

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

JOHN DOE, et. al.,

Plaintiffs,

v

File No. 13-1196-CZ

MDOC, et. al.,

Defendants.

/

HEARING
DEFENDANTS MOTION FOR SUMMARY DISPOSITION
Taken on the 23rd day of April, 2014.

APPEARANCES:

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RECEIVED by Michigan Court of Appeals 5/13/2014 3:35:18 PM

1 April 23, 2014

2 (Beginning of part one of audio recording)

3 FEMALE VOICE: Number 7 on the docket, John Doe
4 versus Michigan Department of Corrections, 13-1196-CZ.

5 MR. GOVORCHIN: Good afternoon, Your Honor.

6 JUDGE: Good afternoon, Mr. Govorchin.

7 MR. GOVORCHIN: We didn't hear which particular
8 motion, but there is a certain logic to these, I think, to
9 go. I didn't know if the Court had a preference already.

10 JUDGE: I'd like to start with the Summary Motion.

11 MR. GOVORCHIN: On the Elliott-Larsen Civil Rights
12 Act?

13 JUDGE: Yes.

14 MS. LABELLE: Good afternoon, Your Honor. Deborah
15 Labelle and Jennifer Salvatore on behalf of the Plaintiffs.

16 JUDGE: Good afternoon.

17 MR. GOVORCHIN: Your Honor, we filed a motion
18 under the Elliott- -- or, a Motion for Summary Disposition,
19 asking that the Court rule that the Plaintiffs are not able
20 to pursue an Elliott-Larsen Civil Rights Act claim against
21 the named Defendants in this case. The interesting thing
22 about this, I think, is that the Plaintiffs -- if we call
23 them -- I'll just refer to the seven prisoner Plaintiffs --
24 are able to utilize the Elliott-Larsen Civil Rights Act, if
25 they are improperly, under the statute, denied access to a

1 public service. So, for instance, if the seven
2 Plaintiffs -- one of them or a prisoner in a State or county
3 Correctional facility, had tried to sign up for a
4 correspondence course through a local community college and
5 the college denied that prisoner the access to that
6 community -- that correspondence course for some basis
7 prohibited in the Elliott-Larsen Civil Rights Act, say,
8 based on their gender, sex, age, weight, race, national
9 origin, then that person could say, "Hey, that's a public
10 service, I'm a citizen for the purpose of accessing this
11 public service," and they could utilize the Elliott-Larsen
12 Civil Rights Act's remedial provisions to seek a remedy.

13 Similarly, if a prisoner was to try to contact the
14 Secretary of State's office and ask for a new registration
15 for their automobile or truck and that was denied, again,
16 for an unlawful reason, that would be a prisoner entitled to
17 utilize the benefits of the Elliott-Larsen Civil Rights Act
18 to challenge that denial unlawful, if it was, of service
19 from the Secretary of State's office.

20 Similarly, if a prisoner wanted to contact the
21 Department of Community Health and ask for a new birth
22 certificate, or replacement birth certificate and it was
23 denied for a prohibited reason under the Elliott-Larsen
24 Civil Rights Act, that prisoner could say, "I've been denied
25 a public service under the Elliott-Larsen Civil Rights Act

1 and seek a remedy."

2 So the question here is whether there is a public
3 service involved. It's got nothing to do with the prisoner
4 status. That's a complete misnomer by the Plaintiffs in
5 that they've argued them in response to my motion. So in
6 this case, the legislature has clarified -- and for our
7 purposes here we can start just on March 10th, 2000, that a
8 public service does not include a State or county
9 correctional facility with regard to decisions or actions
10 taken to a person committed to those facilities after
11 punishment -- or after conviction of a crime. Those people
12 are in a prison for punishment. The management of those
13 people in the prison setting is not a public service under
14 the Elliott-Larsen Civil Rights Act. The statute clearly
15 says so. I don't actually think there's any dispute about
16 that, in what the statute says.

17 So let's get to the argument as to what would be
18 the reasons for challenging the clear language of the
19 statute. Well, the first argument that we anticipated the
20 Plaintiffs would make and they show that we are correct in
21 that anticipation, their response was that the -- a decision
22 from 2007 from a U.S. District Court in the case -- Mason
23 case -- I'm not going to give you all the long string of
24 cites here because I know the Court's familiar.

25 JUDGE: Uh-huh (affirmative).

1 MR. GOVORCHIN: So that that decision is somehow
2 binding on the Defendants going forward in this other
3 situation. But Michigan case law is pretty solid -- or it's
4 very solid, that you have to mutuality of estoppel in that
5 case, and we have different Plaintiffs in this case than
6 there were in the Mason case, different Defendants in this
7 case than in the Mason case, mutuality of estoppel means
8 that that decision in the Federal court does not bind the
9 parties in this case.

10 The next question might be does the Federal
11 court's decision -- and I'll get to the merits of that
12 decision in a minute, but does the Federal court's decision
13 bind you as the judge in the Washtenaw County Circuit Court
14 decision? The answer is "no." We've cited the cases that
15 support that. It can be persuasive; you know, it's somebody
16 who took a look at the question, but it isn't binding on
17 you. And it's clearly not binding on a State court's -- a
18 Federal court's decision of the constitutionality of a state
19 court's statute is not binding on the state court's later
20 review of that same question.

21 So a third question or a third argument might be,
22 well, hasn't that question actually been litigated already?
23 And the answer to that is, again, "no." We've pointed out
24 that, again, you would have to have -- there's a difference
25 between issue preclusion and claim preclusion. I'm speaking

1 only for the record, not for the judge. So -- and in those
2 two situations, in -- this would be an example of issue
3 preclusion. That's what's really happening here. Claim
4 preclusion -- there's another word for that is res judicata.
5 So if you had the same parties litigating the same question
6 in a forum and then they came back to a second forum, you
7 couldn't -- you could apply the doctrine of res judicata, or
8 claim preclusion, say that those parties couldn't
9 re-litigate that question.

10 But issue preclusion is what is happening here
11 because of the difference in the parties. So the
12 Plaintiffs and I have went back and forth citing the
13 respective cases that address that question and I believe
14 that it should be strongly clear that the cases we've cited
15 are more probative. For instance, the Plaintiffs rely on a
16 claim preclusion case to address the issue of preclusion
17 argument. And that's not right. In the Federal courts,
18 both in the Reno decision and the later 6th -- 9th and 11th
19 Circuit cases that we've cited in our brief point out that
20 the states are free to re-litigate that question, even if
21 there was otherwise an argument for collateral estoppel.

22 And this is kind of an important part, that this
23 is because it's a governmental entity that's raising one
24 side of this question, that the U.S. Supreme Court has said
25 that the Federal government should not be bound by the first

1 decision on that point, because it doesn't allow for legal
2 development -- law -- the development of the law over time
3 as applied to different situations. And so it should be
4 okay for the Federal government to -- the United States, to
5 re-litigate those questions in repeated forums. That's a
6 Marino (phonetic) decision. And that's also applied to the
7 state governments; that the state's sovereign when it's
8 addressing a question of the constitutionality of a state
9 statute shouldn't be bound -- I've already mentioned we're
10 not bound, but just as we go down the default line --

11 JUDGE: And you're saying that -- that the State
12 Courts of Appeal in Michigan have adopted Marino -- or the
13 reverse of it?

14 MR. GOVORCHIN: We actually don't have any direct
15 decision one way or another on that. All we have is a
16 Federal -- the 9th Circuit and the 11th Circuit looked at
17 the question in the context of a state court consideration
18 of that -- of that previously litigated topic. And they
19 applied Marino and said it should go to the -- Marino should
20 apply to the states also, meaning that the states should be
21 able to re-litigate the question. So if we're not bound by
22 Judge O'Meara's decision in the Mason case, and the Court's
23 not bound by it, is it persuasive? Does it lead us to any
24 set decision with regard to whether or not the 2000 -- I'm
25 going to call it 2000 for the effective date -- amendment to

1 the Elliott-Larsen Civil Rights Act, which took actions and
2 decisions in a correctional facility regarding a person
3 who's been incarcerated there as punishment for a crime out
4 of the definition of public service, and lead that amendment
5 to be considered violative of equal protection. I think
6 here the parties agree that the equal protection clause in
7 the United States constitution and the State of Michigan's
8 constitution are co-- -- co-extensive. So we don't have a
9 difference there.

10 We do have a question in this particular case of
11 how to look at the question; that is, how do we examine
12 what's happening here? So I've pointed out, right at the
13 outset, one of the fundamental differences that the parties
14 are taking towards this question. For us, when you look at
15 the statute, because the statute defines what a "public
16 service" is and it doesn't have any animus with regard to a
17 person incarcerated anywhere, it simply says that this
18 activity of this governmental activity is not to be
19 considered a public service.

20 Why would that be? Well, as the Supreme Court in
21 Michigan said in the Brown case, the reason is that the
22 concept of the public invitee going into a public forum or a
23 receiving something -- some service that's trying to be
24 offered and pushed out -- fostered to the public is very
25 different than someone else who as been compelled to reside

1 in a certain location for -- as part of their punishment for
2 being convicted of a crime. So the Brown case said that
3 although if you or I or Mr. Farrell were to walk into a
4 county jail and slip and fall, and the county -- we could
5 allege that the county jail structure was defective, we
6 might be able to say, "I'm going to bring suit against this
7 county jail," and the county jail can't raise governmental
8 immunity against our suit because of the public building
9 exception. And we're able to take advantage of that. But
10 if I instead was residing at the county jail as a person who
11 was remanded there for conviction of a crime, so I'm
12 compelled to be there -- I'm not invited to be there, it's
13 not the doors are opened for me but I'm compelled to be
14 there, the Brown says that for me, being compelled there, I
15 cannot raise that same argument. I cannot consider the
16 county jail as a public building, and I cannot assert that
17 the public building exception to governmental immunity will
18 be unavailable to me as a defense.

19 Similarly, a person who is receiving a service at
20 the Secretary of State's office or the local community
21 college or Department of Community Health, they are, again,
22 accessing a service that's made available to everybody,
23 regardless of their statute. But in a custody situation, a
24 person has been remanded to that entity's custody and
25 control for management as punishment for their conviction of

1 a crime and in that situation they are not a person who's
2 choosing to be in this environment in order to get some
3 benefit. They are there against their will. And in that
4 sense, there's no sense of comparing them as an invitee -- a
5 business invitee. And that's a very critical distinction.
6 So in this case, just like in Brown, the legislature has
7 determined that it should not be considered a public service
8 like those other public services enumerated in the
9 Elliott-Larsen Civil Rights Act that would be described as
10 encompassing the actions and decisions regarding a person in
11 the -- incarcerated in one of these prisons or county jails.

12 One of the arguments that had been raised is -- in
13 the response, was that, well, if a prisoner is in a prison
14 setting and they can't sue under the Elliott-Larsen -- can't
15 sue the prison officials under the Elliott-Larsen Civil
16 Rights Act, what could they do? Well, of course, they have
17 many options. They could sue for assault and battery, you
18 know, the tort in Michigan. They could sue for the
19 intentional infliction of mental distress, if they thought
20 that criteria met. And, of course, they could, like the
21 Plaintiffs have in this case, file a Federal case under 42
22 USC, Section 1983, a case that gives them much more -- much
23 broader remedies than are available under the instant
24 action, and allows for all of the rights and remedies that
25 were otherwise encompassed in the Elliott-Larsen Civil

1 Rights Act.

2 So not that that is essential for the
3 constitutionality, that is the failure to violate the Equal
4 Protection clause, but it is that that ability to sue either
5 in State law -- State tort claims or in the Federal forum
6 under 42 USC 1983, just demonstrates that there are
7 alternative remedies. So the argument, in case it was a
8 heartstring kind of argument that otherwise the prisoner
9 population was left without a remedy, is just not true.
10 It's not founded. And the Plaintiffs have, in fact, proved
11 it here by filing the exact same complaint in Federal court.

12 We've asked for another -- raised another basis
13 for dismissal here that isn't reliant just on the wording of
14 the statute. And that is that the Plaintiffs have failed to
15 plead a case -- proper case under the Elliott-Larsen Civil
16 Rights Act against any of the named Defendants. So we've
17 explained in the ca- -- in our briefs that the Plaintiffs
18 have to be asserting liability based on respondeat superior.
19 Under the Hamad (phonetic) decision that's cited in the
20 party's briefs, that means that the person -- the Plaintiffs
21 have to identify how the non-involved person -- that is, the
22 named Defendants who are not involved in the actual
23 activity -- have knowledge or should have constructive
24 knowledge of the injury or likelihood of injury to the
25 victim in this particular case. So the sequence would be

1 like this: Plaintiffs allege that another prisoner assaults
2 them. Plaintiffs would have to show that the wardens or the
3 policy-making Defendants -- who are the only named
4 Defendants in this case -- would have to know that that
5 other prison was going to -- prisoner was going to assault
6 that Plaintiff, or that that other prisoner had propensities
7 that would make them likely to assault that Plaintiff.
8 There's no basis for assuming -- for just throwing out the
9 postulate that this person, no matter what kind of crime,
10 what kind of physique, what kind of attitude they had, but
11 because -- solely because of their age, they represent a
12 risk category that has to be acknowledged. There's no
13 recognition of that anywhere in Michigan law.

14 Instead, under Hamad, they have to -- the
15 Plaintiffs had to plead that the wardens or the
16 policy-makers had direct knowledge or constructive knowledge
17 that the perpetrator of these actions were going to
18 perpetrate the actions on the victims. There's no
19 allegation to that effect in these complaints; completely
20 devoid of them. So absent that, that failure to properly
21 plead under the Elliott-Larsen Act would say that even if
22 the Court was to rule that the Elliott-Larsen Act would be
23 available to the Plaintiffs as a mechanism for bringing this
24 case forward, even if they did that, the Court should rule
25 that the Plaintiffs have not properly pled a case under the

1 Elliott-Larsen Act and required the case to be dismissed.

2 Would you have any questions?

3 JUDGE: No, thank you.

4 MR. GOVORCHIN: Okay. Thanks.

5 MS. LABELLE: Thank you, Your Honor. I think I'll
6 go in the reverse order and just follow up and address the
7 last issue that Counsel raised as to whether we've failed to
8 set forth a valid claim under the ELCRA act. You know,
9 Defendants' own motion sort of is fatal to their argument.
10 And they argue that other than their bare allegations,
11 they're not sufficient proof to support a conclusion that
12 sexual harassment was so pervasive as to these Plaintiffs
13 that Defendants could have been held to have had
14 constructive notice for purposes of Plaintiffs' hostile
15 prison environment claim.

16 This is a C-8 motion. We have pled. In fact,
17 that the harassment was so pervasive that Defendants knew or
18 should have known, had constructive knowledge, of the
19 hostile prison environment. We have not yet got into
20 Discovery yet, but we've clearly pled those facts that are
21 saying, you know, that there is a hostile environment, that
22 the vulnerability of youth, you know, we have a lengthy
23 complaint in which we detail that this is well-known, both
24 in Federal and in State findings and in the Department of
25 Corrections' own acknowledgment, that youth are highly

1 vulnerable to sexual abuse within an adult facility. We
2 argue that, in fact, youth were -- there was great predation
3 on the youth, that they were sexually harassed and raped,
4 not just by adult prisoners, but by cross-gender female
5 staff. We've also alleged specific facts with regard to the
6 discrimination based on age, with regard to the excess
7 treatment of youth into solitary confinement, and the
8 Tasing of youth and the failure to provide them with
9 treatment consistent with their age.

10 We've alleged these facts. Defendants, of course,
11 have argued that we have to show respon- -- vicarious li- --
12 that we've alleged vicarious liability inside the Hamad
13 case. The Hamad case said that public service providers are
14 not vicariously liable for quid pro quo sexual harassment on
15 the unforeseeable criminal acts of their employees.. This is
16 not a quid pro quo case; this is a hostile sexual
17 environment case. We're not alleging that the Defendants
18 are guilty based upon what the prisoners did or what their
19 staff did, but their failure to take action in light of the
20 pervasive hostile environment. They're placing youth --
21 their direct actions in placing youth in harm and then their
22 failure to train, failure to discipline, failure to
23 investigate, and failure to take steps to stop the resultant
24 pervasive hostile sexual environment that occurred. We've
25 clearly pled sufficient facts for this, and I think that

1 issue in a C-8 motion should be denied.

2 The next issue is -- is the amendment, and,
3 actually, I can dismiss -- Counsel didn't argue that,
4 although they did in their motion, that Plaintiffs' claims
5 are barred by the pre-amendment ELCRA. This issue has been
6 resolved by the Michigan Court of Appeals in two cases, of
7 Gormer, Doe and Neal (phonetic). A total of 10 judges
8 sitting on a special panel, and another panel concluded that
9 the Elliott-Larsen Civil Rights Act was intended to and did
10 cover all persons from discriminatory treatment by the
11 State. The Supreme Court denied Defendants' application for
12 leave on this issue. So I think on that request to dismiss
13 based on the original Elliott-Larsen Civil Rights Act should
14 be denied based on the law that exists.

15 The third question is, is the amendment to the
16 ELCRA a bar to Plaintiffs' claims? And there are two parts
17 to this. No, because it's been declared unconstitutional in
18 a final judgment of a Federal court that is binding on this
19 Court. The -- you know, the United States Supreme Court
20 said -- has stated in a number of cases that it would really
21 be unthinkable to suggest that state courts should be free
22 to disregard the judgments of Federal courts, given the
23 basic requirements that --

24 JUDGE: I'm sorry -- who said that? It sounded
25 like you said the 9th --

1 MS. LABELLE: U.S. Supreme Court.

2 JUDGE: Okay. All right. Go ahead.

3 MS. LABELLE: Given the basic requirements that
4 state courts have to honor the judgments of courts in other
5 states and that Federal courts must honor state court
6 judgments. The issue here is what law -- I mean, first the
7 issue is, what is the preclusive effect of the prior Federal
8 court judgment ruling on the specific issues before this
9 Court? There's no dispute that the issue's identical. And
10 they don't seem to have a concern with this, or that it's a
11 final judgment. We attached the ruling of the court in
12 which it said it's a final declaratory judgment, which
13 Defendants chose not to appeal.

14 The question that Defendants appear to quibble
15 with is, you know, the first judgment rule. The first
16 judgment rule is pretty settled. It says that it applies to
17 the preclusive effect of any judgment. The United States
18 Supreme Court in Taylor versus Sturgell addressed both claim
19 and issue preclusion in holding that there's no dispute that
20 the preclusive effect of a Federal court judgment is
21 determined by Federal court law. And, Your Honor, I --
22 Defendants filed a rather lengthy reply brief, and I'm going
23 to cite a few cases. And for the Court's benefit, I've
24 prepared just a list of the cases with a copy of the Federal
25 cases that I'm going to reference, including Taylor versus

1 Sturgell.

2 JUDGE: Thank you.

3 MS. LABELLE: There is no dispute that the
4 preclusive effect of a Federal court judgment is determined
5 by Federal common law. Defendants quibble and say, "Well,
6 the Michigan Supreme Court in the Pierson" -- (phonetic) --
7 "case just said 'claim preclusion.'" Claim preclusion,
8 issue preclusion, it's not a matter of whether it's
9 collateral estoppel or res judicata, it's a matter of which
10 judgment came first. Res judicata, you know, a short primer
11 for all of us, I think, is that res judicata is not an issue
12 of the parties, it's an issue when in the prior litigation
13 could the issue have been litigated, and whether it was or
14 was not. Issue preclusion, collateral estoppel, is even
15 more narrow, and it says, "Was the issue litigated to its
16 finality?" It requires a specific issue to be litigated.
17 So for both claim or issue preclusion, the question is, who
18 made the decision first? Had the state court made the
19 decision first, it is clear that the Federal courts must
20 follow it. It's a matter of determin- -- and have to go by
21 state law in determining what the preclusive effect is. And
22 it makes sense, you know. Whoever issues the decision based
23 on their law, they have the right to determine how that
24 order and judgment is followed and what the impact of it is.
25 So I don't think there's any dispute that there are a number

1 of other cases -- Venture, Global Engineers, 6th Circuit
2 case, which I've cited, the state courts are required to
3 follow Federal rules in deciding the preclusive effect of a
4 prior Federal judgment. It's absolutely clear.

5 So the question is, why does it matter? And that
6 is that in Federal common law, the preclusive effect has
7 very little to do with mutuality of parties. And although
8 many of the courts and state courts have abandoned that as
9 well, the Federal law that applies is very clear, and it
10 says, "A litigant should not have more than one full and
11 fair opportunity for judicial resolution."

12 Defendants fought this issue in the Federal courts
13 and they lost, and they're bound by it. They can't -- it
14 would be like saying in -- to take a recent example, that if
15 Defendants -- if the State chose not to appeal Judge
16 Friedman's decision on the constitutionality of the marriage
17 amendment to the constitution, that they could just say,
18 "Oh, you know what? We're going to come back and litigate
19 that in State court. We lost there, let's do it all over
20 again." You cannot do that. You've had your full
21 opportunity, it's been decided, Federal law says that binds
22 you and you can't, then, come back and try to litigate it in
23 the State forum at that time.

24 Defendants, I don't even think, would think to
25 argue that, that it's not binding in the state. Similarly,

1 Defendants argument is that -- and I would note in two cases
2 in terms of the lack of need for privity is Ludwig
3 (phonetic) and Sunshine, both 6th Circuit cases, in which
4 the court says "clearly we've abandoned the issue of
5 mutuality because what we really want to look to is did they
6 have a full opportunity to litigate this" and they did.

7 Defendants back-up argument is that only the
8 Governor and the director of MDOC should be bound because
9 they're the only ones who are really the Defendants in that
10 case. Again, there are a couple of cases we've provided, a
11 U.S. Supreme Court case, Blonder v Tong, (phonetic) and a 8th
12 Circuit case, Robb v Hungerbeeler. And what it says is when
13 the state is the one litigating it, you really have to look
14 at who has the authority and who they're binding. And in
15 this case, you have the State of Michigan, the Governor was
16 the Defendant in the case, and is here, as well as the
17 relevant Department of Corrections -- the director of the
18 Department of Corrections here. And Defendants argue,
19 "Well, the wardens shouldn't be bound." But the issue is
20 one of the authority of representation and whether there is
21 privity between those government officers and the current
22 wardens. And the case laws are absolutely clear, that there
23 is privity. It would be like, to return to the -- the
24 recent DeBoer case, it would be like arguing, "Well, you
25 know, it was just the DeBoers and it was just one agency

1 involved there, so, you know, the tax collector doesn't have
2 to follow the decision in terms of marriage, and you know,
3 we can still discriminate against other people because they
4 weren't the parties in the first case." Where the State is
5 involved and when you're talking about a declaratory
6 judgment regarding the constitutionality of it, the State
7 and all people that would be bound under them and they have
8 authority over are likewise bound.

9 Lastly, Defendants argue the State should have the
10 same benefit of the United States government, and therefore
11 offensive mutual estoppel should not apply. They cite
12 two -- two cases; one in the 11th and one in the 9th.
13 First, they're not 6th Circuit cases, so it's not the law
14 that's applicable here. Second, you know, those were not
15 like here where the very agency that was involved in the
16 first case is the same agency involved in the second case.
17 You had a class of prisoners there; you have a class of
18 prisoners here, and the whole issue is the constitutionality
19 of amendment on prisoners. And you have the same agencies
20 involved that had the full opportunity to litigate this.
21 And I think that if you look at those cases that Defendants
22 cite, they're clearly distinguishable.

23 Independent of -- though we feel strongly that
24 this Court is bound, we ask this Court to make an
25 independent determination that this amendment violates the

1 equal protection laws as the Federal court found. You know,
2 the amendment -- well, the ELCRA law says that you cannot
3 deny an individual the full and equal enjoyment of services,
4 facilities, privileges, advantages of a public service
5 because of race, color, national origin, age, sex, et
6 cetera. The statute also, with regard to hostile sexual
7 environment, provides that the opportunity to have full and
8 equal utilization of a public service without discrimination
9 based on race, color, national origin, age or sex is
10 prohibited and declared to be a civil right. The amendment
11 exempts from this protection and a protection which the
12 Court of Appeals in the Neil (phonetic) case, back in 1999,
13 recognized is essentially a codification of the
14 constitution's equal protection and anti-discrimination
15 clauses, broadened to include categories not covered under
16 the constitution in two different ways.

17 First, the Act provides a cause of action and
18 remedies for violation of equal protection and
19 non-discrimination doctrines. And, second, it provides a
20 more specific definition of what constitutes a denial of
21 equal protection of the laws by specifying that the State's
22 barred from engaging also in gender, disability, age
23 discrimination; areas not included in our original
24 constitution.

25 The amendments, as they carve out prisoners out of

1 the State's otherwise general scheme from forcing the
2 State's constitution. Defendants argument, at least in
3 their briefs, was that this is because correctional
4 facilities are not open to the public. The statute does not
5 exempt correctional facilities, Your Honor. The statute
6 doesn't say correctional facilities are not public services.
7 The statute says that -- and it doesn't exempt volunteers,
8 employees, visitors, you can't discriminate against them.
9 It just targets current or former prisoners, because it says
10 that for any decisions relative -- made relative to a person
11 who is incarcerated, those decisions can't be challenged as
12 discriminatory. Any decisions or treatment for a -- based
13 on a person's -- well, let me get the exact language: "Only
14 with respect to actions involving individuals serving a
15 sentence of imprisonment." So anyone else, it's a public
16 service for. But prisoners or former prisoners, because you
17 could get out and become a so-called member of the public
18 which Defendants seem to think is a relevant issue, but you
19 still could not sue for discriminatory treatment while you
20 were serving -- any decisions made while you were serving in
21 prison.

22 JUDGE: And as I understand Defendants' argument,
23 it would be that -- that MDOC could segregate prisoners
24 based on race and treat them all differently, --

25 MS. LABELLE: Certainly.

1 JUDGE: -- and the only remedy -- and those
2 prisoners would have no State remedy; they're only remedy
3 would be in Federal court?

4 MS. LABELLE: Correct. You could decide -- the
5 Department of Corrections could decide to put all black
6 prisoners in segregation. They could decide, as they did in
7 the Neil case, to allow staff to have a pervasive and
8 rampant situation of custodial sexual abuse. And those
9 women would not have a cause of action under State court
10 law. They could decide that they would throw young
11 prisoners -- in this case, children under the age of 18 --
12 in cells with adult prisoners and the resultant rapes that
13 we say they knew or should have known would happen, they
14 would have no basis to challenge under the State Civil
15 Rights Act, and under the constitution, Your Honor, because
16 the constitution, as Defendant argues, provides no damage
17 remedies. You would have no jury trial. You would have
18 none of the benefits of the Elliott-Larsen Civil Rights Act,
19 which is essential legislation intended in the constitution
20 to implement that constitution. So taking one group of
21 people from its protection is a denial of protection of the
22 laws in the most literal sense, as the Supreme Court ruled
23 in Romer (phonetic), the guarantee of equal protection of
24 the laws is a pledge of the protection of equal laws. And
25 here they want to say that the prisoners should not have

1 access to those equal laws for their treatment by the
2 Michigan Department of Corrections. It's inexplicable, as
3 the Federal court found, by anything but animus. And
4 although we've argued in our brief that this court should
5 look at heightened scrutiny because of the fundamental right
6 being affected, the access to the courts, we think the court
7 need go no farther than rational basis. Defendants have
8 argued that, "Well, one rational basis might be to deter
9 frivolous lawsuits." But it's not rational to say we're
10 going to deter all lawsuits in order to get to that. The
11 Prison Litigation Reform Act does address frivolous
12 lawsuits, but as the Federal court noted, this is way too
13 broad to have a rational connection to just frivolous
14 lawsuits, and there are many ways to deal with that as
15 opposed to opposing all litigation for discrimination. And
16 as we've cited, too, in both the attachments to our brief
17 from the Civil Rights Commission and the cases that had been
18 decided under this amendment and the cases that were
19 targeted by this amendment were clearly not frivolous.

20 It's not a defense to an Equal Protection claim to
21 say, "Look to Federal actions. You can go to Federal court.
22 You can go to another state to get married. You can go to
23 Federal court and get your DOMA protections." That has
24 nothing to do with equal protection under the law. And, in
25 addition, of course, those are not the same benefits that

1 people get under our state Civil Rights Act, but it's simply
2 no answer to a denial of equal protection to say, "Well, you
3 can go and have other remedies." It's the issue -- it has
4 no applicability in equal protection analysis as the Federal
5 court found.

6 I think I would note that the argument that
7 Defendants have made that somehow this is necessary to keep
8 Federal courts out of -- or to keep courts out of the
9 activities of prison or that it somehow interferes with
10 prisons' legitimate opportunities and services, I think is
11 just -- it's nonsensical and it's frivolous. If you could
12 say that, you could say that prisoners have no right to any
13 laws was because courts shouldn't be involved in anything.
14 And so it has no rational relationship to carving out only
15 discriminatory treatment under the Civil Rights Act. It
16 also -- you know, there can be no valid claim that somehow
17 it's a legitimate service or related to prison
18 administration that you discriminate based on race, color,
19 sex, and age.

20 Defendants also often argue that, "Well, they're
21 not similarly situated to the public," but that is not the
22 issue at all. The issue is within the prison community.
23 Can you treat different prisoners different based upon these
24 discriminatory bases? And the Elliott-Larsen Act says "no."
25 And you can't preclude them from challenging that

1 mistreatment without running afoul of equal protection law.
2 As the Federal court found, the ELCRA amendment denies
3 prisoners the basic protection against discrimination that
4 all others are afforded without any rational basis. It
5 violates the parties' equal protection rights and is
6 unconstitutional. Thank you.

7 JUDGE: Thank you.

8 MR. GOVORCHIN: It looks like we agree that the
9 statute does define actions and decisions of a correctional
10 ins- - -- of a -- in a correctional facility with regard to
11 a person who is serving a term of imprisonment not to be a
12 public service. I think we're -- we've agreed that far.
13 The question -- the rest of the question is whether or not
14 the statute is unconstitutional on its own or whether or not
15 the Mason decision somehow binds us. I think we've covered
16 the Mason decision question in the briefs more than
17 adequately. But the question about whether it's
18 unconstitutional on its own, I think could use just a touch
19 more of a reply.

20 And that is, "similarly situated" is how one -- is
21 the phrase that's commonly used to describe whether there's
22 a denial of equal rights somewhere. "Similarly situated" is
23 the phrase we use so we understand that people who are not
24 similarly situated don't necessarily have a claim to say
25 that if somebody else has access to something or is denied

1 something and they're not similarly situated to me, that I
2 don't necessarily have a claim; that my rights have been
3 violated because that un-similarly situated person has been
4 denied or granted something. Similarly situated is the key.
5 And that's actually part of the rationale for the amendment
6 to the Elliott-Larsen Civil Rights Act. So when the
7 amendment went through to define that actions or decisions
8 in a correctional institution with regard to a person
9 serving a term of imprisonment would not be a public
10 service. That was a way of making that statute consistent
11 with what the Supreme Court had recently also said in Brown
12 with regard to the public building exception. That is,
13 there is a distinction in this area of public service, of
14 access to a public service. The push-out of public service
15 to invitees, to citizens who are -- can then choose whether
16 or not to engage in the public service.

17 So we can all choose whether or not to go to the
18 Secretary of State's office and do whatever business we want
19 to. We can choose to go to the municipal library. We can
20 choose to take a class at the community college. We can
21 choose to seek records from the Department of Community
22 Health. These are volitional activities where the citizen
23 is choosing to engage in the provision or the availability
24 of a public service. But for that person incarcerated in
25 the county jail in Brown, could not choose to be there. And

1 because of that status of their compelled presence in there
2 for punishment, not -- I don't want to be silly here; this
3 isn't punishment for a violation of some other independent
4 right; we're not talking cartoons here, we're talking
5 something real. So these people are in a certain situation
6 where they're not receiving, according to the legislature, a
7 public service. The public receives a service by having
8 these prisons operating. But the prisoners themselves, are
9 not receiving, through the management of that facility with
10 regard to them, a public service. And the reason is they
11 are not similarly situated to the other invitees; the other
12 members of the public who go and engage in one form or
13 another of accessing public service.

14 But that doesn't mean the prisoner can't be a
15 person accessing public service, if they're doing some of
16 those other things in which they would be similarly situated
17 to a business invitee. So in actuality -- so to -- again,
18 what would that be? That would be applying for a new
19 registration, getting your birth certificate replaced, maybe
20 a driver's license in anticipation of release, birth
21 certificate, prior access in the court in regard to a child
22 custody dispute, all of these things would be a public
23 service and the prisoner would have a right to do it and
24 shouldn't be denied based on something -- some prohibitive
25 basis. What the legislature has said is that for this

1 purpose of the housing and management, those decisions
2 regarding a prisoner who has been remanded, compelled
3 against their interests, their own personal desire, to be
4 managed by a correctional facility, they're no longer
5 invitees. They're being managed against their will by a
6 correctional facility. Those actions and decision of that
7 facility with regard to that person serving the term of
8 imprisonment, are not a public service. So if they're not a
9 public service, is there a rational basis for it? And I
10 think I've explained that, more so in the brief.

11 But to highlight, there are several reasons we've
12 mentioned in the briefs, to protect the public risk, avoid
13 frivolous lawsuits, but the -- I think the biggest one is to
14 harmonize with the Supreme Court's ruling in Brown this
15 distinction, this recognition that a person who is forced to
16 be housed in some place is not volitionally accessing their
17 management; they're forced to be there. They don't have any
18 choice about it. They are not an invitee. They're not like
19 me if I was going to the clerk's office downstairs and
20 trying to get a record and they said, "No, you're just too
21 ugly." You know, for whatever reason, they're just not
22 going to let me in. You know, if I'd say, "Well, I think
23 that you're really saying I'm too old, that's age
24 discrimination." Well, I could make a thing about that, but
25 the point is, that's a person accessing a public service.

1 Instead it could be -- it could be a recognition under the
2 Elliott-Larsen Civil Rights Act that these people who are
3 forced to be there are not invitees and that's that.

4 That harmonizing of that treatment is actually a
5 rational basis for the statute itself. The harmonizing of
6 that status under the Elliott-Larsen Act with the
7 Michigan -- the controlling case precedent in Michigan of
8 the Brown decision that recognizes the difference between
9 invitees and involuntary commitments, so to speak, is also a
10 basis for recognizing the constitutionality of this because
11 you're not comparing the prisoners being managed with other
12 similarly situated persons. Thank you.

13 JUDGE: You're welcome.

14 MS. LABELLE: Your Honor, if I just may -- on two
15 points, and I think I realize that the Court would not be
16 able to render a decision today; this is pretty complex, and
17 I've given new cases. But I just did want to point out with
18 regard to the public building exception in the Brown case, I
19 would urge the Court to look; it is so different in terms of
20 statutory requirements and, in fact, talks about it's a
21 plurality decision and it talks, of course, about that it
22 has to be open to -- and used by a member of the public.
23 And, in fact, the Brown case resulted in -- in the Mascery
24 (phonetic) case in 2003, the Board of Regents versus U. of
25 M., in saying a dorm room -- a dorm area, a university dorm

1 was not a public building in any fashion, and therefore
2 university students who fell in a dorm room were excluded
3 from the public buildings exception. It's a very different
4 statute and rationale than the implementation of our
5 constitutional rights to equal protection. And, my God, if
6 anywhere you have to ensure that the constitution is being
7 applied, it's with people who are held in detention and
8 under total control of the State. And to say that the State
9 may discriminate in those circumstances is deeply
10 disturbing.

11 JUDGE: Okay. I agree that the matters here are
12 complicated, but I don't think that I need to take it under
13 advisement. I couldn't agree more with Judge O'Meara when
14 he states that prisoners do not lose their right to equal
15 protection by virtue of their status as inmates. And I
16 believe that his opinion is both persuasive in convincing me
17 that the Elliott-Larsen Act is unconstitutional as urged by
18 the Defendants and also that his opinion is binding upon me
19 as a decision declaring that portion of the Elliott-Larsen
20 Civil Rights Act unconstitutional. So I deny the motion for
21 summary disposition.

22 MR. GOVORCHIN: Your Honor, I -- I have a motion
23 prepared. Or, I'm sorry --

24 JUDGE: An order?

25 MR. GOVORCHIN: -- an order prepared. I did have

1 one --

2 JUDGE: Denying --

3 MR. GOVORCHIN: -- going the other way.

4 JUDGE: Denying your motion and probably asking
5 for a stay, also?

6 MR. GOVORCHIN: Yes, but I have a separate motion
7 for that, if that's acceptable.

8 JUDGE: Okay.

9 MR. GOVORCHIN: Or a separate order for that. If
10 I can show a copy of the order.

11 (Off the record interruption)

12 MS. LABELLE: You know, I'd like an opportunity to
13 review this, Your Honor, the order.

14 JUDGE: Okay.

15 MS. LABELLE: We have a number of -- we have a
16 number of other motions today, so I'd like to look at it
17 before I do.

18 MR. GOVORCHIN: Your Honor, may I make a oral
19 motion for stay pending appeal?

20 JUDGE: Yes. And --

21 MR. GOVORCHIN: So --

22 MS. LABELLE: I'm -- I'm going to object. I'd
23 like an opportunity -- well, I'll wait until he makes his --

24 JUDGE: Go ahead.

25 MR. GOVORCHIN: Your Honor, because there are a

1 number of appeals pending it seems like a good idea to get
2 them all going in the same direction, and also to -- it will
3 help ultimately move things along, I would ask that the
4 Court stay further proceedings in the case pending the
5 Defendants prosecution of their appeal, which we are fully
6 committed to do and will do as soon as we get that order
7 signed. So if I could, I have a motion -- or, I have an
8 order -- I'm sorry -- an order granting the stay. I also
9 have one denying the stay, depending on which one the Court
10 would choose.

11 JUDGE: Ms. LaBelle?

12 MS. LABELLE: Your Honor, I would just note that
13 we have had four -- since December, four applications for
14 leave to appeal, waiver of the transcript request, immediate
15 consideration, motions for stay, none of which have been
16 granted. But I am deeply concerned on this one, that they
17 go up, ask to waive the transcript and present, therefore, a
18 order that is bare bones; it doesn't have this court's
19 reasoning in it -- I haven't really looked at it
20 carefully -- nor does the stay have they given any reasons
21 or rationale for the stay. There are, as the Court knows,
22 specific reasons that you have to set forth in order to get
23 a stay of proceedings. I've heard none of them. I wish the
24 record would be clear here for the fifth or sixth appeal
25 that's going to go up, so I would ask that the Court ask --

1 require Defendants to file a motion in this regard.

2 JUDGE: Okay. I'll take a look at the order and
3 I'll decline to hear the motion for stay as an oral motion
4 without notice to the Plaintiffs.

5 MS. LABELLE: Thank you, Your Honor.

6 MR. GOVORCHIN: May I ask one further question on
7 that same topic, then, --

8 JUDGE: Yes.

9 MR. GOVORCHIN: -- for mechanical purposes --
10 procedural purposes. When we file the motion tomorrow,
11 would we -- we all agree that we can hear that next week
12 when we're here for another matter?

13 MS. LABELLE: I don't have any objection.

14 JUDGE: With her consent, yes.

15 (End of part one of audio recording)
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