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COMMENTARY

Does the Americans With Disabilities Act Protect Gender Dysphoria?

The U.S. Court of Appeals for the Fourth Circuit held in Williams v. Kincaid, 45 F.4th 759 (4th Cir. 2022), that gender dysphoria is, indeed, a disab
worthy of protection under federal disability discrimination laws. When the decision came down last August, many in the LGBTQIA+ community, a
allies alike, heralded the unprecedented decision.

July 18, 2023 at 11:46 AM

Employment Law

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It's hard to believe that in the 33 years since the Americans with Disabilities Act (ADA) was enacted there has not been a single case to decide whether a medical condition known as "gender dysphoria" is protected under the law. That streak came to an end when the U.S. Court of Appeals for the Fourth Circuit held in *Williams v. Kincaid,* 45 F.4th 759 (4th Cir. 2022), that gender dysphoria is, indeed, a disability worthy of protection under federal disability discrimination laws. When the decision came down last August, many in the LGBTQIA+ community, and allies alike, heralded the unprecedented decision.

Finally, protection was to be afforded to nonbinary and transgender individuals coping with gender dysphoria. It would have far-reaching consequences: protection from discrimination and harassment; reasonable accommodations for things as simple (yet consequential) as taking time off for medical appointments; leaves of absence related to treatment; effective use of pronouns to prevent misgendering; and use of single-sex bathrooms associated with one's gender identity.

But not so fast. The decision was appealed to the U.S. Supreme Court and the transgender community braced for a possible setback from a conservative leaning SCOTUS. In a perhaps surprising turn of events, on June 30, the Supreme Court declined to review the Fourth Circuit's ruling, leaving in place the decision that people who experience gender dysphoria are entitled to the disability protections of the ADA. See *Kincaid v. Williams*, 600 U. S. ____ (2023), No. 22–633 (June 30, 2023).

'Williams v. Kincaid'

According to her complaint, Kesha Williams, a transgender woman, spent six months incarcerated in the Fairfax County Adult Detention Center. Williams suffers from gender dysphoria, a "discomfort or distress that is caused by a discrepancy between a person's gender identity and that person's sex assigned at birth," quoting Williams' complaint. People suffering from gender dysphoria often benefit from medical treatment, including hormone therapy.

Williams had received such medical treatment in the form of a daily pill and biweekly injections for 15 years prior to her incarceration.

While her home state of Maryland recognized her gender as female as indicated on her driver's license, the prison refused to house her among other female prisoners. At the outset of her incarceration, prison deputies searched Williams, assigned her housing on the women's side of the prison, and gave her uniforms typically provided to female inmates, including several bras and women's underwear. Williams explained to the prison nurse that she had not undergone transfeminine bottom surgery and retained the genitalia with which she was born. Later that same day, during her preliminary medical evaluation, Williams was labeled "male" after informing the nurse that she was transgender.

Pursuant to the prison's policy, which provides that "male inmates shall be classified as such if they have male genitals" and "female inmates shall be classified as such if they have female genitals," prison deputies required Williams to live on the men's side of the facility. Deputies also required her to give up the women's clothing she had previously received and to wear men's clothing.

As a result of being placed in male inmate housing, Williams "experienced delays in medical treatment for her gender dysphoria, harassment by other inmates, and persistent and intentional misgendering and harassment by prison deputies." During a "shakedown" search of Williams' housing unit, Williams again requested that a female deputy conduct the body search. Despite the presence and availability of a female deputy, deputies ignored her

request. Instead, a male deputy, Deputy Garcia, who knew Williams to be a woman but referred to her as a man, told her: “Sir, you are a male and I need to search you.” He then subjected her to a “highly aggressive” search that resulted in bruising to her breast and caused her “pain for several days.”

Williams filed a lawsuit against Stacey A. Kincaid, Sheriff, Fairfax County, Virginia asserting violations of the ADA, the Rehabilitation Act, the U.S. Constitution, and Virginia law. The prison countered that gender dysphoria was not a recognized disability under the ADA. The district court agreed and dismissed the ADA and Rehabilitation Act claims.

The District Circuit Declares Gender Dysphoria Not a Disability

The ADA defines “disability” to include “a physical or mental impairment that substantially limits one or more major life activities of such individual.” However, the ADA explicitly excludes from the broad definition of disability “transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, [and] other sexual behavior disorders,” as well as “compulsive gambling, kleptomania, … pyromania; or … psychoactive substance use disorders resulting from current illegal use of drugs.” 42 U.S.C. Section 12211(b). Kincaid argued, and the district court held, that the exclusion for “gender identity disorders not resulting from physical impairments” applied to Williams’ gender dysphoria and barred her ADA claims. See *Williams v. Kincaid,* Civil Action No. 1:20-cv-1397 (E.D. Va. June 7, 2021).

The Fourth Circuit Disagrees

On appeal, the Fourth Circuit disagreed with the district court and reversed the dismissal of the ADA and Rehabilitation Act claims. In support of reversal, the Fourth Circuit began by acknowledging the expanded scope of the definition of “disability” under the ADA Amendments Act. Disability “shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the ADA’s terms.”

Turning to the statute, the text of the ADA does not define the term “gender identity disorders” and does not mention gender dysphoria at all, the appellate court noted. Thus, although the ADA specifically lists a number of exclusions from the definition of “disability,” that list does not include gender dysphoria. To determine whether “gender identity disorders” includes gender dysphoria, the court examined the meaning of the ADA’s “terms at the time of its enactment.” Citing *Bostock v. Clayton County*, ___ U.S. ___, 140 S. Ct. 1731, 1738, 207 L.Ed.2d 218 (2020). When the ADA was enacted in 1990, the medical community did not acknowledge gender dysphoria either as an independent diagnosis or as a subset of any other condition. The prevailing authority on mental health conditions at the time was the Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R) which characterized gender identity disorders as an incongruence between assigned sex (i.e., the sex that is recorded on the birth certificate) and gender identity. In sum, 33 years ago, the gender identity disorder diagnosis marked being transgender as a mental illness. Gender dysphoria did not even exist as a diagnosis at that time. When you fast forward to a more modern (read: progressive) way of

analyzing gender identity, the medical community removed "gender identity disorders" from the most recent DSM (5th ed. 2013), and added the diagnosis of "gender dysphoria." Reflecting this shift in medical understanding, the Fourth Circuit and other courts have explained that a diagnosis of gender dysphoria, unlike that of gender identity disorder, concerns itself primarily with distress and other disabling symptoms, rather than simply being transgender. In short, the recent DSM-5's diagnosis of gender dysphoria takes as a given that being transgender itself is not a disability and affirms that a transgender person's medical needs are just as deserving of treatment and protection as anyone else's.

The Fourth Circuit also noted that "even if 'gender dysphoria' and 'gender identity disorder' were not categorically distinct … Williams's gender dysphoria nevertheless fell within the ADA's safe harbor for 'gender identity disorders … resulting from physical impairments.'" Thus, Williams could potentially establish that her gender dysphoria "resulted from a physical impairment" and therefore fell outside the ADA's exclusions.

The Armstrong-Helms Amendment: A Moral Code to the ADA?

Buried in the legislative history of the ADA is a little known congressional record known as the Armstrong-Helms Amendment. As the Fourth Circuit opinion elucidates, Sen. Jesse Helms, a leading force behind the exclusion of gender identity disorders from the ADA, stated: "If this were a bill involving people in a wheelchair or those who have been injured in the war, that is one thing. But how in the world did you get to the place that you did not even [ex]clude transvestites?" Helms demanded that the ADA lists "gender identity disorders" alongside pedophilia, exhibitionism, and voyeurism, implicitly branding all transgender people as equivalent to criminals, the court noted.

Helms was joined by his colleague, Sen. William Armstrong, who offered his own form of reprobation when he declared that he "could not imagine the sponsors would want to provide a protected legal status to somebody who has such disorders, particularly those that might have a moral content to them or which in the opinion of some people have a moral content."

Armstrong continued: "we are talking about behavior that is immoral, improper, or illegal and which individuals are engaging in of their own volition, admittedly for reasons we do not fully understand." With that the Armstrong-Helms amendment was born turning the ADA into a moral code: "disability' coverage applies to those we pity, not those we despise."

Carrying this mantle (or cloak) of repudiation of transgender individuals, Justice Samuel Alito wrote in his dissenting opinion (joined by Justice Clarence Thomas) in *Williams* that "voters in the affected states and the legislators they elect will lose the authority to decide how best to address the needs of transgender persons in single-sex facilities, dormitory housing, college sports, and the like." Alito, like Sens. Helms and Armstrong before him, appears to fail to grasp that transgender people, particularly those suffering from gender dysphoria, are not asking the courts for special treatment. On the contrary, a transgender person's medical needs are just as deserving of treatment and protection as everyone else. To castigate them as pedophiles and sexual deviants is a shameful trope that wreaks of animus. I, for one, am thankful the court did not sanction that archaic and hurtful misunderstanding.

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