No. 17-3332

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DAVID TAFT, Jr. ET AL
Appellants,

vs.

JERRY FOXHOVEN, ET AL.,
Appellees.

AN APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, WESTERN DIVISION

HON. LEONARD T. STRAND, CHIEF JUDGE
UNITED STATES DISTRICT COURT

BRIEF OF APPELLANTS

David Taft, Jr., et al
Appellants

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SUMMARY AND REQUEST FOR ORAL ARGUMENT

A group of patients, all men, having served their Iowa prison terms and having then been committed by the state of Iowa to the Civil Commitment Unit for Sexual Offenders, CCUSO, brought this Equal Protection based civil rights suit complaining that Iowa had committed only men and no women to the program thereby discriminating against the men based on their gender. Defendants, among other affirmative defenses, claimed to have failed in their attempt to commit a woman because their experts used tests which are not validated for use in predicting future dangerousness among women offenders. Defendants' motion for summary judgment was granted and this appeal followed.

Because of the importance of the question presented, Appellants ask this Court to grant oral argument of 15 minutes per side.

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JURISDICTIONAL STATEMENT

(A) The basis for the district court's subject matter jurisdiction is 42 U.S.C. § 1983 and 28 U.S.C. § 1331. The amended complaint (Filing # 25, ¶ 12, Appendix, at p. 14), alleged a cause of action claiming an Equal Protection violation aver that convicted women sex offenders are given gender-based favored status as they are not subject to post imprisonment civil commitment in Iowa. (Filing # 25, ¶ 22, Appendix, at p. 14, ¶ 22) The Plaintiffs also alleged that Defendants hired psychologists who use gender biased testing materials in the admissions process. Finally, they alleged that the trial court had authority to grant declaratory relief pursuant to 28 U.S.C. § 2201 and in the event Plaintiffs became prevailing parties, to grant reasonable attorney fees and costs. (Filings # 25, ¶ 14, Appendix, at 14, ¶ 14)

(B) This Court has jurisdiction over final orders entered by a district court. 28 U.S.C. § 1291. Here the district court entered a final order and judgment on September 29, 2017. (Filing # 55, Appendix, at p. 324 and filing # 56, Appendix, at p. 345)This order and the judgment granted Defendants' motion for summary judgment. (Filing # 46, Appendix, at p. 64) A notice of appeal was timely filed on October 25, 2017. (Filing # 57, Appendix, at p. 346)

(C) The filing dates establish the timeliness of the appeal. The final order and judgment were entered on September 29, 2017 and the notice of appeal was filed less than thirty days later on October 25, 2017.

(D) This appeal is from a final order and judgment that disposes of all Plaintiffs' claims.

STATEMENT OF ISSUES FOR REVIEW

1. Whether the involuntary commitment of men only into Iowa's post imprisonment program housed at the Civil Commitment Unit for Sexual Offenders, CCUSO, violates the Equal Protection Clause of the Fourteenth Amendment?

Sessions v. Morales-Santana, 137 S.Ct. 1678 (2017)

United States v. Virginia, 518 U.S. 515 (1996)

2. Whether the use of testing procedures known to be gender discriminatory violates the Equal Protection Clause of the Fourteenth Amendment?

Washington v. Davis, 426 U.S. 229 (1976)

Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977)

3. Whether summary judgment was appropriate at this stage in the proceedings?

Cosgrove v. Smith, 697 F.2d 1125 (D.C. Cir. 1983)

STATEMENT OF THE CASE

All Appellants[1] are men. They "comprise a group of patients at the Civil Commitment Unit for Sexual Offenders (CCUSO)." (Filing # 55, p. 1, Appendix, at p. 324) They "have served their prison terms but in a separate civil trial have been found likely to commit further sexual offenses." (Filing # 55, p. 1, Appendix, at p. 324) No women have been committed to the CCUSO or to any Iowa program or facility with similar admissions, program, or release criteria. Ultimately, the district court reached the merits of only two issues, gender discrimination in the admission of people into the Unit for Sexual Offenders and excessive security.[2] These final two issues were resolved pursuant to F. R. Civ. P. 56(a). (Filing # 55, p. 5 resolving filing # 46, Appendix, at p. 328)

The facts relevant to the remaining issue were summarized in the trial court' summary judgment order. Filing # 55, Appendix, at p. 324 . Everyone in Iowa who has been committed to the CCUSO program is male. No women have ever been committed to CCUSO or to a similar program within or outside the state. Iowa does not have a comparable program exclusively for women. "The parties also

[1] Appellants are aware of the Court's rule, Fed. R. App. P. 28(d), which provides that parties are ordinarily to be identified by their names and not terms such as appellant and appellee. In this case, use of the names is impossible because there are 11 appellants and several appellees. Whenever possible, names are used.

[2] The excessive security claims along with all damages claims are deliberately abandoned. Appointed counsel takes this step only after telephonic consultation with each Appellant and with their express consent.

generally agree that for various reasons the instruments used to determine the risk of an individual being a sexual offender are aimed at men. It is generally agreed that neither the defendants nor the state of Iowa have taken steps towards establishing a civil commitment facility for female sexual offenders. The state of Iowa has attempted to commit one woman as a sexual offender. However, because of inadequate assessment tools, the court could not find probable cause to proceed with a civil commitment. Doc. No. 46-3 at 10.[3]" (Filing # 55, p. 3, Appendix, at p. 326.)

SUMMARY OF ARGUMENT

It was error to grant summary judgment on the gender discrimination claim against the Plaintiffs. While Iowa's statute providing for post incarceration civil commitment of sexually violent predators (SVPs) is written in a gender neutral fashion, the commitment statute has been implemented to exclude all female sex offenders. *United States v. Virginia*, 518 U.S. 515 (1996); *Sessions v. Morales-Santana*, 137 S.Ct. 1678 (2017). This single gender treatment discriminates against both genders.

Iowa's response was that it tried to commit a woman but failed because its experts used forensic tests which were not reliably calibrated for use against women. The Plaintiffs assert that knowing and deliberate use of testing procedures

[3] This citation to the record is taken from the opinion filed by the trial judge. While the citation is inaccurate, the summary of the trial court record is accurate.

with a demonstrated gender bias or hiring experts known to use gender biased testing protocols is proof of intentional gender bias sufficient to withstand a motion for summary judgment. *Washington v. Davis*, 426 U.S. 229 (1976); *Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252 (1977); *Ricci v. DeStefano*, 557 U.S. 557 (2009).

Even if this evidence does not alone establish a gender based violation of the Equal Protection Clause of the Fourteenth Amendment, this evidence is sufficient to withstand a motion for summary judgment. Iowa's other procedural objections do not bar relief for these Plaintiffs as against these Defendants.

ARGUMENT

STANDARD OF REVIEW

The questions presented are essentially either questions of law or mixed questions of law and fact. This Court applies a de novo standard of review in such appeals. *Karsjens v. Piper*, 845 F.3d 394, 403 (8th Cir. 2017), citing *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S.Ct. 1744, 1748 (2014).

And in *Roubideaux v. North Dakota Dept. of Corrections and Rehabilitation*, 570 F.3d 966, 971-72 (8th Cir. 2009), this Court said it reviews the grant of summary judgment de novo, " viewing all evidence and reasonable inferences in the light most favorable to the nonmoving party." *Habhab v. Hon*,

536 F.3d 963, 966 (8th Cir.2008). Summary judgment is proper where there is no genuine dispute of material fact, and the moving party is entitled to judgment as a matter of law. See Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).”

I. GENDER BASED DISCRIMINATION

Plaintiffs have "a federal constitutional right to be free from gender discrimination" unless a gender classification serves important governmental objectives and is substantially related to the achievement of those objectives. *Marshall v. Kirkland*, 602 F.2d 1282, 1298-99(8th Cir. 1979). *Marshall* was an employment discrimination case, not a case involving conditions of confinement for SVPs.

In *Sessions v. Morales-Santana*, 137 S.Ct. 1678 (2017), the Supreme Court made plain that laws which discriminate on the basis of gender “are subject to review under the heightened scrutiny that now attends ‘all gender-based classifications.’ *J.E.B. v. Alabama ex rel T. B.*, 511 U.S. 127, 136” (1994)(Exercise of peremptory challenges based on gender rendered state conviction constitutionally infirm). *Morales-Santana* was an action by a son being removed from the country because his derivative citizenship came from his United States citizen father rather than from a United States citizen mother.

Morales-Santana is distinguishable from the case before this Court in that here the Iowa commitment statute is gender neutral on its face whereas the derivative citizenship statute was gender discriminatory on its face. However, *Morales-Santana* establishes that in any government program which is gender based, the government has the burden to show at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."

United States v. Virginia, 518 U.S. 515, 533 (1996) involved Virginia Military Institute's male-only admissions policy which was held to violate the Equal Protection clause of the Fourteenth Amendment. The Supreme Court held that VMI could not deny admission to qualified women. Again, VMI overtly and explicitly chose to admit to its gender bias. Plaintiffs make a similar Equal Protection claim.[4] They now assert that women are denied the opportunity to participate in the violent sexual predator treatment programs that are available to them. See, The Evil Men Do: Perverting Justice to Punish Perverts, 2000 University of Illinois Law Review 1199, 1211-1230 (2000). And see, *Navedo v.*

[4] Counsel appointed by this Court for this appeal acknowledges that the Plaintiffs, represented by other counsel in the trial court, did not explicitly claim concern over the exclusion of women from the CCUSO program. Nor did Plaintiffs explicitly assert that the Defendants used the gender biased evaluation tools or that the psychologists who administered or scored those tests used their results in creating treatment plans, evaluating transition planning, for discharge planning, or for any other purpose. Moreover, Defendants did not, in the trial court, have an opportunity to adjust their responses to address these related but different claims.

Preisser, 630 F.2d 636, 638 (8th Cir. 1980), citing *Craig v. Boren*, 429 U.S. 190, 197 (1976). *Cf. Roubideaux v. North Dakota Department of Corrections and Rehabilitation*, 570 F.3d 966 (8th Cir. 2009), in which this Court rejected a claim by two North Dakota inmates that they were confined in all women facilities which provided unequal programs and facilities when compared with those provided to male inmates. Plaintiffs in this case make different claims. Plaintiffs assert that women are denied the opportunity to participate in the Iowa sex offender treatment programs altogether.

Where state law is gender neutral on its face, the analysis requires an additional step. In *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886), the Supreme Court said that even if "the law itself be fair on its face, and impartial in appearance," if it is "applied and administered by public authority with an evil eye and an unequal hand," it is "still within the prohibition of the constitution." See, also, *Church of the Lukumi Babalu Aya, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).

In *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 273 (1979), the Supreme Court applied the equal protection principles articulated in *Washington v. Davis* and *Arlington Heights v. Metropolitan Housing Development Corp*., "with equal force to a case involving alleged gender discrimination." The

Court stressed, as it had in *Davis* and *Arlington Heights* that "purposeful discrimination is 'the condition that offends the Constitution.' "

That is, Plaintiffs must show that the gender discrimination was intentionally done for the purpose of providing different treatment based on gender. Plaintiffs cannot carry this burden by showing only that there is a gender based effect in the admission numbers. For example, in *Washington v. Davis*, 426 U.S. 229, 241-249 (1976), in a case which involved a test used by the District of Columbia Metropolitan Police Department in its hiring practices, the United States Supreme Court upheld summary judgment for the District because plaintiffs' evidence in support of their motion for summary judgment did not establish that the test was used with a discriminatory animus. And see, *Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252, 264-271 (1977).

The question becomes whether the implementation of the program is intentionally gender biased. By phrasing the question in this manner, the burden shifts from the government's obligation to prove "at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives" *Morales-Santana,* to whether the Plaintiffs can demonstrate that the implementation, gender neutral on its face, is in fact intentionally gender biased.

Plaintiffs assert that their evidence was sufficient to survive summary judgment on this point. First, the mathematical disparity here is not a ratio, it is zero. There are no women committed in Iowa. This justifies a stronger inference of discriminatory intent than where there is merely a statistical disparity of one or two standard deviations. Second, implicit in the evidence is a suggestion that men are by and large culprits whereas women are at most co-participants. See, filing 46-1, ¶ 4, Appendix at p. 68, ¶ 4. "Dr. Tracy Thomas authored a report indicating key factors which make females less likely than males to qualify for commitment as an SVP: females sexually offend at lower rates than males; to a greater extent than male sexual offenders, female sexual offenders commit offenses with a co-offender, and [are] at times coerced into the offending; and females are less likely than males to present with paraphilic and antisocial personality disorder." Note that none of these factors is exclusive, all are qualified with phrases such as "less likely," "lower rates," "to a greater extent than males," and "at time." These differentiations apply just as well between male offenders and therefore provide no justification for the use of gender stereotypes.

In their answer to the amended complaint, Defendants affirmatively allege that "To date, no female SVPS have been committed in Iowa" (Filing # 37, ¶ 17, Appendix, at p. 58. ¶ 17); "Defendants do not perform research on psychological tests geared for either gender." (Filing # 37, ¶ 18, Appendix, at p. 58, ¶ 18) "There

is less empirical information on female sex offenders because female sex offenders are relatively rare." (Filing # 37, ¶ 21, Appendix at p. 58, ¶ 21) This head-in-the-sand approach to involuntary commitment of females represents use by the state of Iowa and these Defendants of gender stereotypes which are disfavored. *United States v. Virginia*, 518 U.S. at 533("[I]t must not rely upon overbroad generalizations about the different talents, capacities, or preferences of males and females.")

Plaintiffs acknowledge that the Defendants offered the sworn testimony of a psychologist and they did not. Plaintiffs, nevertheless, assert that weighing credibility of the proffered opinion is not the province of a judge ruling on a summary judgment motion. If there are facts in dispute, such as whether gender bias affects the admissions, treatment, or discharge decisions of these Defendants, summary judgment is not permitted. *Cosgrove v. Smith*, 697 F.2d 1125 (D.C. Cir. 1983). Whether gender stereotypes or inadequate research explain the absence of any female SVPs in Iowa cannot be determined on this record. This Court should vacate the summary judgment order and remand so Plaintiffs can amend to focus this law suit properly.

II. USE OF GENDER BIASED TESTING

Plaintiffs have asserted that in making decisions concerning the status of the plaintiffs, Defendants have used psychologists to render opinions. The Defendants

have relied upon these psychologists even though the Defendants are on actual notice that the psychologists use tests which discriminate on the basis of gender. The trial court found that the "state of Iowa has attempted to commit one woman as a sexual offender. However, because of inadequate assessment tools, the court could not find probable cause to proceed with a civil commitment." (Filing # 55, p. 3, Appendix, at p. 326. And see, Filing 46-3, at pp. 14-25, Appendix at 91-102.

Defendants have used gender stereotypes as a basis for excluding female sex offenders from participation in the CCUSO program. Plaintiffs assert that the same tests which are not scored to reliably assess future risk for women are used against the men. Here, there can be no dispute that the Defendants know that their experts are using tests with a demonstrated gender bias.

Both *Washington v. Davis*, 426 U.S. 229 (1976) and *Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252 (1977) are cases where discriminatory testing was used as an excuse for racially motivated decisions by the defendants. Both times the effort failed. Plaintiffs make essentially the same objection here except that the testing is gender biased.

In *Taylor v. Louisiana*, 419 U.S. 522 (1975), the Supreme Court held that a male defendant could raise gender bias in the selection of the venire from which prospective jurors were to be drawn in Louisiana criminal trials. "*Taylor*, relied on Sixth Amendment principles, but the opinion's approach is consistent with the

heightened equal protection scrutiny afforded gender-based classifications." *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 135(1994).

It is not an adequate response that Defendants did not personally discriminate based on gender when they knowingly relied upon psychologists that did. Even though Plaintiffs cannot complain that the use of these illegal, gender biased tests contributed to their original commitment, they can and do complain that use of these same tests discriminate against women sex offenders, denying them access to the benefits of the CCUSO program. *Ricci v. DeStefano*, 557 U.S. 557 (2009). And Plaintiffs wish to amend on remand to expand their claims to include the misuse of these biased test results in conditions of confinement decisions being made daily in the CCUSO program. Defendants cannot rely upon their experts since they have notice that their experts use tests which are themselves gender biased.[5]

The record does not disclose what steps, if any the Defendants took to look for alternative tests or experts that would be free from the gender bias of the tests

[5] Plaintiffs in the trial court also did not offer evidence of the status of women SVPs in other states. This information is not in the record below and is not evidence! The Association for Treatment of Sexual Abusers formed the Sex Offender Civil Commitment Program Network (SOCCPN.org) in 2015. Their national survey in 2016 reports that six states have female civilly committed residents (WA, CA, NE, MN, IL, and VA) with a combined 20 female residents nationwide. SOCCPN also did not explain the commitment criteria used in each state. Defendants, on remand, will not be able to claim that there is no reasonable means for committing women to their SVP program.

used.[6] Defendants do not claim that no females are sexually violent predators. Their claim, at least on this record, is that the risk of recidivism is lower for women than it is for men. Of course, the risk varies among men too but that does not stop commitments for men. There is no evidence in this record that all female sex offenders are at lower risk to reoffend or to engage in sexually violent behavior than all of the Plaintiffs. Plaintiffs offered no evidence on this point either. The absence of evidence should have resulted in no summary judgment being granted and now should result in a remand so that the parties can provide the trial court with information about whether such evidence exists.

Ricci was a Title VII case and not a constitutional case. The Court implied that the burden on defendants in a constitutional case may be higher. "We also do not hold that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a future case." *Ricci*, at 584. What the record does establish is that the Defendants hire psychologists who use tests known to score females unreliably. In light of the failure of the Defendants to reject these tests and the psychologists who use them, summary judgment was unwarranted.

[6] In fairness, they are not alone. See, *In re Coffel*, 117 S.W.3d 116 (Mo.App. E.D. 2003)(Reversing a commitment because the science did not support the confinement of a female.); *Doe v. Sex Offender Registry Bd*, 999 N.E.2d 478 (Mass. 2013)(Same).

III. RELIEF

Defendants have asserted that they have no responsibility for who is committed to their program and they have no control over how they are committed. Defendants are partly correct. In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), the United States Supreme Court explicitly held that the civil rights statute, 42 U.S.C. § 1983 cannot be used to challenge the fact of or length of a state court order of confinement. Later, in *Heck v. Humphrey*, 512 U.S. 477 (1994), the Court confirmed that the *Preiser* rule barred a damages action unless the plaintiff first demonstrated that the conviction has been reversed, expunged, or declared invalid. See also, *Entzi v. Redmann*, 485 F.3d 998 (8th Cir. 2007). So, to the extent that any Plaintiff wishes to be released through this law suit, his hopes cannot be satisfied.

That however does not mean that conditions of confinement are similarly exempt from § 1983 litigation. It is reasonable to believe that the same defective testing is used repeatedly in making on-going treatment decisions and in considering release decisions. Discriminatory risk assessments, when used for making decisions about treatment plans or when a person might advance a level or fall back a level or even when making discharge decisions, are implicated by the suit filed by the Plaintiffs. When there is *some* possible remedy, even a partial remedy or one not requested by the plaintiff, that possibility should preclude summary judgment. Cf. *Church of Scientology of Cal. v. United States*, 506 U.S. 9,

12-13 (1992). That is, Plaintiffs have standing to pursue claims of unequal treatment between men and women sex offenders in Iowa.

When a court concludes that a statutory classification violates the constitutional guarantee of equal protection of the laws, it has a choice of remedies. *Califano v. Westcott,* (1979) 443 U.S. 76, 89-91 (1979)(Court may either withdraw benefits of welfare statute from favored class or extend those benefits to excluded class); *Heckler v. Mathews*, 465 U.S. 728, 740 (1984).

Accordingly, remand is in order to permit the Plaintiffs to amend their operative complaint to articulate in a more precise way how they are being harmed and what relief may be available to prevent future use of gender biased testing and testimony. In addition, the concern that women are being excluded from access to the treatment opportunities provided by the CCUSO program provides a rational basis upon which to permit this law suit to continue.

CONCLUSION

This Court should vacate the summary judgment order and remand with leave for Plaintiffs to amend. Plaintiffs have established that the admission criteria and likely the ongoing treatment decisions are tainted by gender bias. Plaintiffs have established that gender bias infects the testing that was done. Plaintiffs cannot seek release from confinement, but can and do seek to open the doors to SVP treatment to all Iowa sex offenders without regard to gender.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,506 words and this brief contains 512 lines of text.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface using Microsoft® Word 2000 (9.0.2720) with 14 point Times New Roman® settings. I have no idea how many characters per inch and I do not know how to ask my computer to tell me.

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