not been developed by the Supreme Court, had been rejected by many other courts, and specifically had never been adopted by the Oregon Supreme Court in construing the state's constitution.

The court rejected the Kleins' arguments that recognizing a limited or narrow exception for businesses whose owners had religious objections to same-sex marriage would have only a "minimal" effect on "the state's antidiscrimination objectives," pointing out that "those with sincere religious objections to marriage between people of different races, ethnicities, or faiths could just as readily demand the same exemption. The Kleins do not offer a principled basis for limiting their requested exemption in the manner that they propose, except to argue that there are 'decent and honorable' reasons, grounded in religious faith, for opposing same-sex marriage, as recognized by the United States Supreme Court in Obergefell. That is not in dispute. But neither the sincerity, nor the religious basis, nor the historical pedigree of a particular belief has been held to give a special license for discrimination," wrote Garrett.

The court rejected the Kleins' claim for free speech and religious exemptions under the Oregon Constitution, pointing out that they had not advanced any additional arguments peculiar to Oregon constitutional jurisprudence that would justify going beyond the federal constitutional analysis in this case. The court also rejected the argument that BOLI's ruling should be set aside because BOLI's Commissioner had made public comments about the case before voting to affirm the ALJ's ruling and award the damages. The court found that the commissioner's comments "fall short of the kinds of statements that reflect prejudgment of the facts or an impermissibly closed-minded view of law or policy so as to indicate that he, as a decision maker, cannot be impartial." The court rejected the Kleins' objection to the damage award, finding that the ALJ and BOLI had scrupulously limited the award to damages flowing from the Kleins' discrimination and had an adequate basis in the trial record to award the amounts in question, which were not out of line with awards in other cases.

However, the court concluded that BOLI erred by failing to affirm the ALJ's conclusion that the Kleins had not violated a section of the law that forbids any business "to publish, circulate, issue or display… any communication, notice, advertisement or sign of any kind to the effect that any of the accommodations, advantages, facilities, services or privileges of the place of public accommodation will be refused, withheld from or denied to, or that any discrimination will be made against, any person on account of. . . sexual orientation." The court, agreeing with the ALJ but not with BOLI, found that the Kleins' public comments about their determination to defend this case and to adhere to their religious beliefs did not specifically violate this provision.

The Kleins were careful in wording the sign they put up at their bakery and in their comments on Facebook and in the press to avoid stating that they would discriminate because of a customer's sexual orientation. Their position throughout this case is that they were not engaging in such discrimination. The court was not willing to interpret this section of the statute as exposing businesses to additional liability for stating publicly their belief that their past action had not violated the law. Since BOLI's calculation of damages awarded to Rachel and Laurel did not include any amount for violation of this section, however, the reversal of this part of the decision did not require any reduction in damages.

The Kleins were represented in this appeal by attorneys from several law firms, some specializing in championing socially conservative causes, so it would not be surprising to see

them file an appeal with the Oregon Supreme Court. The Oregon attorney general's office represented BOLI. Lambda Legal filed an amicus brief on behalf of Rachel and Laurel. A long list of liberal religious associations and organizations joined in an amicus brief filed by pro bono attorneys in support of BOLI's ruling, and amicus briefs were also filed by the ACLU and Americans United for Separation of Church and State.

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