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Transgender Students: Are They a Protected Class?

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Seamus Johnston (plaintiff) brought action against the University of Pittsburgh at Johnstown (UPJ) and its employees (defendants) for unlawful discrimination based on his sex and transgender status. Johnston had received numerous disorderly misconduct citations and imposed sanctions due to his use of male designated spaces at the university, as a biological female, which ultimately resulted in his expulsion from UPJ on January 24, 2012. The District Court granted the defendant's motion to dismiss on the basis that the plaintiff failed to allege sufficient facts to establish claims for discrimination and retaliation. This case intends to resolve whether an institution that receives federal funds is engaging in unlawful discrimination when it prohibits a transgender student from using sex-segregated restrooms and locker rooms on a university campus.

Facts of the Case

Johnston was assigned the female sex at birth, and by the age of nine he recognized that he identified with a male gender identity. According to the plaintiff, he is recognized legally, socially and medically as a man and began living in accordance with this gender identity in all aspects of life in May of 2009. In August 2010, Johnston was diagnosed with gender identity disorder (GID) by his psychotherapist and began testosterone injections as a hormone treatment for this disorder. Gender identity disorder refers to deeply distressed and

fixed feelings of being born with the wrong sex, and it is the only psychiatric diagnosis for which surgery is advocated as a treatment (Manners, 2009). Beginning in 2009, Johnston began amending his identity documents and records (e.g., driver's license, passport) to reflect his gender identity as a male.

Johnston attended UPJ from 2009 to 2011 as an undergraduate student, having received a four-year commuter scholarship. When he applied to the university in March 2009, Johnston identified "female" as his sex on his application; however, he continued to live as a male. In the fall of 2011 Johnston requested his gender be changed to male on his school records as well as his name changed, for which only the request for the name change had the proper documentation to be fulfilled. Johnston continued to live in accordance with the male gender identity while enrolled at UPJ, including using of the men's restrooms and locker rooms on campus, as well as enrolling in male-designated classes.

On September 19, 2011 Johnston was informed by the university that he could no longer use the men's locker room, upon which Johnston agreed to use a unisex locker room typically reserved for referees. Soon after, the defendants informed the plaintiff that he would be permitted to use the men's locker room if his student records were changed from female to male, which required the provision of a court order or new birth certificate that reflects the plaintiff's

Johnston v. University of Pittsburgh of the Commonwealth System of Higher Education

United States District Court for the Western District of Pennsylvania
97 F.Supp.3d 657
March 31, 2015

current gender. Johnston began reusing the men's locker rooms regardless, and in October and November of 2011 received two separate citations for disorderly conduct based on his use of the men's locker room. Additionally, the defendants banned Johnston from using the sports center, an athletic building on campus, and required his attendance at a disciplinary hearing.

On November 28, 2011 Johnston used the men's locker again and was subsequently issued his third citation for disorderly conduct, being found guilty of violations of the Student Code of Conduct. Several sanctions were placed on Johnston, including "exclusion from all male-designated campus facilities" for the remainder of his time at UPJ (*Johnston v. University of Pittsburgh of the Commonwealth System of Higher Education*, 2015). Despite these sanctions Johnston continued to use men's restrooms around campus. As a result the plaintiff was called for another disciplinary hearing, found guilty of exhibiting disorderly conduct, failing to comply with the lawful directions of UPJ, and the unauthorized entrance to university facilities and was consequently expelled from the university. After his expulsion the Federal Bureau of Investigation (FBI) investigated Johnston as a suspect for a series of bomb threats received by UPJ. Johnston alleged that this was an act of retaliation by UPJ, claiming the defendants' conduct caused him to suffer from post-traumatic stress disorder.

Disclaimer

The comments regarding the case presented here are generalized thoughts and not hard law. The cases in The Law and You are illustrative of situations that can happen and how the courts have responded to the circumstances. The generalized thoughts may not apply or be proper in all states and jurisdictions and under all circumstances. Finally, it is important to understand that the tips provided may not apply in your state or jurisdiction.

Case Analysis

In his second amended complaint to the District Court, Johnston asserted discrimination and retaliation claims under the Equal Protection Clause of the Fourteenth Amendment, Title IX of the Education Amendments, and Pennsylvania state law.

Discrimination. The plaintiff first claimed that the defendants violated the Equal Protection Clause under the Fourteenth Amendment, Title IX of the Education Amendments of 1972, and Pennsylvania state law by not allowing him to use men's locker rooms and restrooms on campus. The Equal Protection Clause provides that a state is not to "deny to any person within its jurisdiction the equal protection of the laws" (U.S. Const. amend. XIV, § 1). The plaintiff alleged that the defendants treated him differently from other students with similar situations on the basis of sex, transgender status, and failure to conform to the gender stereotypes, by denying the plaintiff access to men's locker rooms and restrooms while permitting access to non-transgender male students.

In response, the defendants argued that 'transgender' is not a suspect classification under the Equal Protection Clause and therefore only requires a rational basis review, asserting that UPJ's conduct was to "protect the privacy rights of students at UPJ" (*Johnston v. University of Pittsburgh of the Commonwealth System of Higher Education*, 2015). More specifically, the defendants maintained the students' "right to disrobe and perform personal bodily functions out of the presence of members of the opposite biological sex" (*Johnston v. University of Pittsburgh of the Commonwealth System of Higher Education*, 2015).

In relation to the Equal Protection claim, the District Court affirmed that transgender individuals do not constitute a "suspect" class, as was set forth by precedent (e.g., *Brown v. Zavaras*, 1995; *Jamison v. Davue*, 2012; *Lopez v. City of New York*, 2009). Therefore, based on a rational basis review, the District Court found that sex-segregated locker room and bathroom facilities, on the basis of biological sex, are substantially related to a government interest. Furthermore,

the District Court ruled that the plaintiff failed to establish that he was discriminated against based on his sex, as the plaintiff alleged he was assigned the female sex at birth, identified the female sex on his UPJ application, and has not updated his school records to reflect a male sex nor inferred any kind of sex reassignment surgery.

Title IX prohibits discrimination on the basis of sex in any education program that receives federal funding (20 U.S.C. § 1681-1688, 2013). In response to the plaintiff's Title IX complaint, the defendants argued that the claim lacked merit because the language of Title IX does not prohibit the act of discrimination on the basis of gender identity, expression or transition but rather on the basis of sex. As federal courts have yet to address whether a student can claim discrimination based on transgender status under Title IX (*Johnston v. University of Pittsburgh of the Commonwealth System of Higher Education*, 2015), the District Court relied on federal cases involving Title VII of the Civil Rights Act of 1964. In *Ulane v. Eastern Airlines, Inc.* (1984), the court concluded that "if the term 'sex' ... is to mean more than biological male or biological female, the new definition must come from Congress." This traditional rather than expansive interpretation has been upheld by later courts (e.g., *Etsitty v. Utah Transit Auth.*, 2007). In the current case the District Court concluded that the language of Title IX does not protect against discrimination based on transgender status. Furthermore, while Title IX is intended to protect equal opportunities in educational settings, sex-segregated spaces are not necessarily prohibited. More specifically, Title IX regulations permit "separate toilet, locker room, and shower facilities on the basis of sex" (34 C.F.R. § 106.33, 2010).

The plaintiff alleged discrimination not only based on his transgender status, but also based on his failure to conform to sex stereotypes. The District Court found that the plaintiff failed to establish a sex stereotyping claim, as this type of claim is based on behaviors, mannerisms and appearances, for which UPJ allowed him, without harassment

or discrimination, to act and dress like a man, change his name, and enroll in classes designated for men. Ultimately, the plaintiff's sex stereotyping claim was discredited because enforcement of the university's policy of sex-segregated bathrooms and locker rooms was based on his birth sex, not how he behaved, walked, talked or dressed. For the above reasons, the District Court granted the defendant's motion to dismiss the plaintiff's federal claims of discrimination, while the state law claims were dismissed without prejudice as the federal court declined to exercise supplemental jurisdiction over these related claims.

Retaliation. In addition to claims for discrimination, the plaintiff claimed retaliation under the Equal Protection Clause and Title IX, based on UPJ providing the plaintiff's name to the FBI for investigation of potential involvement in bomb threats against the school after his expulsion. While filing sexual discrimination complaints to the courts is considered a protected activity, the District Court found no evidence of retaliation under the Equal Protection Clause and Title IX because the plaintiff failed to sufficiently establish that the defendants' action was motivated by retaliation aims. Therefore, the defendants' motion to dismiss the plaintiff's federal claims of retaliation was granted, for which the state law claims were similarly dismissed with prejudice due to the District Court declining to exercise supplemental jurisdiction.

Discussion

The District Court's dismissal of the plaintiff's discrimination and retaliation claims was largely due to legislation not recognizing transgender as a protected class, but rather a person's biological sex as the protected class. In the eyes of the law, Johnston is a female. Therefore, the university is within their rights to deny a transgender male, who is biologically a female, access to male-designated spaces, based on the governmental interest of protecting the privacy of students to disrobe outside of the presence of individuals of the opposite sex. The university attempted to accommodate Johnston by allowing him to change his

sex on school records provided that he show proper documentation, accepted his name change to a more traditional male name, and allowed him to enroll in classes designated for men. Ultimately, the plaintiff's request to perform some of life's basic functions in the facilities for individuals of the gender he sexually identifies with is a critical issue to consider from a practitioner and legislative standpoint.

It is important for public institutions and the courts to be mindful of the changing legal landscape in relation to protected rights based on sexual identity and orientation. For example, in April of 2015 the Equal Employment Opportunity Commission "concluded that denying the use of a restroom consistent with their gender identity" is regarded as sex discrimination under Title VII of the Civil Rights Act (Glasser, 2015). In light of the persistent reliance on Title VII to define and interpret "sex" (Buzuvis, 2013), the expanding legal interpretation of sex discrimination under Title VII to encompass both biological sex and gender identity has significant implications for future cases.

Implications

In the United States, awareness of human rights issues concerning the lesbian, gay, bisexual, transgender and queer (LGBTQ) community has burgeoned. According to a recent study, there are an estimated 700,000 transgender adults in the United States (0.3% of adults; Gates, 2011). Little research has examined national population estimates of transgender youth; however, Shields and colleagues found approximately 1.3% of middle school youth to identify as transgender (Shields et al., 2013). It is a challenge to gauge the exact demographics of this population due to the lack of surveys that include this topic, as well as the lack of willingness of some participants to disclose their gender identity.

With so much attention on former Olympian Caitlyn Jenner, famous world-champion skier Erik Schinegger, Chloe Anderson (the first transgender athlete in Santa Ana College), Chris Mosier (the first transgender athlete to join a U.S. national team matching his

gender identity), and other transgender athletes, GID and transgender rights have become a widely discussed topic in the world of sports (Brown, 2015). These athletes have helped pave the way for transgender people to live according to the gender with which they identify. While this group of individuals is not yet identified as a protected class according to the law, it is important to consider risk-management strategies that can decrease possible litigation against schools and sport organizations in relation to sex discrimination. In light of the *Johnston v. University of Pittsburgh of the Commonwealth System of Higher Education* (2015) case, practitioners in both school and sport should consider the following strategies:

- All students and sport participants need to be informed of policies instated by the university, club, high school or athletic department on permitted locker-room usage.
- Schools should develop explicit procedures regarding the process for students to gain permission to use the locker-room facility consistent with their gender identity.
- Administrators should consider creating gender-neutral changing spaces for individuals who feel uncomfortable changing in the space designated for their biological sex.
- If the creation of a gender-neutral locker room causes undue hardship, administrators should consider creating a designated changing place or stall within existing segregated locker rooms for transgender individuals to have the option to change in private.
- If facility accommodations are not reasonable, separate changing schedules after a practice or physical education class will help provide safety and comfort for transgender students (The New York City Department of Education, 2016).
- Physical education and sport administrators should monitor locker rooms for potential bullying and harassment (GLSEN Sports Project, 2016).

As a school or athletic administrator, it is important to be aware of the changing legal landscape in relation to gender identity and transgender rights. The guidelines presented here reflect

practical steps to decrease risk of discrimination and to create a welcoming and inclusive environment.

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