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It Was Never About Water Fountains, And It's Not About Bathrooms, Either

by Meghann Burke

In 1968, the City of Charlotte adopted a nondiscrimination ordinance applicable to places of public accommodations. The ordinance followed the enactment of Title II of the Civil Rights Act of 1964, which states in relevant part: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, and privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a(a). Title II was upheld by the Supreme Court in 1964 in the landmark case of *Katzenbach v. McClung*, 379 U.S. 294 (1964), finding that the Commerce Clause confers on Congress such power to forbid racial discrimination in such places of public accommodation due to its burden on interstate commerce.

Since 1968, the Charlotte ordinance has defined a place of public accommodation as "a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold or otherwise made available to the public."

On February 22, 2016, the Charlotte City Council voted 7-4 to add the following ten words to this ordinance after the word "religion" and before the phrase "national origin," effective April 1, 2016: "marital status, familial status, sexual orientation, gender identity, gender expression."

In a swift response, House Speaker Tim Moore immediately called for legislative action in the General Assembly, specifically pertaining to, in his words, "the bathroom piece." In a hastily called special session without study or examination, the infamous law known as House Bill 2 ("HB2") was enacted. Known as the "bathroom bill," HB2 contained five main sections: (1) defining "biological sex" and requiring people to use the bathroom that corresponded to the General Assembly's definition of "biological sex," stating that one's birth certificate would be the only means of proving that one is using the "correct" bathroom; (2) preempting local governments from setting a minimum wage while removing statutory and common law private rights of action to enforce state antidiscrimination statutes in state courts; and (3) eliminating local nondiscrimination provisions pertaining to employment and public accommodations.

NCAJ members know well the backlash that ensued. The NCAA and ACC instituted a boycott of North Carolina, refusing to hold championships in our state under the reign of HB2. The NBA All-Star Game was withdrawn, PayPal canceled a planned global operations center in Charlotte, Deutsche Bank halted plans to create 250 new jobs in Cary, and conventions were cancelled in Raleigh. Bruce Springsteen, Pearl Jam, Bos-

ton, and Ringo Starr cancelled performances. Five states and several cities enacted bans on official travel to North Carolina. Economic impact in just the first six months after enactment of the bill was estimated at nearly $400 million.[1] The Associated Press then-estimated the economic damage to our state at $3.76 billion in lost business over a dozen years.

On March 23, 2017, in the midst of March Madness, the NCAA warned that North Carolina would not be permitted to host championship games through 2022 unless House Bill 2 was repealed. Despite taking a strong position against state-sanctioned discrimination, the publicly released statement did not affirmatively demand the enactment of an inclusive, nondiscrimination ordinance, of the ilk Charlotte had attempted in the first place. Five days later, the NCAA imposed a 48-hour deadline for repeal. On March 30, 2017, a bill known as "House Bill 142" was passed with bipartisan support and signed into law by Governor Cooper. House Bill 142 repealed the so-called "bathroom" provision of HB2; however, the statute prohibited local governments from enacting inclusive, nondiscrimination provisions pertaining to regulation of bathrooms, showers, and changing facilities—an arguably even more necessary exercise of a locality's police powers in the climate created by the General Assembly following HB2. Local governments are, under HB142, purportedly prohibited from regulation public accommodations or private employment practices until December 1, 2020.

The pro-business lobby breathed a sigh of relief. Both parties touted a political victory. Economic investment resumed. The NCAA lifted its ban. The Tar Heels won the national championship. And in Arden, a mountain town in Western North Carolina, six-year old Emma, a transgender kindergarten student, was forced to wet herself when her teacher refused to let her use the bathroom that corresponded to her gender identity.[2] She sat in urine-soaked clothes, too embarrassed to eat her lunch, until an adult noticed.

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The insidiousness of HB142 is precisely that it made the majority of North Carolinians—not the Emma's of this world—comfortable. It appealed to business interests at the expense of the dignity and individual rights of a politically vulnerable minority of people. This should, however, be familiar to NCAJ membership. It is, after all, the very same fight that we have fought many times before, and it is the fight we will live to fight again.

In 2011, significant tort reforms bills were voted into law—damages caps, "billed vs. paid," etc., *vis a vis* Senate Bill 33 and House Bill 542. At the time of Senate Bill 33's introduction, Senate President Pro Tem Phil Berger said that the bill will "make health care more affordable and accessible for all North Carolinians."[3] Our members know all too well the impact that these so-called reforms have had on injured people and clients and does not need to be recited here.

When the so-named "Protecting and Putting NC Back to Work Act," passed, the General Assembly purported to drive costs down while depriving North Carolina's working people of statutory protections that were designed to protect their health and safety. Now, these reforms are described as "one of the biggest advantages for employers, administrators and insurance carriers," significantly reducing the cost of workers' comp claims—a fact that is measured in the daily lives of injured working people.[4]

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Also in 2011, the Indigent Defense Services Commission was forced to reduce the hourly rate for private assigned counsel from $95 per hour to $75 per hour for capital cases where a client's life is, not euphemistically, on the line.[5] As a point of reference, the rate recommended by a subcommittee in a presentation to the General Assembly was $95 . . . in 1993.[6]

These illustrative examples are not silos in a barren field. These are coordinated legislative assaults on individual rights under the thin veil of economic interests. It is no doubt ironic that those who would use the power of lawmaking authority to enact laws that tilt the scales in favor of the many to deny rights to a few would rely on the economic premise that authorized Congressional regulation of private action in *Katzenbach* and the Civil Rights Act. It is also easy, when presented with this false choice between individual rights and economic interests, to forget that these injured patients, injured workers, accused people, and transgender citizens are business owners, themselves . . . taxpayers, neighbors, teachers, doctors, students, neighbors, and yes, lawyers.

While the easy path is to avoid the discomfort that comes with this topic and, instead, to consider the political compromise that HB142 struck to be a reasonable (read: comfortable for the majority) solution, I challenge NCAJ members to steel themselves for the battles that give our organization the raison d'étre, in this and in all practice areas. The premise of privileging purported economic and business interests over individual rights is, after all, at the heart of each and every legislative assault NCAJ has battled against in recent institutional memory.

"We're all just human beings," Emma's father, a Western North Carolina native and owner of a towing service in Asheville, says. "Her being transgender doesn't do anything to anybody."

I implore my colleagues to consider this. You, who defend the marginalized, the accused, the forgotten, the injured, the downtrodden, have found not stigma but pride in standing next to people in the darkest moments of their lives in trying times. Where others see weakness, you see strength. You tell their stories in new ways, appealing to the basic humanity that lies within all of us. See the same battles, the same hopes, and the same spark in your neighbors, family, friends, co-workers, and clients who are transgender or gender nonconforming. I challenge you to consider that there is strength and possibility in realizing that others' battles against the same premise is a worthy battle of your own.

Emma's fight is our fight. ◆

1. Mark Abadi, *North Carolina has lost a staggering amount of money over its controversial 'bathroom law*, Business Insider (Sept. 21, 2016), http://www.businessinsider.com/north-carolina-hb2-economic-impact-2016-9.

2. *Id.*

3. Fain, Travis, *Negligence, cap on damages, focus of malpractice reform bill*, Indy Week (Mar. 23, 2011), https://www.indyweek.com/indyweek/negligence-cap-on-damages-focus-of-malpractice-reform-bill/Content?oid=2210435.

4. Cranfill Sumner & Hartzog Blog, *Navigating the Return to Work Process in North Carolina Workers' Compensation Claims: Cost Containment Strategies for the Middle of the Claim (Part 9 of 10)*, http://www.cshworkerscomp.com/resources/navigating-return-work-process-north-carolina-workers-compensation-claims-cost-containment-strategies-middle-claim-part-9-10.

5. Apparently, the State's decision not to seek the death penalty in a First-Degree Murder cases warranted a $10 per hour reduction in the court-appointed rate. *See* NC IDS, *Notice to Private Assigned Counsel Regarding Hourly Rates of Compensation* (June 6, 2011), http://www.ncids.org/News%20&%20Updates/NoticePAC_ExpertRates.pdf

6. NC IDS, Report of the Commission on Indigent Defense Services (Mar. 1, 2010), http://www.ncids.org/Reports%20&%20Data/Prior%20GA%20Reports/IDS%20leg%20report%202010,%20final.pdf.