

# U.S. District Court Holds St. Joseph Medical Center of the University of Maryland Medical System Corporation Violated Title IX by Canceling Hysterectomy for Transgender Patient

By Matthew Goodwin

On January 6, 2023, Senior U.S. District Judge Deborah Chasanow (D. Md.) ruled in favor of Jesse Hammons, a transgender man, in his suit against St. Joseph Medical Center of the University of Maryland Medical System Corporation (UMMS) for refusing to perform a hysterectomy to treat his gender dysphoria. *Hammons v. Univ. of Md. Med Sys. Corp.*, 2023 U.S. Dist. Lexis 2896; 2023 WL 121741.

Hammons sued St. Joseph, UMMS, and the UMMS Health System (UMMSJ) under Section 1557 of the Affordable Care Act (ACA) which forbids health care programs receiving federal funds from discriminating on grounds prohibited by Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex.

Importantly, Judge Chasanow's ruling relied on the reasoning of *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), which held that, in employment discrimination claims under Title VII, "it is impossible to discriminate against a person for being . . . transgender without discriminating . . . based on sex." As readers are likely aware, there is a continuing controversy over whether *Bostock's* reasoning should also be used to construe Title IX in claims such as Hammons'. Judge Chasanow's decision takes the position that *Bostock's* reasoning is, indeed, "portable" beyond just Title VII.

The facts of the case began in September of 2019 when Hammons was scheduled by the attending physician at St. Joseph for a hysterectomy—i.e., a surgery to remove a person's uterus. The procedure was calendared for early January of 2020. In late December of 2019, the Chief Medical Officer of St. Joseph, Dr. Gail Cunningham, learned about the upcoming surgery and stated that St. Joseph cannot perform transgender surgery. She went on to testify in a deposition that "the fact

that it was a gender transition treatment . . . was enough to deny [permission to perform the surgery]." The night before the surgery, the hospital called Hammons and let him know it had been cancelled due to the fact it was to treat gender dysphoria as opposed to another medical diagnosis.

When UMMS purchased St. Joseph in 2012 from Catholic Health Initiatives, it agreed as a condition of the sale that UMMS would continue to operate St. Joseph in a manner consistent with Ethical and Religious Directives for Catholic Health Services (ERDs) adopted by the Conference of Catholic Bishops. The ERDs stipulate "[g]ender transitioning of any kind is intrinsically disordered because it cannot conform to the true good of the human person, who is a body-soul union unalterably created male or female. Gender transitioning should never be performed, encouraged, or positively affirmed as a good in Catholic health care. This includes surgeries, the administration of cross-sex hormones or pubertal blockers, and social or behavioral modifications." Why St. Joseph's attending physician scheduled the operation for Hammons in the first instance in light of the ERDs is not addressed in the opinion.

Hammons' suit also alleged violation of the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Those claims were dismissed in a prior opinion by Judge Chasanow after the defendants collectively argued they are "private corporations that cannot be sued under 42 U.S.C. 1983, or, alternatively, if they are found to be state actors, they are entitled to sovereign immunity on those claims." The court agreed with Defendants on the latter argument and found "that UMMS is an arm or instrumentality of the government for purposes of Plaintiff's

assertion of claims under § 1983 as well as for purposes of sovereign immunity."

After that decision, defendants were allowed to amend their answer to add two additional affirmative defenses—namely that the suit should be dismissed based on the Religious Freedom Restoration Act (RFRA) and the ecclesiastical abstention doctrine.

Hammons opposed defendants' motion to amend, arguing the court had already deemed them to be state actors.

The defendants responded, essentially, by arguing that later developments—i.e., an appeal—might change Judge Chasanow's earlier ruling so that they would instead be deemed private actors and then these new defenses might apply. Judge Chasanow permitted the amendment, but pointed out that it was unclear how, even if they were deemed private rather than state actors, a RFRA defense might apply to a claim brought by a private person such as Hammons or what role ecclesiastical abstention could play. RFRA, it should be pointed out, is typically a defense reserved to protect against action by the Federal Government seeking to interfere with a person's exercise of religious belief and Hammons was acting individually and has no affiliation the Federal Government in the lawsuit.

As Professor Arthur Leonard pointed out in his article reporting on this case for *Gay City News*, there might also be an Establishment Clause issue if an entity that has been found to be a state actor with sovereign immunity against constitutional claims was allowed to make a free exercise of religion claim.

The January 2023 opinion decided cross motions for summary judgment.

Hammons argued the undisputed facts established that defendants discriminated on the basis of sex. Defendants opposed claiming that (1) UMMS was not a proper defendant because St. Joseph was the "relevant"

recipient of federal funds under Section 1557; (2) a nationwide injunction from the District Court of North Dakota required dismissal of Hammons's case; (3) defendants' conduct was not intentional discrimination on the basis of sex because the policy at issue was neutrally applicable.

Judge Chasanow first dispensed with the defendants' argument that cancelling Hammons's surgery was pursuant to a neutrally applicable policy. "[A]s under Title IX, Section 1557 prohibits discrimination on the basis of sex. Upon review of the parties' statements of undisputed facts and the exhibits to their motions, the undisputed facts establish that the cancellation was discrimination on the basis of sex because it was pursuant to a policy against providing gender-affirming care—a policy that in practice permits all patients to obtain doctor-recommended, medically necessary hysterectomies, *except* transgender patients seeking treatment for gender dysphoria. Defendants' attempt to frame the policy as neutrally applicable is unavailing."

Judge Chasanow went on to write, ". . . the policy at issue here is not a neutrally-applicable prohibition on all hysterectomies, or even a prohibition on hysterectomies for the purpose of elective sterilization—it is a prohibition on hysterectomies (along with other gender-affirming surgeries) that are sought by transgender patients for the purpose of treating gender dysphoria . . . the true basis for Defendants' refusal to perform the surgery was Mr. Hammons's transgender status."

Next, Judge Chasanow went on to explain how maintaining a policy against providing gender affirming care is discrimination on the basis of sex under Section 1557 of the ACA. It is here that the judge imports the reasoning of *Bostock*.

"The Supreme Court and the Fourth Circuit have yet to extend the principles they have applied in employment and school discrimination cases to discrimination against gender-affirming treatment in a healthcare setting. However, multiple district courts in the Fourth Circuit have done so; because the facts in those cases are closely analogous

to the fact in the present case, their reasoning is persuasive here."

Judge Chasanow pointed to *Fain v. Crouch*, 2022 U.S. Dist. Lexis 137084, 2022 WL 3051015, a class action suit on behalf of transgender persons in West Virginia which held, using *Bostock's* reasoning, that the West Virginia Medicaid Program's exclusion of surgical treatment of gender dysphoria violated section 1557 and the Equal Protection Clause.

The judge also reviewed *Kadel v. Folwell*, 2022 U.S. Dist. Lexis 103780, 2022 WL 3226731, which held, also relying on *Bostock*, in favor of transgender individuals seeking gender-affirming treatments after denial by the North Carolina State Health Plan for Teachers.

As to Hammons, then, "[d]efendants necessarily and intentionally relied on sex in creating and enforcing a policy that prohibits treatment if a patient's medical need for that treatment is an incongruence between the patient's gender identity and sex assigned at birth."

Judge Chasanow did not accept the defendant's citation to an out-of-circuit district court case, *Polonczyk v. Anthem BlueCross & BlueShield*, 586 F. Supp. 3d 648 (E.D. Ky. 2022). There, a transgender litigant's claim was dismissed on the basis that the health insurance plan at issue ". . . excluded all 'cosmetic' procedures from coverage, which included certain gender-transition-related procedures" and, apparently, the plaintiff, unlike Hammons, failed to show the exclusion was intentional sex discrimination.

The defendants also tried to rely on *General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S. Ct. 401 (1976) in which the Supreme Court held that discriminating against someone on the basis of pregnancy was not discrimination on the basis of sex under Title VII. Judge Chasanow pointed out, of course, that after *General Electric*, Congress amended Title VII in response to that decision by adding "pregnancy, childbirth, or related medical conditions to the definition of 'on the basis of sex.'"

Having found summary judgment in favor of Hammons was appropriate, Judge Chasanow went on to consider the defendants' remaining claims

that judgement in their favor and not Hammons's was appropriate.

First, defendants argued that "[b]ecause Section 1557, like Title VI, Title IX, and the Rehabilitation Act, is Spending Clause legislation that operates like a contract between the government and the recipient of federal funds in which the recipient agrees to comply with federally imposed conditions, they argue that 'liability only attaches to the actual recipient of federal funds for its own misconduct occurring in its own program or activities.'" The Court responded that it has never been established that an entity's parent corporation such as UMMS could not be held responsible for a subsidiary such as St. Joseph. The court also pointed to Title IX's legislative history, writing that Congress never intended to limit the scope of Spending Clause legislation to only the government and the direct recipient of the funds. "At a minimum, UMMS can be held directly liable under Section 1557 for owning and operating a hospital that adheres to discriminatory policies—and ensuring it does so as required by the contracts entered into by UMMS."

Second, the defendants argued that a 2021 injunction in *Religious Sisters of Mercy v. Azar*, 2021 U.S. Dist. Lexis 79043, 2-21 WL 1574628, required dismissal. In that case, the District Court of North Dakota enjoined the Department of Health and Human Services, Secretary Azar, and anyone acting on their behalf, in concert or participation with them, from enforcing Section 1557 against, among others, the Catholic Benefits Association (CBA).

St. Joseph, apparently, joined the CBA recently. Judge Chasanow, in rejecting this argument, pointed out that Hammons was not a party to the lawsuit in North Dakota and is not enjoined by the terms of the injunction.

Third, the defendants claimed there were facts in dispute with regard to the "corporate relationships" between the defendants, as well as St. Joseph's policies and motives and that this "dispute" was material to the disposition of Hammons's claims. Judge Chasanow rejected that there was any dispute as to legal relationships of the defendants, instead

writing that there was a “difference in characterization of undisputed facts.”

Additionally, the defendants seemed to try to argue that, while Hammons said he sought the hysterectomy for gender affirming care, he actually sought a hysterectomy for the purpose of sterilization—and St. Joseph refuses to perform sterilization hysterectomies on anyone. The judge rejected this, pointing to the statements of Dr. Cunningham that the procedure was cancelled because “it was a gender transition treatment.”

Finally, the defendants argued that, even if they are not entitled to summary judgment, Hammons is not entitled to summary judgment against St. Joseph because St. Joseph is entitled to raise a RFRA defense at trial.

Wrote Judge Chasanow, “[b]ecause St. Joseph is a state actor, it simply may not assert this defense.” “By the time Defendants sought to assert this defense, the court had ruled that they, as a single unit of three entities, were entitled to sovereign immunity as to § 1983 claims precisely because they were an instrumentality of the state. And St. Joseph has not sought reconsideration of that ruling.”

Although RFRA is typically a defense reserved to protect against action by the Federal Government seeking to interfere with a person’s exercise of religious belief, Judge Chasanow did discuss three circuit courts that have allowed a private defendant’s RFRA defense in suits by private plaintiffs. She found that those cases were easily distinguishable and then went on to discuss how “multiple circuit courts have explicitly rejected the notion that RFRA can apply in a suit involving only private parties.”

Judge Chasanow concluded, “[i]f St. Joseph were not a state actor, the growing weight of authority . . . would counsel in favor of finding that it could not assert RFRA in a case brought by a private party.”

The Senior Director of Media Relations for UMMS provided the following statement to Professor Leonard following publication of his article on this case in *Gay City News*:

“The University of Maryland St. Joseph Medical Center and the University of Maryland Medical System

are carefully reviewing the decision from Judge Chasanow. We dispute many of the conclusions that were reached in this decision and may be in a position to comment further after additional analysis of the ruling. Legal disagreements aside, we sincerely wish the very best for Mr. Hammons and we support his efforts to seek the highest quality healthcare. We may disagree on certain technical, legal points but compassion for the patients we serve remains foundational to our work. This legal claim stems directly from, and is traceable to, a surgeon mistakenly scheduling a procedure that could not be performed at UM SJMC. Although our offer to perform gender affirming surgery at a different location was declined by Mr. Hammons, the University of Maryland Medical System remains committed to meeting the unique medical needs of transgender individuals and patients who are routinely scheduled by physicians for appointments and procedures at UMMS member organizations.”

[Editorial Note: Accompanying the above statement was an *assertion* that, contrary to the implication of its name, University of Maryland Medical System Corporation is not a part of the University of Maryland, but rather a separate non-governmental corporation. Presumably an appeal of this case would attempt to persuade the 4<sup>th</sup> Circuit Court of Appeals that Judge Chasanow was mistaken in labeling St. Joseph and UMMS as “state actors” that may not raise religious objections as a defense to a discrimination claim under the ACA.]

Hammons was represented by Abigail E. Marion, Andrew D. Cohen, Aron Fischer, Emily H. Harris, Jonah Knobler, of Patterson Belknap Webb and Tyler LLP, New York, NY; Daniel Mach, ACLU Foundation, Washington, DC; Jonathan S. Hermann, Patterson Belknap Webb and Tyler, New York, NY; Joshua A Block, Leslie Cooper, American Civil Liberties Union, New York, NY; Louis J Ebert, Rosenberg Martin Greenberg LLP, Baltimore, MD.

Senior Judge Chasanow was appointed by President William J. Clinton. ■

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## District Court Rejects Constitutional Challenge to Federal Hate Crime Prosecution in Anti-LGBTQ+ Bias Case

*By Arthur S. Leonard*

Chief U.S. District Judge Brian Morris rejected John Russell Howald’s argument that Howald could not be prosecuted for violating the federal Hate Crimes Prevention Act (HCPA), 18 USC Sec. 249 (a)(2), because, he argued, it exceeds Congress’s power under the Commerce Clause to federalize criminal law. *United States v. Howald*, 2023 WL 35049, 2023 U.S. Dist. LEXIS 1435 (D. Mont., Jan. 4, 2023). Later in January, Judge Morris denied a second motion to dismiss, this time predicated on the argument that the predicate offense, a violation of 18 USC Sec. 924(c)(1)(A), does not require a “crime of violence.” *See United States v. Howald*, 2023 WL 402509, 2023 U.S. Dist. LEXIS 12983 (D. Mont., Jan. 25, 2023). The court rejected this argument based on clear precedent involving the application of the HCPA.

*Howald* presents an egregious case, as the indictment was summarized by Judge Morris. John Russell Howald is a resident of Basin, Montana, who undertook a “self-described mission” to rid the town of its LGBTQ+ community, evidently one member at time, as he armed himself with three semi-automatic rifles on March 22, 2020, and carried them to the home of a lesbian in Basin, then firing at least seven shots at her home using an AK-47 style rifle. Luckily, nobody was injured, but police recovered one bullet from inside the house and located bullet holes in the fence, yard, deck and house. The indictment claims that Howald intended to kill the resident of the house because of her sexual orientation, and alleges that the rifle and its ammunition moved in interstate commerce, a jurisdictional element to invoke the HCPA. A bystander recorded