



# RIGHTS STUFF

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## Does Nursing Home Have to Accommodate Volunteer's Sexual Harassment Under the ADA?

James McElwee is a man in his 30s who has a neurodevelopmental disorder and an IQ of 79. He lives with his mother and may never be able to live independently.

He began volunteering at the Valley View Center for Nursing Care in 1996, performing janitorial and housekeeping duties and helping patients get to events within the facility. He was able to do his volunteer duties without a problem, and the work helped improve his self-esteem.

In 2009, a female staff member at the Center complained about McElwee. She said he waited for her and followed her in the hallways, staring at her rear end. Two other female staffers said they felt bothered by him as well.

The Center's director of activities, Amy Fey, discussed the allegations with McElwee. He said he had done some bad things, and that "there needs to be punishment," making a gesture as if he were slitting his throat. She told him she needed to investigate the allegations more and that he needed to leave the center and not return until he heard from her. He said God was punishing him for his past bad acts, and that he had been researching to learn whether his actions would constitute sexual harassment or domestic violence.

Other women came forward and complained about McElwee's behavior. He

had asked female employees to pet his stuffed dolphin in a way that was sexually suggestive, asked a woman how he would look in a Speedo and talked about dating a woman's daughter in an uncomfortable way. He once said to a woman, "Do you realize what I could do to you?" in a way she perceived to be threatening.

After the investigation, the Center told McElwee not to return to his volunteer job. His mother objected, saying he was "not like everyone else" and should not be punished for looking at people.

McElwee sued, saying the Center had discriminated against him on the basis of his disability. He said he was able to do his duties as a volunteer and should not have been told to leave. He lost.

The Court said that one of the requirements for a volunteer was to "emotionally [be] able to conduct himself in an appropriate manner when dealing with residents, supervisors and other staff members." The evidence showed that McElwee was not able to do that.

McElwee argued that the Center should have worked with him and his therapist to help him improve his behavior, but the Court said he had no evidence that doing so would have helped.

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## Firing a Woman Because She is Lactating is Illegal

Donnica Venters began working for Houston Funding as an account representative/collector in March of 2006. In December, 2008, she took a leave of absence to have a baby. Houston Funding is too small to be covered by the Family and Medical Leave Act, which requires employers with 50 or more employees to provide up to 12 weeks of paid or unpaid leave for medical issues such as giving birth. But the company did not object to her taking a leave.

Venters told her supervisor, Harry Cagle, that she would return to work as soon as her doctor released her. Because of complications, she had to stay home through mid-February. She kept in regular communication with personnel at Houston Funding. During one conversation, she mentioned to another supervisor, Robert Fleming, that she was breastfeeding her baby and asked if she could use a breast pump at work. Fleming asked Cagle, and Cagle "responded with a strong NO. Maybe she needs to stay home longer." Apparently that decision was not communicated to Venters.

On February 17, 2009, Venters called Cagle and told him that her doctor had released her to return to work. She mentioned to him that she was breastfeeding and asked if she could use a backroom to pump milk. She said there was a long pause after she asked this question. Cagle told

her they had filled her spot. She soon received a letter saying that effective February 13, she had been terminated for job abandonment.

Venters sued, alleging sex discrimination in employment in violation of the federal Pregnancy Discrimination Act (PDA). At the trial level, Houston Funding argued that "firing someone because of lactation or breast-pumping is not sex discrimination" and that lactation is not "a related medical condition of pregnancy." The company won a summary judgment motion, but that was appealed successfully.

The Court of Appeals found that firing a woman because she is lactating or expressing milk is a violation of applicable law, in that it imposed an adverse employment action on women that cannot be imposed on men. And the Court found that "lactation is a related medical condition of pregnancy for purposes of the PDA. Lactation is the physiological process of secreting milk from mammary glands and is directly caused by hormonal changes associated with pregnancy and childbirth."

The Court said that if Houston Funding fired Venters because she demanded an accommodation - space to pump milk - that might not be a violation of the PDA. But the company was arguing that she was fired for abandoning her job, not for demanding an accommodation, and their

justification did not stand up to scrutiny. That Court remanded the case to the trial court for further proceedings.

The parties and the Court overlooked a provision of the Patient Protection and Affordable Care Act (aka Obamacare) which says that all employers covered by the Federal Labor Standards Act have to provide employees with a reasonable break time to express milk for babies under one year. If the employer has 50 or more employees, it has to provide a space for pumping milk, "a place, other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public."

The case is Equal Employment Opportunity Commission v. Houston Funding II, Limited, 717 F3d 425 (5th Cir. 2013).





## Familial Status Discrimination

Federal, state and local fair housing laws all prohibit discrimination on the basis of familial status, meaning landlords may not treat tenants differently because they have children under age 18. Two tenants recently sued an Illinois landlord under this law and lost.

Elisabeth Manly is the owner, landlord and property manager of a nine-unit apartment complex called Greenwillow located in Glenview, Illinois. Two former tenants, Alicia Tyrell and Toni Dini, said that Manly harassed and threatened them with eviction because their children played in the complex yard. They filed a complaint with the Interfaith Housing Center (IHC) about Manly's alleged discriminatory practices. IHC sent testers to attempt to rent apartments from Manly, and allegedly, Manly did not return calls when the testers said they had children. The tenants sued.

The Court noted that the

evidence was clear that Manly did rent to families. She rented to both tenants, knowing they had children. When she showed the apartment to Tyrell, she told Tyrell that there was a nearby park and where the school bus came. She told Dini where the park was as well. Of her 28 tenants, 16 had children, and several other had grandchildren who regularly visited. This evidence was more persuasive to the Court than the allegation that she had failed to return calls from IHC testers posing as prospective tenants with children.

The plaintiffs said that Manly harassed them by sending them letters saying that their children could not play in the front yard. Several other tenants had complained about the noise when the children played there, and the children had damaged the landscaping. The Court said that Manly had the right to make certain areas off limits for children. The plaintiffs essen-

tially argued that their kids were not all that loud, but the Court said it "does not sit as the reviewer of the merits of every tenant complaint and landlord decision under the [Fair Housing Act]."

The plaintiffs provided evidence of some animosity between them and Manly about how much notice she gave them before making repairs, but there was no evidence that the animosity was based on the fact that the plaintiffs had children.

The plaintiffs argued that Manly did not renew their leases because of her animosity towards people with children. But she did renew Dini's lease once, and the Court said she had "ample non-discriminatory justification in declining to renew plaintiff's leases. Plaintiffs are not forever entitled to live at Greenwillow merely because they have children."

The case is Tyrell and Dini v. Manly, 2012 WL 3765188 (N.D. Ill. 2012).

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Testimony showed that his behavior was consistent with his diagnosis and was long-standing, despite years of therapy.

McElwee also argued that the Center should have trained his co-workers to be more tolerant of his behavior. The Court said

that "requiring others to tolerate misconduct, however, is not the kind of accommodation contemplated by the ADA. Further, nursing home employees, volunteers and visitors should not be required to tolerate harassing behavior, and it would be an undue burden for Valley View to have to countenance behavior of this kind."

The case is McElwee v. County of Orange, 700 F. 3d 635 (2nd Cir. 2012).



## **Medicare Will Now Cover Gender Reassignment Surgery**

In 1981, Medicare implemented a ban on covering gender reassignment surgery, basing its decision on the finding that such surgery was considered experimental. But now, as a result of a lawsuit filed by a transgender woman and army veteran, it will begin covering these procedures.

The Department of Health and Human Services Board found in May that medical studies published since 1981 showed that the grounds for exclusion of this coverage are "not reasonable" any longer and lifted the ban.

Judith Bradford, co-chair of Fenway Institute, a Boston-based research center that focuses on LGBT (lesbian, gay, bisexual and transgender) health, said, "This is long overdue. It brings govern-

ment policy in line with the science around transpeople's health care needs."

In contrast, Leanna Baumer, a senior legislative assistant with the Family Research Council, said the ruling "ignores the complexity of issues surrounding gender identity issues." She said, "Real compassion for those struggling with a gender identity disorder is to offer mental health treatments that help men and women become comfortable with their actual biological sex - not to advocate for costly and controversial surgeries subsidized by taxpayers."

Jennifer Levi, an attorney who worked on the case, said that "For someone who can't get treatment [for gender dysphoria],

the impact can be devastating." She said they may be depressed, have serious problems with self-esteem and have difficulty forming relationships.

The Medicare ruling is not setting a ground-breaking precedent. Five states have affirmed that transition care for transgender individuals should be considered an essential part of medical coverage, as has Washington, D.C. In 2002, no Fortune 500 companies offered transgender benefits. In 2012, 19% did and by 2014, 28% did.

(Article based on "Ban Lifted on Medicare Coverage for Sex Change Surgery," by Ariana Eunjung Cha, published May 30, 2014 in the Washington Post.)

## **2015 Human Rights Award Winner Announced**

The Bloomington Human Rights Commission (BHRC) has announced the winner of its 14th annual Human Rights Award. The BHRC chose the Rev. Bill Breeden.

The Rev. Breeden was nominated by Guy Loftman. Loftman noted in his nomination that Breeden "retired [last year] as the wildly popular co-minister of the Unitarian Universalist church. His commitment to human rights is legend."

Breeden's lifelong advocacy for peace and human rights includes

organizing and participating in countless anti-war protests during the Iraq and Afghanistan wars, as well as during the Vietnam era. He was a key organizer of Bloomington's interfaith winter shelter, and has spent many nights there, supervising operations. He preached a gospel of activism at his church, galvanizing his congregation to, among many other activities, install solar panels on the church roof, and care for elders and those recently released from jail. His prison ministry includes years of visits to death row inmates. He also helped transport aid to the

people of Nicaragua, which led to harrowing run-ins with Latin American police.

The chairperson of the BHRC, Byron Bangert, will present the award to Breeden at the Bloomington Common Council meeting at 7:30 on March 4 in the Council Chambers at Showers City Hall.