LGBT

Federal Courts Trumping POTUS's Military Transgender Ban

By Christopher J. Chimeri

In July of this year, President Trump tweeted that the Federal Government "will not accept or allow" transgender individuals to serve "in any capacity" in the U.S. Military. A year earlier, former President Obama established a policy that allowed transgender people to serve openly in our military.

President Trump's August 25, 2017 Memorandum (the "ban") contains three directives. First, all transgender service members are to be discharged starting no later than March 23, 2018. Second, the existing ban on accession of transgender members, which was scheduled to end on January 1, 2018, is to extend indefinitely. Third, after March 23, 2018, the Defense Department is required to cease providing sex reassignment surgery for transgender personnel, with a possible individual exception in cases where failure to complete procedures already underway could endanger the health of the individual.

Since then, four separate lawsuits were filed on behalf of plaintiffs challenging the policy. In all four cases, as of December of 2017, the various district courts have granted injunctive relief. Specifically, the ACLU first filed suit in the U.S. District Court in Maryland on August 8, 2017, which resulted in a preliminary injunction against all directives contained in the ban in *Stone v. Trump*, 2017 U.S. Dist. LEXIS 192183, 2017 WL 5589122 (D. Md.). Then, on August 9, 2017, another suit was filed in the D.C. District Court. That suit resulted in Judge Colleen Kollar-Kotelly issuing a preliminary injunction against two directives in Trump's three-directive memo. (See *Doe v. Trump*, 2017 U.S. Dist. LEXIS 178892, 2017 WL 4873042 (D.D.C. Oct. 30, 2017). The D.C. Circuit Court of Appeals has denied the Administration's appeal from Judge Kollar-Kotelly's order as of December 21, 2017. Likewise, on December 11, 2017 in the U.S. District Court in Seattle, Washington, in the matter of *Karnoski v. Trump*, the court found "that the policy prohibiting openly transgender individuals from serving in the military is likely unconstitutional." Finally, the U.S. District Court in Los Angeles, California granted injunctive relief against the ban on December 22, 2017 in *Doe v. Trump*.

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At the heart of the analysis in each of these cases is whether heightened judicial scrutiny applies to the plaintiffs' equal protection claim and whether the usual judicial deference to military policy decisions by the Executive branch are appropriate in this case. One of the District Court judges cited an amicus brief filed by retired military officers and former national security officials, and wrote that "this is not a case where deference is warranted, in light of the absence of any considered military policymaking process, and the sharp departure from decades of precedent on the approach of the U.S. military to major personnel policy changes." Another concluded that heightened judicial scrutiny was not required to rule in plaintiffs' favor on the motion for injunctive relief.

Also of note, the Maryland Court found that "President Trump's tweets did not emerge from a policy review, nor did the Presidential Memorandum identify any policymaking process or evidence demonstrating that the revocation of transgender rights was necessary for any legitimate national interest. Based on the circumstances surrounding the president's announcement and the departure from normal procedure, the court agrees with the D.C. court that there is sufficient support for plaintiffs' claims that 'the decision to exclude transgender individuals was not driven by genuine concerns regarding military efficacy.'" Judge Garbis of the Maryland District Court followed Judge Kollar-Kotelly's (of the D.C. District Court) example by including a 'cut and paste' version of the original Trump tweet sequence in the background section of his opinion, and specifically identified policy announcement via Twitter as a departure from normal procedure that is to be factored into this constitutional analysis.

The preliminary injunctions have largely been based on findings that plaintiffs are likely to prevail in their equal protection argument. However, there is also a due process argument at play, and the Maryland Circuit Judge (Garbis) found that "it is egregiously offensive to actively encourage transgender service members to reveal their status and serve openly, only to use the revelation to destroy those service members' careers." Judge Garbis also wrote, of due process: "An unexpected announcement by the President and Commander in Chief of the United States via Twitter that 'the United States Government will not accept or allow Transgender individuals to serve in

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LITIGATION

The Continuing Evolution of Personal Jurisdiction in New York Over an Out-of-State Defendant

By Jeffrey Basso

One of the more challenging and ever-evolving issues that we continue to see is determining what is necessary to obtain personal jurisdiction in New York State over an individual or business that resides or does business out of state. If you are dealing with real property in New York, a tort that occurred in New York, or a defendant who resides in or regularly does business in New York, jurisdiction is easily exercised. The issue arises when the defendant you are seeking to sue in New York has few or no ties to the state. In such cases, courts go through a very fact-specific analysis to determine whether the defendant has sufficient contacts within New York to avail itself of jurisdiction here.

A recent Suffolk County Commercial Division decision from Justice Emerson in *Katherine Sales & Sourcing, Inc. v. Fiorella* provides a great snapshot of what courts will consider when determining whether personal jurisdiction exists over an out-of-state defendant. This derivative action centered on the plaintiff's claims that defendants engaged in a scheme to defraud a company they jointly owned — Zingarr Sales and Marketing — by submitting fraudulent and inflated bills for services rendered to Zingarr and diverted contracts to a business separately owned by defendants, TGG Direct.

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The rundown on the confusing cast of characters in this case — the plaintiff, Katherine Sales and Sourcing, a New York corporation that owned a 50 percent interest in one of the nominal defendants and Zingarr, a New Jersey limited liability company that is authorized to do business in New York. Zingarr is in the business of developing, manufacturing, and selling consumer goods to retail stores, online retailers and wholesalers and has offices in both New Jersey and New York. The other 50 percent owner of Zingarr is another nominal defendant, Emily Gottschalk, who also owns and manages a third nominal defendant, TGG, a New Jersey limited liability company with offices in New Jersey. Gottschalk and non-party Arthur Danzinger are co-managers of Zingarr. Danzinger is also the president and a shareholder of Katherine Sales. Gottschalk's office is in New Jersey, while Danzinger's is in New York. Defendant Robert Fiorella is a resident of California, where he maintains an office.

So, in summary, we have a New York plaintiff, nominal defendants in New York and New Jersey, and a defendant who resides in and has an office solely in California. Fiorella made a motion to dismiss the case against him for lack of personal jurisdiction.

Fiorella was hired by Zingarr at Gottschalk's request to perform certain consulting services for Zingarr over a period of seven months in 2014. Fiorella performed all services in California, and never came to New York.

In her decision, Justice Emerson first noted that CPLR 302(a)(1) provides that the court can exercise jurisdiction over a nondomiciliary who transacts any business in New York if the plaintiff's claims arise from the transaction of such business. *Opticare Acquisition Corp. v. Castillo*, 25 A.D.3d 238, 243 (2d Dep't 2005). A single act of business in New York has been held to be sufficient under certain circumstances when the business activities in New York were purposeful and there is a substantial relationship between the transaction and the claim asserted. *Id.* While being physically present in New York when a contract is agreed to is generally sufficient to confer jurisdiction, courts will likely not exercise jurisdiction over a non-resident when the contract was negotiated solely by mail, phone, or fax without any New York presence by the out-of-state defendant. *Patel v. Patel*, 497 F.Supp. 2d 419, 428 (E.D.N.Y. 2007).

The court found that although Fiorella had an ongoing relationship with Gottschalk and Zingarr, he never entered New York to negotiate their consulting arrangement, to perform under that consulting arrangement, or for any reason related to his relationship with Gottschalk and Zingarr. Fiorella's only actual contacts with New York that directly related to the consulting services were through telephone calls and emails

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The Sentence Reform and Corrections Act (Continued from page 3)

and local cops to put on the street. Most law enforcement professionals agree that the physical presence of cops on the street is the first line of defense against violent crime.

There are the human costs as well, with more than 2 million children growing up with a parent behind bars. Many are incarcerated far from their home communities creating further instability where violent crime has its roots. It has tended to undermine the type of police-community relationships that are crucial in making our streets safer.

It is notable, therefore, that the bill also requires a bipartisan commission to examine the criminal justice system on the federal, state, and local level. Previous proposals for such a commission have received support from both civil rights and police organizations, all of whom agree that the justice system is overdue for review.

In 2016, the Sentencing Reform and Corrections Act never received a vote due to opposition from, among others, then Senator Jeff Sessions. As Attorney General, Mr. Sessions has since made his opposition to sentencing reform clear by advocating for prosecutors to pursue the harshest penalties possible.

It is the considered opinion of most, however, that Congress needs to back this much needed legislation, notwithstanding the lack of support from the Justice Department.

The spirit of reform has manifest itself here in New York by passage of a 2018 budget that would phase out the routine treatment of 16 and 17-year olds as adults in criminal court. Those in this age group charged with misdemeanors will go to family court, and those charged with felonies will go before judges in a youth branch of the criminal court system. Some charged with violent felonies could still end up in adult criminal court, but only if their crime is particularly egregious.

Methods of confinement for this group will also change. Until now, those 16 and 17- year olds charged as adults resulted in this arguably more vulnerable population being remanded to custody in facilities designed for adult jail populations. In 2018, the state will stop holding those under 17 in county jails, with the age rising to 18 and under in 2019.

In his State of the State address, the governor spoke of proposals to reform the system by which judges assess bail as well as discovery and speedy trial reform.

Clearly, the spirit of reform is in the air and while there can be differences of opinion on what the goals are and how to achieve them, the fact is these crucial issues need attention and this is the time as sentencing and criminal justice reform on the federal and state level is one of the few areas of policy change that has had, and continues to have, bipartisan support.

Note: The Hon. Peter H. Mayer is a New York State Supreme Court Justice for the Tenth Judicial District, Riverhead, New York, where he presides over civil matters. On the Bench, Justice Mayer presides over medical malpractice, land use and commercial cases as well as a variety of tort litigation.

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any capacity in the U.S. Military' can be considered shocking under the circumstances. According to news reports provided by Plaintiffs, the Secretary of Defense and other military officials were surprised by the announcement. The announcement also drew swift criticism from retired generals and admirals, senators, and more than 100 Members of Congress. A capricious, arbitrary, and unqualified tweet of new policy does not trump the methodical and systematic review by military stakeholders qualified to understand the ramifications of policy changes."

Among the defenses, the government argued that there has been no "harm" yet, and thus, plaintiffs lack standing to bring suit. The courts uniformly rejected the government's argument in this regard, as well as rejected that the matter is not yet ripe for judicial resolution. In doing so, the courts reason that the adoption of a policy that violates equal protection is deemed a harm even before it is implemented, and the stigmatic harm of the government officially deeming all transgender people as unfit to serve the country is immediate. This type of holding may, if the matter works its way through the Circuit Courts and to SCOTUS, have important precedential value in years to come.

Note: Christopher J. Chimeri is partner with the Hauppauge law firm Quatela Chimeri PLLC and heavily focuses on complex trial and appellate work in the matrimonial and family arena. He sits on the Board of Directors of the Suffolk County Matrimonial Bar Association and is a co-founder and co-chair of the Suffolk County Bar Association's LGBT Law Committee. From 2014-2017, he has been peer-selected as a Thomson Reuters Super Lawyers® "Rising Star," and was recently featured in Forbes Magazine, Long Island Business News, and New York Magazine as a "Leader in Law."

Attend Academy's Trial Practicum (Continued from page 12)

of the cross-examination, structure the cross-examination, elicit favorable testimony, discredit unfavorable testimony, and impeach a witness.

- Lecture 5: Closing Arguments will cap off the series on Tuesday, May 8, from 5:30 – 9:15 p.m., offering 2.0 credits in Skills, 1.0 in Professional Practice, and 1.0 in Ethics, followed by a Mentoring Workshop on Tuesday, May 15, from 6-9 p.m. Faculty members Harvey Besunder, Alan Clark, Richard Haley, Hon. Emily Pines, and Marvin Salenger will give advice for arguing your theory of the case and organizing an effective argument, as well as provide an inside look on ethical issues surrounding ineffectiveness of counsel charges.

Finally, enjoy the opportunity to put these lessons into action during trials to take place the week of May 21. You may attend the full series or individual sessions, depending on your needs and schedule. To register, please visit our website at scba.org or call the office at (631) 234-5511. I'll see you in the courtroom.

Note: Patrick McCormick is a partner at Campolo, Middleton & McCormick, LLP, a premier law firm with offices in Ronkonkoma and Bridgehampton. Email Patrick at pmccormick@cmm-llp.com.

The Record on Appeal (Continued from page 8)

Division to engage in meaningful review and to render an informed decision on the merits, the appeal will be dismissed.[9] For example, on an appeal from an order determining a motion, the record must include, *inter alia*, all motion papers that were presented to the lower court in support of — and in opposition to — the motion.[10] Where an appeal was taken from an order denying a motion for leave to amend a complaint, the appellant's omission from the record of the proposed amended complaint (which, pursuant to CPLR 3025[b], should have been included by the movant with the papers submitted in the lower court) was fatal, resulting in dismissal of the appeal.[11] Also, the omission of a trial or hearing transcript will be fatal as well.[12] Of course new or additional evidence, which was not presented to the lower court is *dehors* the record and must not be included in the record on appeal. If it is, a motion by the adversary to strike the record will be in order. Ultimately, matters *dehors* the record will not be considered by the Appellate Division.[13]

In conclusion, a lawyer preparing to perfect an appeal to the Appellate Division, Second Department, must be thoroughly familiar with the statute (CPLR 5526) and pertinent Appellate Division rules (22 NYCRR Part 670) prescribing the requirements for a reproduced full record.

Note: Scott Karson is the former law secretary to the late Justice Lawrence J. Bracken of the Appellate Division, Second Department. He is the former President of the Suffolk County Bar Association and member and former Chair of the SCBA Appellate Practice Committee. He currently serves as Treasurer of the New York State Bar Association and is a member and former Chair of the NYSBA Committee on Courts of Appellate Jurisdiction. He is also a member of the American Bar Association Council of Appellate Lawyers. Mr. Karson is a member of Lamb & Barnosky, LLP in Melville, New York.

[1] Appellate Division, Second Department Rules of Procedure Rule 670.2(a)(4) (*see*, 22 NYCRR Part 670).
[2] Appellate Division, Second Department Rules of Procedure Rule 670.9.
[3] CPLR 5017.
[4] CPLR 5526.
[5] CPLR 5526.
[6] CPLR 5526; Appellate Division, Second Department Rules of Procedure 670.9, 670.10.1, and 670.10.2.
[7] Appellate Division, Second Department Rules of Procedure Rule 670.8(c).
[8] *See, e.g., Lee v. Barnett*, 134 AD3d 908 (2d Dept. 2015); *Jelks v. St. Mary's Hosp.*, 131 AD3d 670 (2d Dept. 2015); *425 E. 26th St. Owners Corp. v. Beaton*, 128 AD3d 766 (2d Dept. 2015).
[9] *See, e.g., Avraham v. Avraham*, __ AD3d __, 2017 WL 5617589 (2d Dept. 2017); *Ciafone v. Jobs for NY, Inc.*, 151 AD3d 692 (2d Dept. 2017); *Ghatani v. AGH Realty, LLC*, 136 AD3d 744 (2d Dept. 2016); *Jelks v. St. Mary's Hosp., supra; see also, Istomin v. Istomin*, 130 AD3d 575 (2d Dept. 2015).
[10] *See, e.g., Istomin v. Istomin, supra.*
[11] *See, Hanspal v. Washington Mut. Bank*, 153 AD3d 1329 (2d Dept. 2017).
[12] *See, e.g., Matter of Congregation K'Hal Torath Chaim, Inc. v. Rockland County Bd. Of Health*, 148 AD3d 1145 (2d Dept. 2017; *Matter of Gwiazdowska v. Gwiazdowska*, 136 AD3d 618 (2d Dept. 2016); *Lamini v. Baroda Props., Inc.*, 128 AD3d 910 (2d Dept. 2015).
[13] *See, e.g., Matter of Mohamed v. New York City*, 139 AD3d 858 (2d Dept. 2016).