No Right to Cross-Dress in State Penitentiary

In *Long v. Nix*, 1995 WL 96864, an Iowa federal district court held that a male Iowa state penitentiary inmate asserting a 42 U.S.C. § 1983 action had no federal constitutional right to be permitted to cross-dress or to receive medical treatment for his gender dysphoria. Quoting *Estelle v. Gamble*, 429 U.S. 97 (1976), the court noted that an 8th Amendment violation occurred where the state acted with "deliberate indifference" to a prisoner's serious medical need. Finding the extent of the inmate's gender identity disorder insufficient to constitute a serious medical need, the court observed that the inmate was motivated by the need for both female gender identity expression and sexual stimulation, and the latter stimulus was not of protectable magnitude. Summarily rejecting the inmate's 14th amendment due process claim, the court declared that the inmate had no property or liberty interest in either particular medical care or a specific prison classification. R.M.

Same-Sex Marriage Developments

Concerned about the possibility that same-sex couples may be able to marry in Hawaii and will seek to gain recognition of their marriages elsewhere, several state legislatures have taken up proposals to enact public policy statements against same-sex marriage that might be relied upon by courts to deny "full faith and credit" to out-of-state marriages. On March 17, Utah Governor Mike Leavitt signed such a bill into law. A spokesperson for Gay and Lesbian Utah Democrats (GLUD) vowed that the organization would challenge the constitutionality of the measure in court, once there is a married same-sex couple to bring a challenge (which may not be for several years due to the snails pace of the Hawaii litigation). The ACLU of Utah director indicated she expected her organization to be involved in any such lawsuit. *San Francisco Sentinel*, March 22. Meanwhile, GLUD has launched an effort to keep the Winter Olympics out of Utah in 2002 as a protest. ⋒⋒⋒ Previously, the South Dakota Senate voted 17–13 on March 1 to reject a similar bill, which had passed the state's House of Representatives. A similar bill is pending in Alaska.

In *Baehr v. Lewin*, the Hawaii same-sex marriage case scheduled for trial beginning September 25, Honolulu Circuit Court motions judge Herbert K. Shimabukuro rejected a motion by the Mormon Church to become a co-defendant in the case with the state of Hawaii. The church apparently thought the state would not defend the current marriage law with sufficient vigor, in light of statements supporting same-sex marriage by Governor Cayetano.

Hungary's Constitutional Court issued a ruling March 8 rejecting a constitutional challenge to the exclusion of same-sex couples from obtaining civil marriages. In the same decision, however, it held unconstitutional the exclusion of same-sex couples from common law marriage. The case was brought by Homerosz Lambda Organization, a Hungarian gay activist group. The court sent the issue to the legislature for adjustments to the statute governing common law marriage. Unless some change is made to Hungary's constitution in response to this case, it appears that same-sex couples will be entitled to the benefits of common law marriage, as that concept is embraced in Hungarian law. (Interestingly, the Associate Press reported the story as a loss for the gay group [see *New Orleans Times-Picayune*, March 9], while Reuters [see *San Francisco Examiner*] reported it as a win, also on March 9.)

Reuters reported March 15 that two Cambodian women, one dressed as a man, were legally married in large ceremony in Kro Bao Ach Kok village, according to a Cambodian newspaper which described the event as a "strange story." Cultural diversity, we say. A.S.L.

N.Y. Court Rules Discrimination Against Transsexual is Sex Discrimination

Finding that N.Y. City's employment discrimination ordinance should be broadly construed to achieve its intended purpose, a State Supreme Court justice held that the prohibition against sex discrimination in the workplace applies to transsexuals. *Maffei v. Kolaeton Industry Inc.*, S.Ct. N.Y. Co., IA Part 19, NYLJ, 3/17/95 p.26 (Lehner, J.).

The issue arose after plaintiff, born Diane Maffei, underwent sex reassignment surgery in January 1994. Although the record is unclear as to what physical changes had taken place, the plaintiff held himself out to be Daniel Maffei. He had been employed by Kolaeton Industry for 8 years prior to the surgery. Until then, he was frequently praised for his work and received numerous pay increases and bonuses. After his operation, the president of Kolaeton, Mr. Wong, began to degrade and humiliate the plaintiff, stripped him of his duties, and stated in front of the office that what he did was "immoral." Plaintiff claimed that this rose to the level of a hostile work environment. Defendant denied plaintiff's allegations and moved to dismiss the complaint for failure to state a claim on which relief can be granted. The defendant asserted that even if the allegations were true, there is no cause of action because neither federal, state nor city laws recognize transsexuals as a protected class.

Justice Lehner first reviewed the applicable statutes. Title VII of the 1964 Civil Rights Act, as well as state and city laws, prohibit discrimination on the basis of sex. N.Y. City law also prohibits discrimination on the basis of sexual orientation. Two major Supreme Court cases are used as the benchmark for Title VII violations. The first, *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), held that "[i]n order for sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of (the victim's) employment and create an abusive working environment." In the second, *Harris v. Forklift Systems, Inc.* 114 S.Ct. 367 (1993), Justice O'Connor wrote: "Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."

The plaintiff did not claim to fall within the federal or state statute, but relied on the city provision prohibiting sexual orientation discrimination. Justice Lehner found that this did not help Maffei, stating that the prohibition against sexual orientation discrimination deals with "sexual preferences and practices," and that these were not at issue. "There is no claim that the harassment alleged herein is the result of any sexual preferences expressed by plaintiff." He added that in *Underwood v. Archer Management*, 857 F.Supp. 96 (D.D.C. 1994), the only case in which a transsexual sought to claim coverage on a statute prohibiting discrimination based on sexual orientation, the complaint was dismissed because it was "devoid of any claim of discriminatory conduct based on plaintiff's real or perceived preference or practice of sexuality." The court distinguished transsexuals from homosexuals; in its view, transsexuals may be aroused by persons of the same anatomic sex, like homosexuals, but transsexuals do not view themselves as members of that sex, whereas homosexuals do.

Federal courts have unanimously held that Title VII prohibitions do not apply to transsexuals. *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984) cert. denied 471 U.S. 1017, found that "[w]hile a transsexual claiming discrimination because of his or her current status as a male or female could state a valid cause of action under Title VII, the discrimination was because the plaintiff was a biological male who takes female hormones, cross dresses, and has surgically altered parts of her body to make it appear to be female. The statute does not protect persons based on their sexual identity." Lehner concluded that the *Ulane* ruling is consistent with every federal ruling on the issue, but that the federal cases were unduly restrictive and that they should not be followed in interpreting the city ordinance.

The court then considered the only N.Y. case on the issue, *Richards v. United States Tennis Association*, 93 Misc.2d 713 (Sup.Ct. N.Y. Co. 1977), in which Dr. Renee Richards, who had undergone sex reassignment surgery from male to female, sued USTA for prohibiting her from participating in the women's division of the United States Open Tennis Tournament. The *Richards* court had found that there was "overwhelming medical evidence" that demonstrated the plaintiff was female. Lehner observed that in most of the federal cases, the courts focused on the fact that there were numerous attempts in Congress to add "sexual orientation" to Title VII, all of which had failed. He then added, in what is perhaps the most startling in an opinion of startling statements, "[b]ecause Congress may have chosen not to include the term 'sexual orientation' in Title VII does not mean that it has considered and declined coverage to transsexuals." But in the reverse, he opined, if it is logical to assume that the failure of Congress to adopt legislation including sexual orientation in Title VII is proof of a lack of intent to include transsexuals, then the inclusion of sexual orientation in a statute evidences an intent to cover transsexuals. However, as he did not agree with the first part of the statement, he did not rely on the second.

He concluded by noting that anti-discrimination statutes are to be construed liberally in order to achieve their intended purpose. "New York City law is intended to bar all forms of discrimination in the workplace and to be broadly applied. The creation of a hostile work environment as a result of derogatory comments relating to the fact that as a result of an operation an employee changed his or her sexual status, creates discrimination based on 'sex,' just as comments would based on secondary sexual characteristics of a person. Thus, an employer who harasses an employee because the person, as a resulting of surgery and hormone treatments, is now of a different sex has violated our City prohibition against discrimination based on sex." Thus the motion to dismiss was denied. P.T.

N.Y. Court Grants Limited Name Change for Pre-Operative Transsexual

N.Y. City Civil Court Judge Lucindo Suarez (Bronx County) granted a legal change of name in a much-litigated application brought by William Rodriguez Rivera. *Matter of Rivera*, NYLJ, 3/10/95, p. 30, col. 3. Rivera, who sought to change her name to Veronica, originally filed a petition in Queens County, where it was denied by Judge Nathan L. Berke, who found that "the change of name from a 'male' name to a 'female' name would be fraught with danger of deception and confusion and contrary to the public interest." At the time, Rivera had not undergone sex-reassignment surgery or full hormonal treatment. Rivera filed again in Queens County, and was again refused, this time on grounds that her papers were "defective and not in proper form." Two years later, Rivera filed a new petition in Bronx County, but the petition was denied as "premature" by Judge Suarez.

The fourth time was the charm, for Judge Suarez, who seemed more moved by Rivera's "tenacity" than anything else, decided to grant the petition, even though the application made no allegation that Rivera had undergone sex reassignment surgery. "The prevailing psychiatric evaluation is that petitioner is a transsexual whose behavior, mannerisms and appearance are feminine, and that he is confident about his sexuality and choice of female gender. Dr. Benito B. Kish states that petitioner has undergone hormonal therapy for over 15 years, and that petitioner was born having both female and male characteristics. A psychotherapist states that petitioner is seen on a weekly basis and is under medication. Although the documentation in support leads to the conclusion that petitioner's comportment and sex orientation is that of a female, there is no claim that petitioner has in fact undergone a sex operation. However, upon the review of the corroborating competent medical affidavits, and the totality of the circumstances herein, including petitioner's tenacity in the pursuit of this name change, it is Ordered that petitioner's application to change his name from William Rodriguez Rivera to Veronica Rodriguez is granted solely upon the condition that petition not use or rely upon this order as any evidence whatsoever or judicial determination that the sex of petitioner has been changed anatomically." A.S.L.

Wisconsin Court Rejects Battering Defense in Murder Case

The Wisconsin Court of Appeals refused to set aside a 35-year sentence imposed after a guilty plea to felony murder, where the defendant argued that his homosexual relationship with the victim extending over 7 years was "marked by incidents of violence by the victim toward the defendant." *State v. Fitzpatrick*, 1995 WL 104584 (March 14). Defendant Edward C. Fitzpatrick beat the victim to death with a baseball bat and then robbed him "in an apparent attempt to cover up the murder." In appealing the sentence, Fitzpatrick argued that the court gave inadequate consideration to the abusive nature of the relationship, and gave undue weight to testimony of the victim's relatives, which Fitzpatrick claimed was "directed toward the goal of exacting a heavy price" from Fitzpatrick to expiate their guilt over having ostracized their gay family member. Fitzpatrick also asserted ineffective assistance of counsel, based on comments made by his attorney during the sentencing proceeding. The court of appeals, in a per curiam opinion, rejected the appeal, finding that Fitzpatrick's allegations had been adequately presented in the presentencing report, that no undue weight was given to the relatives' testimony, and that his counsel's performance had been well within the boundaries of reasonableness. A.S.L.

State Courts Rule in Lewdness Cases

The Texas Court of Appeals upheld the conviction of a man charged with public lewdness in an adult movie theater in *Campbell v. State*, 1995 WL 73091 (Feb. 23). The court held that a rational fact finder could have believed the police officer's version of the story (that the defendant groped himself and the officer) over the defendant's version (that the police officer had identified the wrong person in the dark theater, or that the defendant had accidentally bumped up against the officer). The court also rejected Campbell's arguments that the statute prohibited only heterosexual contact, and that there was insufficient evidence that he acted with the requisite intent "to arouse or gratify sexual desire." The officer testified, based on his