trative determination was bounded by the administrative factual record. A.S.L.

7th Circuit Rules Prison Not Required to Provide Treatment for Gender Dysphoria

The U.S. Court of Appeals for the 7th Circuit ruled on Dec. 9 that a trial court correctly dismissed a suit by a transsexual prisoner seeking estrogen treatment, rejecting a claim that denial of such treatment constitutes cruel and unusual punishment under the 8th Amendment. *Maggert v. Hanks*, 1997 WL 757446. In a decision by Chief Judge Richard Posner, the court concluded that prisoners are not entitled to medical care that in the civilian world would only be available to the "wealthy."

When prisoner Tasha Maggert claimed to be gender dysphoric and requested treatment, the prisoner hired a psychiatrist to examine Maggert and supervise treatment. The psychiatrist refused to prescribe estrogen, instead recommending that Maggert continue to see the prison psychologist for counseling. The psychiatrist had concluded that Maggert did not actually have gender dysphoria, stating that Maggert's "sexual identity is polymorphous and his sexual aims ambiguous." Judge Posner noted that Maggert had "not submitted a contrary affidavit by a qualified expert and so has not created a genuine issue of material fact that would keep this case alive."

Ordinarily, that comment would dispose of the matter. But Posner, author of the controversial book *Sex and Reason*, was apparently looking for an excuse to deal more generally with the issue of the constitutional standard for dealing with prisoner claims to treatment for gender dysphoria, and this case provided the excuse. Posner asserted that gender dysphoria is a "rare condition" but that enough prisoners were filing claims to have generated a body of "jurisprudence of transsexualism" of a "problematic character."

Posner's analysis of the situation proceeds along the following lines: First, the 8th Amendment forbids prisons from ignoring "serious medical afflictions" of prisoners. Gender dysphoria "is a serious psychiatric disorder, as we know because the people afflicted by it will go to great lengths to cure it if they can afford the cure. The cure for the male transsexual consists not of psychiatric treatment designed to make the patient content with his biological sexual identity — that doesn't work — but of estrogen therapy designed to create the secondary sexual characteristics of a woman followed by the surgical removal of the genitals and the construction of a vagina-substitute out of penile tissue... Someone eager to undergo this mutilation is plainly suffering from a profound psychiatric disorder." Consequently, the prison is not free to ignore the gender dysphoric prisoner's need for medical treatment.

"Yet," insists Posner, "it does not follow that the prisons have a duty to authorize the hormonal and surgical procedures that in most cases at least would be necessary to 'cure' a prisoner's gender dysphoria." Posner describes the procedures as "protracted and expensive" and observes that Medicare does not cover them and, with rare exceptions, Medicaid does not cover them either. "A prison is not required by the 8th Amendment to give a prisoner medical care that is as good as he would receive if he were a free person, let alone an affluent free person... Withholding from a prisoner an esoteric medical treatment that only the wealthy can afford does not strike us as a form of cruel and unusual punishment. It is not unusual; and we cannot see what is cruel about refusing a benefit to a person who could not have obtained the benefit if he had refrained from committing crimes. We do not want transsexuals committing crimes because it is the only route to obtaining a cure."

So where does that leave transsexual prisoners? According to Posner, "except in special circumstances that we do not at present foresee, the 8th Amendment does not entitle a prison inmate to curative treatment for his gender dysphoria. Of course, as the cases have already established, he is entitled to be protected, by assignment to protective custody or otherwise, from harassment by prisoners who wish to use him as a sexual plaything, provided that the danger is both acute and known to the authorities."

Posner does not address (out of ignorance or deliberate oversight?) the frequently recurring question of whether a prisoner who was in the course of estrogen treatment when subjected to confinement is entitled to a continuation of that treatment while incarcerated in order to maintain her physical status. Posner's use of the term "mutilation" also betrays a rather unfortunate lack of empathy with the people whose needs he so blithely dismisses in this egregious display of dicta. A.S.L.

5th Circuit Rules That Calling Someone a "Faggot" is Per Se Defamation in Texas

When George Plumley, who was assisting his son, Wesley, in buying a truck from Landmark Chevrolet, Inc., revealed to Hamilton, the salesman, during a discussion on financing for the purchase that he had AIDS. Allegedly, Hamilton rudely repudiated the deal, stating "we just don't want your business." The salesman also allegedly asked Wesley if he had a "fucking problem" and called Plumley a "fucking faggot." These comments were made in the presence of Plumley's daughter-in-law and her young daughter. As a result of this incident, Wesley bought his truck elsewhere, and George filed suit against Landmark and the salesman. *Plumley v. Landmark Chevrolet, Inc.*, 122 F.3d 308 (5th Cir., Sept. 24, 1997). Plumley subsequently died and his wife Diane was substituted as named plaintiff. Plumley had asserted claims of slander, intentional infliction of emotional distress, and violations of the Texas Deceptive Trade Practices Act and the Americans With Disabilities Act, Title III (public accommodations). The district judge granted summary judgment on all claims for the defendants.

Writing for the circuit court, Judge Duhe affirmed the district court on all counts save one: the slander claim. Duhe commented that the district court had "erroneously held that the slander cause of action did not survive Plumley's death." Although it is true that you can't slander the dead, you can slander them while their still alive and owe compensation to their estates!

Landmark had also argued that there was no publication of the slanderous comment and no proof of special damages. But Duhe asserted that proof of special damages is not required, because calling somebody a "faggot" in Texas is slander per se. "Landmark argues that Hamilton's comment was not slander per se because the only crime imputed is sodomy which in Texas is a misdemeanor punishable by fine only. We disagree. *Head v. Newton*, 596 S.W.2d 209, 210 (Tex.Civ.App. — Houston [14th Dist.] 1980, no writ), holds that calling someone 'queer' is slander per se even though sodomy is a misdemeanor no longer punishable by imprisonment. Thus, when Hamilton called Plumley a 'faggot', Hamilton imputed the crime of sodomy to Plumley. Therefore, the alleged remark is slander per se and Plumley does not have to prove special damages."

As to publication, Landmark argued that for a statement to be defamatory, the third party to whom it is uttered must believe the substance of it, and in this case there is no evidence that Plumley's daughter-in-law had believed it or that the daughter-in-law's daughter was old enough to understand it. Again the court stated its disagreement. So long as the third party "understands the words in a defamatory sense," publication has occurred; in this case, whether the daughter-in-law understood the statement as defamatory was a question of fact for trial.

Consequently, plaintiff made out a prima facie case and was entitled to trial of the slander claim. However, the court found that an emotional distress claim does not survive the death of the plaintiff, and that Plumley was not a "consumer" within the meaning of the Texas statute, because he was not buying the truck for himself, merely loaning some of the purchase price to Wesley, and Wesley had not joined the case as a plaintiff.

However, the court upheld dismissal of all other claims, most significantly the Americans With Disabilities Act Title III claim. This claim alleged that the dealership refused to deal with Plumley because he had AIDS. The court observed that the remedy under Title III is limited to injunctive relief. Since Wesley bought his truck elsewhere and Plumley is dead, injunctive relief is not necessary under the circumstances. "Plumley has died and his son bought another truck," wrote Duhe: "It is unlikely that Landmark will wrong Plumley again." Further, the court held that at this point there is not an actual case or controversy under the ADA sufficient to grant a declaratory judgment: "No actual controversy exists between