IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Newport News Division

G.G., by his next friend and mother, DEIRDRE GRIMM, Plaintiffs, v. GLOUCESTER COUNTY SCHOOL BOARD, Defendant.	)	Civil No. 4:15-cv-00054-RGD-TEM

PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Plaintiff respectfully submits this memorandum of law in opposition to Defendant's Motion to Dismiss (ECF No. 31). As G.G. explained in his principal brief and his reply brief in support of his Motion for Preliminary Injunction (ECF Nos. 18 and 41, both of which are incorporated by reference herein), he is likely to succeed on the merits of his claims under the Fourteenth Amendment and Title IX. For the same reasons, he has also stated valid claims for purposes of Fed. R. Civ. P. 12(b)(6).

Even if this Court concludes that G.G. is not likely to succeed on the merits for purposes of a preliminary injunction, however, the School Board's motion to dismiss must still be denied because the Complaint "state[s] a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The School Board concedes that, even under its narrow reading of sex-stereotyping case law, school policies that are actually motivated by disapproval of a student's gender nonconformity

constitute impermissible sex discrimination under the Fourteenth Amendment and Title IX. Def.'s Mem. 11, 14-15, ECF No. 30. The allegations in the Compliant are more than sufficient to raise a plausible inference that the School Board acted based on such improper motives. The School Board asserts that its transgender restroom policy is motivated by a desire to protect student privacy and "not because of a perception that Plaintiff does not conform to gender norms, or in an attempt to stigmatize, embarrass or otherwise reject Plaintiff." *Id.* at 11. But the School Board's motivation is a disputed question of fact that cannot be resolved on a motion to dismiss without any evidentiary record. *Cf. Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007) (ruling on summary judgment after full discovery).

I. Standard for Motions to Dismiss

In order to survive a motion to dismiss under Rule 12(b)(6) after *Iqbal* and *Twombly*, "a complaint must contain 'factual allegations sufficient to raise a right to relief above the speculative level.'" *McCleary-Evans v. Md. Dep't of Transp., State Highway Admin.*, 780 F.3d 582, 585 (4th Cir. 2015) (quoting *Twombly*, 550 U.S. at 555) (alterations incorporated). The complaint must contain "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face in the sense that the complaint's factual allegations must allow a court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (internal quotation marks, brackets, and citations omitted).

Even after *Iqbal* and *Twombly*, however, the plausibility standard does not impose a "'probability requirement.'" *Moody v. City of Newport News, Va.*, No. 4:14CV99, 2015 WL 1347475, at *5 (E.D. Va. Mar. 25, 2015) (quoting *Iqbal*, 556 U.S. at 678). "*Iqbal* and *Twombly* do not require a plaintiff to prove his case in the complaint. The requirement of nonconclusory factual detail at the pleading stage is tempered by the recognition that a plaintiff may only have

so much information at his disposal at the outset." *Robertson v. Sea Pines Real Estate Co., Inc.*, 679 F.3d 278, 291 (4th Cir. 2012). A plaintiff must simply "'nudge[ ] [its] claims across the line from conceivable to plausible' to resist dismissal." *Wag More Dogs Liab. Corp. v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012) (alterations in original) (quoting *Twombly*, 550 U.S. at 570).

II. The Complaint's Factual Allegations Raise a Plausible Inference of Improper Motive.

The allegations in the Complaint create a plausible inference that the School Board enacted the transgender restroom policy based, in whole or in part, on discomfort with G.G's gender nonconformity. The Complaint alleges that "some adults in the community were angered when they came to learn that a transgender student had been allowed to use the restroom corresponding to the student's gender identity," and they "contacted members of the School Board to demand that the transgender student be barred from continuing to use the restroom at issue." Compl. ¶ 33, ECF No. 8. The Complaint also alleges that Board member Carla B. Hook drafted the transgender restroom policy based on those complaints and placed it on the School Board's agenda without even notifying G.G. or his parents. *Id.* ¶¶ 34, 36. At the School Board meetings, speakers who urged the School Board to adopt the transgender restroom policy "displayed many misperceptions about transgender people," pointedly referred to G.G. as a "young lady" instead of a young man, and "suggested that boys who are not transgender would come to school wearing a dress and demand to use the girls' restroom for nefarious purposes." *Id.* ¶ 37. "One speaker called [G.G.] a 'freak' and compared him to a person who thinks he is a 'dog' and wants to urinate on fire hydrants." *Id.* ¶ 42. "Several speakers threatened to vote the School Board members out of office if they did not adopt the transgender restroom policy." *Id.*

As these factual allegations demonstrate, this is not a case where "[o]nly speculation can fill the gaps in [the] complaint" to draw an inference of improper motive. *McCleary-Evans*, 780

F.3d at 586. The statements at the School Board meeting strongly support a non-speculative inference that the transgender restroom policy was motivated at least in part by disapproval or discomfort with G.G.'s gender nonconformity. "[I]t is well-established that community views may be attributed to government bodies when the government acts in response to these views." *A Helping Hand, LLC v. Baltimore Coy., Md.*, 515 F.3d 356, 366 (4th Cir. 2008). Moreover, even if the School Board members merely capitulated to the threats of being voted out of office, the School Board cannot escape a finding of improper motive "by deferring to the wishes or objections of some fraction of the body politic." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985).

III. The School Board's Motivation Must Be Determined With the Benefit of Full Discovery.

The School Board asserts that its decision to pass the transgender restroom policy was not infected by sex-stereotypes or discomfort with G.G.'s gender nonconformity. Def.'s Mem. 11, 14-15, ECF No. 30. Whether that assertion is true or whether it is pretext can be determined only after discovery and the submission of evidence. "[T]o survive a motion to dismiss, plaintiff need not prove anything. Indeed, she need not even allege that defendant's proffered explanation is a pretext. This, of course, is because a plaintiff, when filing her complaint, does not yet know what explanation a defendant will proffer and has not yet had the opportunity to uncover evidence of pretext [in discovery]." *Hart v. Lew*, 973 F. Supp. 2d 561, 584 (D. Md. 2013). "A complaint need not make a case against a defendant or *forecast evidence* sufficient to *prove* an element of the claim. It need only *allege facts* sufficient to *state* elements of the claim." *Robertson,* 679 F.3d at 291 (emphasis in original) (internal quotation marks and citation omitted).

Evidence obtained in discovery will be highly relevant in determining whether the School Board acted based on improper motive. The School Board admits that it passed the transgender restroom policy in response to "numerous complaints from parents and students." Andersen Decl. ¶ 4, ECF No. 30-1. The press release it issued on December 3, 2014 also stated that the School Board received "a great deal of input from the local public through emails" and "phone calls." Press Release, Gloucester (Va.) Cty. Sch. Bd., *Gloucester School Board Prepares to Discuss, Likely Vote at Dec. 9 Meeting on Restroom/Locker Room Use for Transgender Students* 1 (Dec. 3, 2014).[1] The School Board has not disclosed the substance of the phone calls and emails it received, so there is no way to know whether those complaints were based on discomfort with or disapproval of G.G.'s gender nonconformity or any other improper motives.

Moreover, statements made by the School Board to the press indicate that several Board members believed that the transgender restroom policy could be illegal. In an apparent reaction to the proposal by Board member Hooks, School Board Chairman Randy Burak wrote in an email to other Board members on November 3, 2015: "I believe that if we do not move cautiously we will put the board, children, district, and community at risk unnecessarily." Frances Hubbard, *Gloucester schools face challenge with proposed transgender restroom policy*, Daily Press (Dec. 7, 2015).[2] Discovery will shed light on what statements and actions by other Board members prompted Mr. Burak's concern. Another School Board member, Kim Hensley, voted against the policy and continues to believe the transgender restroom policy violates Title IX. *See* Dominic Holden, *Teen Sues School District In Potentially Key Federal Case For*

[1] *Available at* http://gets.gc.k12.va.us/Portals/Gloucester/District/docs/SB/GlouSBPressRelease120314.pdf

[2] *Available at* http://www.dailypress.com/news/gloucester-county/dp-nws-mid-transgender-policy-20141207-story.html#page=1

Transgender Restroom Rights, BuzzFeed News (June 11, 2015).[3] Her testimony, and the testimony of other Board members, will also be important in demonstrating pretext. *Cf. Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184, 190 (5th Cir. 1995) (finding that school board's motivation for removing library book must be determined by "requiring testimony from all of the School Board members and permitting cross-examination probing their justifications for removing the Book").

IV. Defendant's Arguments Must Be Evaluated at Summary Judgment or Trial.

Even cases that the Defendant cites to defend the legality of its transgender restroom policy confirm that these questions cannot be resolved on a motion to dismiss. For example, in *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1225-26 (10th Cir. 2007), the Tenth Circuit affirmed dismissal at the *summary judgement* stage after considering deposition testimony from the defendants and concluding that the plaintiff had failed to create a genuine issue of fact as to whether the stated reasons for firing the plaintiff were pretextual. Similarly, in *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.,* 325 F. App'x 492, 494 (9th Cir. 2009) (unpublished), the Ninth Circuit affirmed dismissal at the summary judgment stage because defendant "proffered evidence" that that its decision was based on safety concerns and plaintiff had failed to submit sufficient evidence of pretext. At the outset of that case, in contrast, the defendant's motion to dismiss was denied. *See Kastl v. Maricopa Cnty. Cmty. Coll. Dist.,* No. CIV.02-1531, 2004 WL 2008954, at *3 (D. Ariz. June 3, 2004).

Just a few days ago, a district court denied a motion to dismiss a Title VII complaint by a transgender woman related to a university's discriminatory bathroom policy. The complaint alleged that the university created a hostile work environment based on sex by, among other

[3] *Available at* http://www.buzzfeed.com/dominicholden/teen-sues-school-district-in-potentially-key-federal-case-fo#.vlo7gvQe0P

things, prohibiting the plaintiff from using the same restrooms as other women. *See* Intervenor Compl. ¶¶ 45-57, 144-45, 166-69, *United States v. Se. Okla. State Univ*, No. 15-324 (W.D. Okla. July 10, 2015), ECF No. 24 (attached hereto as Exhibit B). The court concluded that, even under *Etsitty*, the plaintiff had stated a valid claim for sex discrimination because the alleged actions "occurred because she was female, yet Defendants regarded her as male." Mem. Op. & Order at 5, *United States v. Se. Okla. State Univ.*, No. 15-324 (July 10, 2015), ECF No. 34 (attached hereto as Exhibit A).

To be sure, the district court in *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, No. 13-213, 2015 WL 1497753 (W.D. Pa. Mar. 31, 2015), appeal docketed No. 15-2022 (3d Cir. Apr. 22, 2015), granted a motion to dismiss at the pleading stage. In doing so the court relied primarily on *Etsitty* and erroneously confused the standard for motions to dismiss with the standard for summary judgment. Moreover, even if *Johnston* had been correct, the factual background in this case – including the extensive record of comments at the School Board meetings – are sufficient to distinguish the factual allegations in *Johnston* from the allegations in this case.

CONCLUSION

For the foregoing reasons, and the reasons set forth in G.G.'s submissions in support of his Motion for a Preliminary Injunction, Defendant's Motion to Dismiss should be denied.

Respectfully submitted,

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Dated: July 16, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of July, 2015, I filed the foregoing document with the Clerk of Court's Electronic Document Filing system (ECF), which will automatically send a copy to all counsel of record.

/s/
Rebecca K. Glenberg