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RECENT DEVELOPMENTS

SUMMARIES OF RECENT CASES

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I. INTRODUCTION

In this issue, the Recent Developments Department has decided to present, for the first time, summaries of recent cases impacting women. We spent a great deal of time deciding which topics to explore. We wanted to choose topics impacting women where there have been recent developments in the law and where there has been public attention on those topics. The issues we selected are same-sex rights in the workplace, the constitutionality of state stalking statutes, and the use of earning capacity as a basis for determining child support awards. While the courts in these cases may not have overtly framed the topics as women's issues, we feel the issues nevertheless have a substantial impact on women's lives.

II. SAME-SEX RIGHTS IN THE WORKPLACE

Same-sex rights increasingly have become the subject of public debate. The following two cases explore same-sex rights in the employment context. In *Shahar v. Bowers*,¹ the court considered whether the Attorney General of Georgia could withdraw the plaintiff's offer of employment based on her decision to

1. 114 F.3d 1097 (11th Cir. 1997).

participate in a same-sex "marriage."² In *Johnson v. Community Nursing Services*,³ the court examined whether the plaintiff had a right under Title VII to be free from same-sex sexual harassment in the workplace.

Shahar v. Bowers

In *Shahar*, the Eleventh Circuit Court of Appeals considered whether the Georgia Attorney General's revocation of a job offer violated the plaintiff's free association rights. The Attorney General presented three arguments in support of his decision to withdraw the plaintiff's offer for a staff attorney position after he learned of her intention to participate in a same-sex "marriage." First, he argued that the plaintiff's same-sex "marriage" would affect the Georgia Department of Law's ("Department") credibility with the public regarding its stance on controversial matters, particularly Georgia's sodomy law. Second, he argued that retaining her as an employee would disrupt the collegial work environment within the Department. Third, he questioned the quality of her judgment in general based on her controversial decision to "marry" another woman.⁴

Addressing the issue of whether the Attorney General's decision to withdraw the plaintiff's offer violated her constitutional right of association, the court held that the Attorney General did not violate the plaintiff's right of association because as an employer, the Attorney General's interest in promoting the efficiency of an important public service outweighed the plaintiff's constitutional right of association.⁵ The court arrived at its holding by applying the *Pickering*⁶ balancing test. The *Pickering* balancing test is a method of analysis by which a court compares the relative values of the interests before it.⁷ Applying the *Pickering* balancing test in this case, the court weighed the plaintiff's free association rights against the Attorney General's interests as an employer. Examining the plaintiff's constitutional rights, the court noted that the plaintiff's right of association was not abso-

2. The court used "marriage," in quotation marks, to refer to Shahar's relationship with her female partner and marriage, without quotation marks, to indicate legally recognized heterosexual marriage. *Shahar*, 114 F.3d at 1099 n.1.

3. 932 F. Supp. 269 (D. Utah 1996).

4. The court did not analyze this last concern in depth.

5. See 114 F.3d at 1110.

6. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

7. See 114 F.3d at 1103.

lute.⁸ Considering the Attorney General's interests, the court granted great deference to the Attorney General in his employment decisions, stating "[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate."⁹

Addressing the Attorney General's argument about public perception, the court recognized that this case arose against the backdrop of ongoing controversy in Georgia regarding homosexuality. Under these circumstances, the court held that the Attorney General could have reasonably concluded the plaintiff's acts would likely give rise to confusion among the public about the Department's position regarding homosexuality.¹⁰ While the court acknowledged that the public might not be confused about the Department's stance on homosexuality, assessing what the public perceives about the Department is a judgment for the Attorney General to make, not for the federal judiciary to make with hindsight.¹¹ Where the Attorney General's decision is reasonable, the court will defer to his judgment.¹²

Addressing the Attorney General's concern about disruption to the work environment, the court found that the Attorney General had a reasonable concern about the internal consequences of retaining a lawyer who openly represents herself to be "married" to a person of the same sex. Summarizing its position, the court stated, "we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."¹³

In conclusion, the court determined that the Attorney General's interest in avoiding both negative public perception and the anticipated disruptive effect that the plaintiff's marriage would have on the Department was sufficient to outweigh the plaintiff's constitutional right of association.¹⁴

8. *See id.* at 1102.

9. *Id.* at 1107 (citation omitted).

10. *See id.* at 1104-07. When the job offer was withdrawn, the Department had already won a highly visible case in which the Department's lawyers worked to uphold the lawful prohibition of homosexual sodomy. *Id.* at 1108.

11. *See id.* at 1109.

12. *See id.*

13. *Id.* at 1107 (citation omitted).

14. *See id.* at 1109.

Johnson v. Community Nursing Services

In *Johnson*, a Utah federal district court examined a sexual harassment claim by a plaintiff employee against her openly lesbian supervisor. The plaintiff alleged that her supervisor attempted to initiate a sexual relationship with her. The plaintiff further claimed that her supervisor's harassing behavior was directed only at female employees, and not male employees, and therefore was discriminatory on the basis of sex.

The court addressed two issues: (1) whether same-sex sexual harassment is actionable under Title VII; and (2) whether the plaintiff stated a claim based on sex discrimination, as distinguished from sexual orientation discrimination.

Addressing the first issue, the court held that same-sex sexual harassment is actionable under Title VII.¹⁵ The court reasoned that Title VII creates a broad rule of workplace equality, without requiring that sex-based discrimination or harassment be perpetrated by a member of the opposite sex.¹⁶ In support of its holding, the court cited an excerpt from an Equal Employment Opportunity Commission ("EEOC") manual, stating:

[T]he crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex. The victim and the harasser may be of the same sex where, for instance, the sexual harassment is based on the victim's sex (not on the victim's sexual preference) and the harasser does not treat employees of the opposite sex the same way.¹⁷

The court concluded that Title VII should not be interpreted to condone sexual harassment by a supervisor of the same sex.¹⁸

Addressing the second issue, the court held that the plaintiff established a *prima facie* case of sex discrimination rather than sexual orientation discrimination.¹⁹ The distinction between sex discrimination and sexual orientation discrimination is an important one because sex discrimination is actionable under Title VII, whereas sexual orientation discrimination is not.²⁰ The court reasoned that the plaintiff established a *prima facie* case of sex discrimination by proving that her supervisor treated female

15. See 932 F. Supp. 269, 273 (D. Utah 1996).

16. See *id.*

17. *Id.* at 271.

18. See *id.* at 273.

19. See *id.* at 274.

20. See *id.* at 273-74.

employees differently than male employees.²¹ In other words, the plaintiff proved that the sexual harassment would not have occurred but for her gender.

In conclusion, the court ruled that same-sex sexual harassment is actionable under Title VII and that the plaintiff established a prima facie case of sex discrimination.

III. THE CONSTITUTIONALITY OF STATE STALKING STATUTES

Recently, state stalking statutes have received considerable attention as the media has brought stalking against women into the limelight. In the midst of this attention, numerous constitutional attacks against state stalking statutes have been waged.²² These constitutional challenges generally take three forms; the statutes are challenged for: (1) vagueness; (2) overbreadth; and (3) violating an individual's constitutional right to travel. In the first case discussed below, *Petersen v. State*,²³ the court analyzed Alaska's stalking statute for vagueness and overbreadth.²⁴ In the second case, *Snowden v. State*,²⁵ the court considered whether Delaware's stalking statute was unconstitutionally vague and whether it violated an individual's constitutional right to travel.

Petersen v. State

In *Petersen*, the Alaska Court of Appeals examined the consolidated appeals of three defendants convicted of stalking following separate trials before the superior court.²⁶ Under Alaska Statute section 11.41.278, the government must prove three ele-

21. *See id.*

22. *See* Callie Anderson Marks, Note, *The Kansas Stalking Law: A "Credible Threat" to Victims. A Critique of the Kansas Stalking Law and Proposed Legislation*, 36 WASHBURN L.J. 468, 495 n.145 (1997).

23. 930 P.2d 414 (Alaska Ct. App. 1996).

24. Other state courts recently have addressed whether their stalking statutes are unconstitutionally vague and/or overbroad. *See* *People v. Tran*, 47 Cal. App. 4th 253 (1996) (holding that the California stalking statute was not unconstitutionally vague); *State v. Lee*, 82 Wash. App. 298 (1996) (ruling that the Washington stalking statute was neither unconstitutionally vague nor overbroad); *State v. Fonseca*, 670 A.2d 1237 (R.I. 1996) (ruling that the former version of Rhode Island's stalking statute was not unconstitutionally vague).

25. 677 A.2d 33 (Del. 1996).

26. The first defendant repeatedly appeared at the victim's workplace and outside her home despite numerous requests that he leave her alone. The second defendant tailgated the victim's car, harassed her outside her home, and telephoned her numerous times threatening her and her daughter's safety. The third defendant frequently appeared at the victim's workplace and followed her home, telephoned her frequently threatening to harm or kill her, and assaulted her.

ments to establish the crime of stalking. First, a defendant must have knowingly engaged in repeated acts of nonconsensual contact. Second, these nonconsensual contacts must have placed the victim in fear of injury or death. Finally, a defendant must have acted with reckless disregard in causing the victim to be fearful of injury or death.²⁷ The statute defines nonconsensual contact to include "following or appearing within the sight of [the victim]," "approaching or confronting [the victim] in a public place or on private property," and "contacting [the victim] by telephone."²⁸

The court addressed three issues: (1) whether the statute was unconstitutionally vague; (2) whether the statute was unconstitutionally overbroad; and (3) whether the provision defining contact by telephone as nonconsensual conduct was unconstitutional.

Addressing the first issue, the court held that the definition of stalking was not unconstitutionally vague.²⁹ The court ruled that for a statute to be unconstitutionally vague, the wording has to be so imprecise that "people of common intelligence would be relegated to differing guesses about its meaning."³⁰ The defendants argued that the statute was unconstitutionally vague because some of the terms used in the definition of stalking, including "follow[]," "approach[]," "appear[] within the sight of," and "repeated," are not capable of being understood by people of common intelligence. The court rejected this argument, reasoning that people of common intelligence would understand what it means to knowingly follow, approach, or appear within the sight of another person.³¹ Furthermore, an Alaska court previously had interpreted the term "repeated" to mean more than once and had held the word was not vague.³²

Addressing the second issue, the court held that the statute was not unconstitutionally overbroad because there is a "hard core of cases to which . . . the statute unquestionably applies."³³ The court further noted that while nonconsensual contact may encompass a wide range of constitutionally protected conduct, the statute at issue did not significantly restrain such conduct.³⁴

27. See *Peterson*, 930 P.2d at 423.

28. *Id.*

29. See *id.* at 424.

30. *Id.* (citation omitted).

31. *Id.*

32. *Id.*

33. *Id.* at 429 (citation omitted).

34. See *id.* at 425.

In reaching its holding, the court concluded that the three elements of stalking considerably narrowed the definition of stalking, thereby preventing a significant amount of constitutionally protected conduct from being classified as stalking.³⁵ The first element requires that a defendant knowingly engage in repeated acts of nonconsensual contact. Therefore, an individual could not be convicted of stalking if he inadvertently attends the same public functions as the victim.³⁶ The second element requires that a defendant's conduct place the victim in fear of injury or death. For instance, this element would protect a political protester who repeatedly pickets the building where a government official works, provided he does not place the official in fear of injury or death.³⁷ The third element further narrows which conduct may be labeled stalking by requiring that a defendant *recklessly* place his victim in fear of injury or death. A defendant acts recklessly in causing fear of injury or death if he "consciously disregard[s] a substantial and unjustifiable risk that his actions would have this effect, and that [his] disregard of this risk constituted a gross deviation from the standard of care that a reasonable person would exercise in that situation."³⁸

Although these three elements prevent a significant amount of constitutionally protected conduct from being labeled stalking, the court acknowledged that these elements may not always provide sufficient protection in borderline cases.³⁹ In consideration of this problem, the court held that in cases involving statutes primarily concerned with conduct rather than speech, courts will resolve overbreadth challenges on a case-by-case basis.⁴⁰

Addressing the third issue, the court held the provision that defined nonconsensual contact to include telephone contact was constitutional.⁴¹ The defendant argued that conviction under the statute was possible even if the telephone contact caused the victim to unreasonably fear injury or death. Rejecting that argument, the court ruled that the definition of reckless encompassed not only a conscious disregard of the risk that the defendant's

35. *See id.* at 425-30.

36. *See id.* at 426.

37. *See id.* at 427.

38. *Id.*

39. *See id.* at 428.

40. The court also noted that due process problems should be considered on a case-by-case basis. *Id.* at 429.

41. *See id.* at 431.

conduct might instill fear of injury or death in the victim, but also that the victim's fear be reasonable.⁴²

The court concluded its analysis with the policy argument that "[w]hen a person's words or actions constitute an assault—when they cause other people to reasonably fear for their own safety or the safety of those close to them—the [Alaska] Constitution no longer provides a refuge."⁴³

Snowden v. State

In *Snowden*, the Supreme Court of Delaware examined the defendant's argument that the Delaware stalking statute was unconstitutional. In 1993, the defendant pled guilty to stalking Josephine Teagle. He was sentenced to two years probation and ordered to refrain from contacting Teagle for two years. When the court order expired, the defendant resumed following Teagle despite her requests that he leave her alone. The defendant was subsequently arrested and convicted of stalking Teagle.

Under the Delaware stalking statute, an individual may be punished if he "wilfully, maliciously and repeatedly follows or harasses another person."⁴⁴ "Harasses" is defined as "a knowing and wilful course of conduct directed at a specific person which seriously alarms, annoys or harasses the person, and which serves no legitimate purpose."⁴⁵ The statute defines "course of conduct" as a "pattern of conduct composed of a series of acts."⁴⁶

The court considered three constitutional issues on appeal: (1) whether the statute was unconstitutionally vague on its face; (2) whether the statute was unconstitutionally vague as applied to the defendant; and (3) whether the statute violated the defendant's constitutional right to travel.

Addressing the first issue, the court held the statute was not unconstitutionally vague on its face.⁴⁷ The defendant argued the statute was unconstitutionally vague because it was unclear whether the word "repeatedly" modified both "follows" and "harasses" or only modified "follows." If "repeatedly" only modified "follows," an individual could be convicted after *one* series of harassing acts. On the contrary, if "repeatedly" also modified

42. *See id.* at 430-31.

43. *Id.* at 431.

44. *Snowden v. State*, 677 A.2d 33, 36 (Del. 1996) (citation omitted).

45. *Id.* (citation omitted).

46. *Id.* (citation omitted).

47. *See id.* at 37.

“harasses,” an individual would need to commit *more than one* series of harassing acts in order to be found guilty of stalking.

In response to the defendant’s argument, the court stated that a criminal statute is clear if it defines the offense “with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”⁴⁸ The court concluded that the only logical reading of the statute was that “repeatedly” modified “follows” and not “harasses.”⁴⁹ The court reasoned that it would be illogical to read the statute as mandating repeated harassment when harassing itself is defined as consisting of repetitive acts.⁵⁰ Therefore, because there was only one logical reading of the statute, the statute was not ambiguous on its face.⁵¹

Addressing the second issue, the court held the statute was not unconstitutionally vague as applied to the defendant.⁵² The defendant argued that he did not know from the language of the statute that his acts were criminal. Rejecting the defendant’s argument, the court concluded that the defendant must have known his actions were alarming, annoying, or harassing to the victim, and ultimately criminal, because any reasonable person would realize that repeatedly following an individual constitutes harassment under the statute.⁵³ Furthermore, the court reasoned that the defendant must have been aware his actions were harassing in light of the fact that he previously had pled guilty to stalking the same victim.⁵⁴

Addressing the third issue, the court held the statute did not violate the defendant’s constitutional right to travel.⁵⁵ The defendant argued he had a constitutional right to follow the victim on the public roads of Delaware. While acknowledging that the use of public roads is constitutionally protected, the court ruled that the right is not absolute.⁵⁶ Rather, the government may restrict an individual’s use of public roads if the restriction passes the intermediate scrutiny test, which requires the restriction “be

48. *Id.* at 36 (citation omitted).

49. *Id.* at 37.

50. *See id.*

51. *See id.*

52. *See id.*

53. *See id.*

54. *See id.*

55. *See id.* at 38.

56. *See id.* at 37.

narrowly tailored to meet [a] significant governmental [interest]."⁵⁷ Applying the intermediate scrutiny test, the court found that protecting individuals from emotional harm caused by fear and loss of privacy and protecting society by preserving a general sense of security constituted significant governmental interests.⁵⁸ Furthermore, the statute was narrowly tailored to meet these interests. For example, the statute would not restrict travel on public roads if the travel served a legitimate purpose or if the defendant inadvertently caused another to suffer emotional harm.⁵⁹

IV. EARNING CAPACITY AS A BASIS FOR DETERMINING CHILD SUPPORT AWARDS

As the structure of the family has changed, the legislature's ability to achieve desired policy goals has become increasingly difficult. Child support laws intended to benefit one child may result in hurting another. In *Othman v. Hinman*,⁶⁰ the California Court of Appeal clarified whether it was appropriate to impute earning capacity to a defendant mother who had conflicting duties to her children from two separate families and who was not trying to evade her familial responsibilities.

Othman v. Hinman

In *Othman*, the California Court of Appeal examined the appeal of a defendant mother who was ordered to pay child support based on her earning potential, rather than her actual earnings. The defendant had eight children, five from an earlier marriage to the plaintiff and three from a subsequent relationship.⁶¹ This case concerned only the children from the plaintiff and defendant's marriage. After the court granted sole custody of the children to the plaintiff, he sought child support payments from the defendant. Although the defendant was not working in order to care for her three other children, the plaintiff requested that child support payments be based on her earning capacity. The trial court granted the plaintiff's request and imputed an annual income of \$38,400 to the defendant.

57. *Id.* (citation omitted).

58. *See id.* at 38.

59. *See id.*

60. 55 Cal. App. 4th 988 (1997).

61. Although the plaintiff is the biological father of only three of the five children, the court refers to all five children as the defendant and plaintiff's children.

On appeal, the court considered whether the district court had improperly imputed income to the defendant based on her earning capacity.

The court held that the trial court did not commit error when it imputed income to the defendant based on her earning capacity.⁶² Relying on *Philbin v. Philbin*,⁶³ the defendant argued that the court may not impute income to a parent unless the parent is deliberately avoiding his or her financial responsibilities. The court rejected this argument based on a review of the applicable case law and the precise language of the Agnos Child Support Standards Act ("Act") and Family Code section 4058(b) ("Code").⁶⁴

Under the Act, the court shall consider "to the extent consistent with the best interests of the child or children, the earning capacity of either or both parents."⁶⁵ Under the Code, "[t]he court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children."⁶⁶

Addressing the defendant's argument that bad faith is a prerequisite for imputing earning capacity to a parent, the court first looked at what effect the Act had on the *Philbin* bad faith requirement. In examining prior case history, the court noted a split among courts as to whether the Act eliminated *Philbin*'s bad faith requirement.⁶⁷ While some courts held the *Philbin* bad faith requirement survived the Act, other courts concluded the Act allowed a court to impute earning capacity even in the absence of bad faith where it is in the best interests of the child.⁶⁸

In the midst of the confusion over how to reconcile the effect of the Act on the *Philbin* bad faith requirement, the court in *In re Marriage of Regnery*⁶⁹ established a three-prong test to determine the existence and extent of a parent's earning capacity.⁷⁰ The *Regnery* test consists of three factors: (1) ability to work, including such factors as age, occupation, skills, education, health, background, work experience, and qualifications; (2) will-

62. *Othman*, 55 Cal. App. 4th at 999.

63. 19 Cal. App. 3d 115 (1971).

64. *See id.* at 994-99.

65. *Id.* at 994-95 (citation omitted).

66. *Id.* at 998 (citation omitted).

67. *Id.*

68. *See generally id.* at 995-97.

69. 214 Cal. App. 3d 1367 (1989).

70. *See Othman*, 55 Cal. App. 4th at 995.

ingness to work, established through good efforts, due diligence, and meaningful attempts to secure employment; and (3) opportunity to work, which means the existence of an employer willing to hire.⁷¹ This court noted that the court in *Regnery* did not limit imputation of earning capacity to instances of bad faith, and therefore, in actuality, established only a “two-prong” test — ability to work and opportunity to work.⁷²

This court accepted the *Regnery* test for two reasons. First, the “two-prong” test in *Regnery* is consistent with the exact language of and policy behind the Act and Code. Summarizing the policy underlying the Act and Code, the court stated:

Because children's interests are top priority . . . and payment of appropriate support is a parent's primary obligation[,] . . . a child support obligation must be taken into account whenever an obligor wishes to pursue a different lifestyle or endeavor [C]hild . . . support [is] an overhead which must be paid first before any other expenses . . . [A payor does] not have the right to divest himself [or herself] of his [or her] earning ability at the expense of . . . minor children.⁷³

Second, the court was influenced by the California Supreme Court's approval of the *Regnery* test. The court noted that while the California Supreme Court had not resolved the issue of the continuing validity of the *Philbin* rule, it cited with approval the *Regnery* definition of earning capacity.⁷⁴

In applying the *Regnery* test to this case, the court noted that the defendant did not contest her ability or opportunity to work. Rather, the defendant argued she would not be able to reconcile working with her need to care for her three other children. In response, the court acknowledged that imputing earning capacity to a parent may place a significant burden on that parent's new family members. However, the court noted that the Code granted the trial court discretion to balance the interests of the defendant's other children against the interests of her children from her marriage to the plaintiff in a manner consistent with the best interests of the supported children.⁷⁵

71. *Id.*

72. *Id.* at 995 n.6.

73. *Id.* at 996 (citations omitted).

74. *Id.* at 998.

75. *Id.* at 999.

In conclusion, the court affirmed the trial court's ruling that it was in the best interests of the supported children to impute earning capacity to the defendant.⁷⁶

— *Summaries by the Recent Developments Department*

76. *Id.* at 1001.

