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JUDGE REED O'CONNOR STRIKES AGAIN

Issues Another Nationwide Injunction,
This Time Blocking Healthcare Antidiscrimination Regulation

EXECUTIVE SUMMARY

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Federal Judge Issues National Preliminary Injunction against ACA Regulation Banning Gender Identity Discrimination in Health Care

In an eleventh-hour action, U.S. District Judge Reed O'Connor (N.D. Texas, Wichita Div.) issued a nationwide preliminary injunction on December 31, barring the federal government from enforcing part of a new regulation that was scheduled to go into effect on January 1, 2017, which interpreted the prohibition on discrimination because of sex under the Affordable Care Act to extend to discrimination because of "gender identity" and "termination of pregnancy." *Franciscan Alliance v. Burwell*, Civ. Action No. 7:16-cv-00108-O. Judge O'Connor's action echoed his earlier issuance, on August 21, 2016, of a nationwide preliminary injunction against the enforcement by the federal government of Title IX of the Education Amendments of 1972 to protect transgender schoolchildren from discrimination, in *State of Texas v. United States of America*, 2016 WL 4426495 (N.D. Texas, August 21, 2016). In both opinions, O'Connor rejected the Obama Administration's position that discrimination because of gender identity or expression is a form of "sex discrimination" that is illegal under federal laws, a question that the U.S. Supreme Court may address if it gets to the merits in *G.G. v. Gloucester County School Board*, 822 F.3d 709 (4th Cir.), *cert. granted*, 136 S. Ct. 2442 (No. 16A52) (2016). Judge O'Connor's analytical task was "simplified" because the ACA anti-discrimination provision, Section 1557, incorporates by reference the sex discrimination ban in Title IX that was the subject of the judge's prior preliminary injunction ruling.

The ACA authorizes the Department of Health and Human Services (HHS) to adopt regulations through the procedures of the Administrative Procedure Act (APA) to give detailed substance to the broad terms of the statute. The ACA provides in Section 1557 that health programs or activities receiving federal financial assistance not discriminate on grounds prohibited by four federal statutes. Title IX, which bans sex discrimination in educational programs receiving federal money, was one of the listed statutes and thus incorporated by reference into the ACA. (Others deal with discrimination because of race, national origin, or disability.) The Title IX regulations adopted by the Education Department in the 1970s include an express religious exemption provision, so that religiously-controlled educational institutions are exempt from Title IX compliance to the extent that compliance would violate their religious tenets. After the ACA was enacted in 2010, the Department of Health and Human Services began the APA process, drafting proposed regulations, publishing them for comment, and publishing a final regulation that, with respect to the provisions in dispute in this case, was to go into effect on January 1, 2017. During the Obama Administration, several different federal agencies responsible for interpreting and enforcing sex discrimination bans have been working through the issue of how these relate to gender identity. The Equal Employment Opportunity Commission (EEOC) was the first to issue a ruling, in the context of adjudicating a federal job applicant's complaint, that gender identity discrimination was actionable under Title VII's sex discrimination ban, but in so doing, it was actually following earlier case law, most specifically from the 6th Circuit, which used sex stereotyping analysis first accepted by the Supreme Court in 1989 in *Price Waterhouse v. Hopkins*, a Title VII case. The HHS regulation drafters adopted similar reasoning to include "gender identity" in their proposed regulation, and included gender identity in the final Rule published in the federal register on May 18, 2016. 81 Fed. Reg. 31376-31473 (codified at 45 CFR Sec. 92). By the time of that publication, the Education Department had taken the position that Title IX bans gender identity discrimination, in the context of a restroom access dispute in the *Gloucester County School District* case and a subsequent "Dear Colleague" letter published on its website and distributed to school districts nationwide. However, HHS did not include in its proposed or final rule the religious exemption language from Title IX.

Judge O'Connor's action echoed his earlier issuance of a nationwide preliminary injunction against the enforcement by the federal government of Title IX to protect transgender schoolchildren.

Several states and some religious health care providers joined together to challenge the new HHS Rule, not in its entirety but in a focused attack on the inclusion of "gender identity" and "termination of pregnancy" in the non-discrimination provisions. Blatantly forum shopping, they filed their suit in the U.S. District Court in Wichita Falls, an outpost of the Northern District of Texas where Judge O'Connor, the only judge assigned to that courthouse, sits a few days every month. (O'Connor's

chambers are in Fort Worth, the location of his home courtroom.) Filing in a major city would subject the plaintiffs to a random assignment of a judge; filing in Wichita Falls guaranteed that their case would be heard by Judge O'Connor. O'Connor, who was appointed by President George W. Bush, has a propensity to issue nationwide injunctions against regulatory actions of the Obama Administration on grounds that they exceed executive branch authority. His August 21 preliminary injunction in the Title IX case was not his first. There is no logical reason why this case should have been filed in the Wichita Falls court, but plaintiffs can claim proper venue there by pointing to local members of the co-plaintiff Christian Medical & Dental Association (CMDA), a national organization, who may reside within the geographical confines of the Wichita Falls court, or to local Texas state agencies whose operation in that area would be affected. (The court does not engage in a venue analysis, despite the obvious forum-shopping.) Other private plaintiffs are Franciscan Alliance, Inc. and its wholly owned entity Specialty Physicians of Illinois LLC. The public plaintiffs are the states of Texas, Wisconsin, Nebraska, Kansas, Louisiana, Arizona, Kentucky, and Mississippi. The heavy hand of Texas Attorney General Ken Paxton looms over the litigation, since Paxton has said, in effect, that his job is to sue the federal government every day on behalf of the right of Texas to operate free of federal regulatory constraints. Plaintiffs moved for partial summary judgment or, in the alternative, a preliminary injunction, on October 21, 2016, and the court agreed to expedite briefing and hearing so as to be able to rule, at least on the preliminary injunction, before the Rule could go into effect on January 1.

There is a basic argument between the parties as to the requirements imposed by the Rule. The plaintiffs argue that under the rule they would be required to provide gender transition surgery and abortions or suffer liability to patients and potential loss of federal funding eligibility. They claim that this would violate their rights under the Religious Freedom Restoration Act, and that the government's interpretation of the ban on sex discrimination to cover "gender identity" and "termination of pregnancy" went beyond regulatory authority. HHS argues that the rule does not compel either procedure in every case, merely banning discrimination on these bases. Thus, for example, it could be argued, if a health care provider/institution performs mastectomies, it may not take the position that it will perform a mastectomy for a woman as a treatment for breast cancer, but will not perform a mastectomy for a transgender man as part of his transition process, as this would be sex discrimination. Both women and transgender men are entitled to mastectomies. Similar arguments are made for a variety of the component parts of procedures, including, for example, hormone therapy, sterilization procedures, and the like. A woman suffering an estrogen deficiency can receive hormone therapy, and so can a transgender woman; depriving the transgender woman of estrogen therapy, because she was identified male at birth, is sex discrimination. In effect, argue the private plaintiffs, the non-discrimination requirement would inevitably require them to perform procedures that violate their religious views, and, argue the public plaintiffs, would require them to violate various state laws and regulations, such as those that ban the termination of pregnancies in state facilities or the use of state Medicaid funds for gender transition or pregnancy termination procedures. Judge O'Connor agreed with the private plaintiffs that however the dispute over interpretation is resolved, there is a likelihood that their exercise of religion would be substantially burdened.

A portion of the decision, not detailed here, goes through the analysis of jurisdiction, ripeness, and administrative exhaustion, finding that none of those doctrines would require a finding against the court's jurisdiction to grant the requested relief on this motion. Proceeding to the merits, Judge O'Connor provided a detailed discussion of the tests for issuing a preliminary injunction.

First, as to likelihood of success on the merits, he found that Title IX does not on its face ban discrimination because of "gender identity" or "termination of pregnancy." Most of the discussion focuses on the "gender identity" issue, and channels the discussion accompanying his August 21 preliminary injunction against Title IX enforcement in gender identity cases. The discussion regarding the abortion issue focuses on the failure of HHS to incorporate in its new regulation the religious and abortion exemptions in existing Title IX regulations, arguing that Congress's wording of the Section 1557 non-discrimination provision led to the conclusion that such incorporation was intended by Congress.

"The precise question at issue in this case is: What constitutes Title IX sex discrimination?" he wrote. "The text of Section 1557 is neither silent nor ambiguous as to its interpretation of sex discrimination. Section 1557 clearly adopted Title IX's existing legal structure for prohibited sex discrimination. 42 U.S.C. sec. 18116(a). For the reasons set out more fully below, this Court has previously concluded: the meaning of sex in Title IX unambiguously refers to 'the biological and anatomical differences between male and female students as determined at their birth.' *Texas v. United States*, No. 7:16-cv-00054, 2016 WL 4426495, at *14 (N.D. Tex. Aug. 21, 2016)." Judge O'Connor reinforced this reference with a citation to the federal district court ruling in *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 674 (W.D. Pa. 2015), *appeal dismissed* (Mar. 30, 2016), rejecting a Title IX gender identity discrimination claim by a transgender college student with restroom access issues, but omits reference at this point to the contrary ruling of the 4th Circuit in the *Gloucester County* case. Because he finds Title IX unambiguous on this point, he concludes that the HHS Rule is not entitled to *Chevron* deference that would normally be accorded a regulation adopted under the APA, and proceeds to apply his own interpretation of the statute, in which he finds Congress's "binary definition of

sex" to be shown by references in the statute to "students of one sex," "both sexes," and "students of the other sex." He also appeals to "ordinary meaning," to the failure of Congress to spell out any intent to cover "gender identity," and to the fact that as of the time the ACA was enacted, federal agencies had not yet begun to treat "gender identity" discrimination as cognizable under sex discrimination statutes.

He wrote that "even if, as Defendants argue, the definition of sex discrimination was determined in 2010 when the ACA incorporated Title IX's prohibition of sex discrimination, the Court is not persuaded it was passed with the Rule's expansive scope in mind because: (1) Congress knew how but did not use language indicating as much, and (2) in 2010 no federal court or agency had interpreted Title IX sex discrimination to include gender identity." (To this point he quoted a *Washington Post* article from 2015 stating that the new HHS Rule "for the first time includes bans on gender identity discrimination as a form of sexual discrimination, language that advocacy groups have pushed for and immediately hailed as groundbreaking.") And, of course, he notes that before the ACA was passed and "for more than forty years after the passage of Title IX in 1972, no federal court or agency had concluded sex should be defined to include gender identity" in a Title IX case. In a footnote, he rejected the government's attempt to bolster its case by reference to *Price Waterhouse*, pointing out that it was Title IX, not Title VII, which was incorporated by reference into the ACA.

As to the failure of the Rule to incorporate Title IX's religious exemption language, he wrote, "The text of Section 1557 prohibits discrimination 'on the ground prohibited under Title IX of the Education Amendments Act of 1972 (20 U.S.C. 1681 et seq.).' . . . That Congress included the signal 'et seq.', which means 'and the following,' after the citation to Title IX can only mean Congress intended to incorporate the entire statutory structure, including the abortion and religious exemptions. Title IX prohibits discrimination on the basis of sex, but exempts from this prohibition entities controlled by religious organizations when the proscription would be inconsistent with religious tenets. 20 U.S.C. sec. 1681(a)(3). Title IX also categorically exempts any application that would require a covered entity to provide abortion or abortion-related services. 20 U.S.C. sec. 1688. Therefore, a religious organization refusing to act inconsistent with its religious tenets on the basis of sex does not discriminate on the ground prohibited by Title IX," and any attempt by HHS to impose the non-discrimination requirement without including the religious exemption violates Congressional intent. O'Connor bolstered this point by invoking the Supreme Court's *Hobby Lobby* decision, finding that the Rule "places substantial pressure on Plaintiffs to abstain from religious exercise" by forcing them to provide services contrary to their religious tenets, and that the government's desire to expand access to "transition and abortion procedures," even if deemed a "compelling interest" for purposes of the federal Religious Freedom Restoration Act, was not the least restrictive alternative for providing such access, and thus failed under *Hobby Lobby*. Taking his cue from Justice Samuel Alito's opinion in that case, O'Connor pointed out that the government could offer to pay for transition and abortion services to be provided by those who did not have religious objections to them in order to avoid burdening the Plaintiff's religious rights.

In another point worth noting, O'Connor cited to an HHS study showing that the medical community is not unanimous on the value and necessity of performing transition procedures, particularly on minors, undermining the "compelling interest" that the government must show under RFRA to justify substantially burdening health care providers with sincere religious objections to performing such procedures.

Having concluded that the plaintiffs were likely to succeed on the merits of their attack, O'Connor found that they easily satisfied the other requirements for preliminary injunctive relief, noting in particular that an ongoing investigation of the state of Texas's practices made the potential of harm to the Plaintiffs more than hypothetical, as did the looming requirement for the private Plaintiffs to change the range of services they offer or risk loss of federal funding. More significantly, as to the scope of the injunction, he cited authority that "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class," and that "a nationwide injunction is appropriate when a party brings a facial challenge to agency action under the APA." In this case, he pointed out, "CMDA's membership extends across the country and the Rule applies broadly to 'almost all licensed physicians,'" quoting the HHS description published in the Federal Register. "Accordingly, the Rule's harm is felt by healthcare providers and states across the country, including all of CMDA's members, and the Court finds a nationwide injunction appropriate." Noting a severability provision in the Rule, he observed that the injunction only applied to the inclusion of "gender identity" and "termination of pregnancy" under the definition of sex discrimination, and did not bar enforcement of any other part of the Rule. A preliminary injunction stays in effect until the court issues a ruling on the merits, unless it is reversed on appeal. As of December 31, the Obama Administration had barely three weeks left in office, to be succeeded by an administration much less likely to defend the Rule, so while this is merely preliminary relief for the Plaintiffs, it signals a major and probably long-term setback to efforts by transgender people to obtain non-discriminatory health care, including coverage for medically-necessary transition procedures.

On December 30, *American Health Line* reported on Westlaw, 2016 WLNR 3986388, that various other Catholic health care organizations have also filed federal lawsuits challenging Section 1557, including the Catholic Benefits Association, which includes 880 Catholic hospitals, colleges, and business. ■

Arkansas Supreme Court Concludes State's Preferential Treatment of Opposite-Sex Married Couples When Issuing Birth Certificates Passes Constitutional Muster Post-*Obergefell*

The Supreme Court of Arkansas, by a closely divided 4-3 vote, read the holding in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and the final order resolving Arkansas's marriage litigation, *Smith v. Wright*, 2015 Ark. 298 (per curiam), extremely narrowly and reversed a circuit court ruling that found unconstitutional the Arkansas Department of Health's practice, pursuant to its interpretation of various state statutes, of only naming by default the husbands, but not the wives, of birth mothers as parents on birth certificates. *Smith v. Pavan*, 2016 Ark. 437 (Dec. 8, 2016). Associate Justice Josephine Linker Hart, reasoning that "[i]t does not violate equal protection to acknowledge basic biological truths," wrote the majority opinion, with Chief Justice Howard W. Brill and Associate Justices Rhonda K. Wood and Paul E. Danielson each dissenting separately.

Three married lesbian couples sued the director of the Arkansas Department of Health, Dr. Nathaniel Smith (also the named defendant in the state's marriage litigation), when the agency refused to list the respective same-sex spouses of the birth mothers on birth certificates for babies born in the state, relying on gender-specific Arkansas statutes that provide for listing husbands, but not wives, of birth mothers. Both parties filed competing motions for summary judgment.

Looking back at the final May 2014 trial court order in *Wright* (later appealed to the Arkansas Supreme Court, but dismissed as moot after *Obergefell*), Pulaski County Circuit Judge Timothy Davis Fox accepted the couples' argument that the case was controlled by *res judicata*. The May 2014 order broadly enjoined the state from enforcing any state or local law "to the extent they . . . deny same-sex married couples the rights, recognition and benefits associated with marriage in the State of Arkansas." He also declared the various relevant state statutory provisions governing birth certificates to be unconstitutional. Finally, he ordered the three birth certificates to be amended, and later denied a motion for stay.

Speaking for her other colleagues in the majority, Justice Hart saw the case entirely differently, stressing at every point in the analysis that she did not see birth certificates as having anything to do with marriage. On the first point of *res judicata*, she noted that "[a] fair reading of the *Wright* orders indicates that the orders did not address the issues presented here relating to birth certificates." Likewise, she found the mention of birth certificates in *Obergefell* to have been irrelevant dicta in the context of this case: "*Obergefell* did not address Arkansas's statutory framework regarding birth certificates, either expressly or impliedly."

Moving to her constitutional analysis, Justice Hart again attempted to completely disentangle birth certificates from marriage, minimizing the inapplicability of her reasoning to married opposite-sex couples that might also use a donor and artificial insemination, but face none of the hurdles that a married lesbian couple does in having the intended parents listed when the birth certificate is issued. "In our analysis of the statutes . . . , it is the nexus of the biological mother and the biological father of the child that is to be truthfully recorded on the child's birth certificate."

From her perspective, the circuit court had inappropriately "conflated distinct categories of marriage, parental rights, and vital records" by ignoring that "[t]he purpose of the statutes is to truthfully record the nexus of the biological mother and the biological father to the child." According to her, this purpose "serves an important governmental objective—tracing public-health trends and providing critical assistance to an individual's identification of personal health issues and genetic conditions."

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Adding insult to injury, after reversing and dismissing the case, Justice Hart also admonished Judge Fox for remarks he made when the agency earlier sought an emergency stay of his order to amend the birth certificates. "The gist of Judge Fox's remarks was that if this court granted the stay, then it would deprive persons of their constitutional rights, and that this court previously had deprived people of their constitutional rights in a separate matter." In the eyes of the majority, these comments were "made to gain the attention of the press and to create public clamor," and arguably undermined "'public confidence in the independence, integrity, and impartiality,' not only of this court, but also of the entire judiciary."

The dissenters, meanwhile, all agreed that the state's treatment

of married lesbian parents is unconstitutional, but each took a separate path. Chief Justice Brill quoted Bob Dylan to make the point that "the times they are a-changin" and, like it or not, insisted "[a]ll three branches of the government must change accordingly." Justice Wood, on the other hand, felt the situation was a textbook example of when a court should avoid a constitutional ruling under the prudential-mootness doctrine, because "this case is fluctuating and underdeveloped" (the state had backed away some from its hardline position after the case was filed). Finally, Justice Danielson questioned the fundamental rationale of the majority, maintaining that "there can be no reasonable dispute that the inclusion of a parent's name on a child's birth certificate is a benefit associated with and flowing from marriage."

Local attorney Cheryl K. Maples represented the couples, with amicus support from the Arkansas ACLU and the national ACLU LGBT Project. On a matter of huge importance for LGBT family law, it is unclear, as of yet, whether the couples will petition the U.S. Supreme Court to grant certiorari and reverse this damaging decision, as another lesbian mother did last year when her state supreme court also questionably ruled against her. She thankfully got a unanimous summary reversal, on the certiorari petition briefs alone, to undo an Alabama Supreme Court decision similarly creating a gay exception to avoid the pro-gay result of applying clear principles of constitutional law (in that case, full faith and credit of a second-parent adoption). *V.L. v. E.L.*, 2016 WL 854160 (Mar. 7. 2016). Despite several of the justices calling for it, there is probably little political incentive for the Republican-controlled state legislature in Arkansas to provide relief for same-sex couples by amending the statutes in question to reflect the reality of LGBT families. – *Matthew Skinner*

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2nd Circuit Upholds Vermont District Court's Award of Quantum Meruit Damages to Man Who Worked in His Former Same-Sex Partner's Business Without Salary During Their Relationship

Ruling in *Cressy v. Proctor*, 2016 U.S. App. LEXIS 21973, 2016 WL 7195814 (Dec. 12, 2016), the 2nd Circuit found that U.S. District Judge William K. Sessions III (D. Vt.) did not abuse his discretion in awarding equitable relief on the theory of *quantum meruit* to Ronald Cressy, who had worked for many years in his partner Kevin Proctor's business without formal compensation, and who sought payment after the men's relationship ended, or in rejecting Proctor's equitable defenses to the claim, including that Proctor was providing Cressy's only means of support during the relevant time period. The court also concluded that Judge Sessions' award of $173,685 on the claim was not clearly erroneous. The opinion for the circuit court was by E.D.N.Y. Judge Nicholas G. Garaufis, who sat by designation as part of the 2nd Circuit panel.

The men's relationship continued for almost two decades. They considered themselves domestic partners. Proctor supported Cressy financially throughout the relationship.

Judge Garaufis's opinion omitted any detailed recitation of facts, but they can be found in Judge Sessions' opinion, 2015 WL 4665533 (D. Vt., Aug. 6, 2015). Proctor began his business, Synergy Advertising, in Long Beach, California, in 1990 as a sole proprietorship, following a successful career in the advertising business, with one primary client. At its height, the business had five employees, although the staff fluctuated in size. The business operated at first out of Proctor's den, then out of an office in his garage. Before meeting Proctor, Cressy, who was married to a woman, worked for a women's clothing company as a manager, eventually attaining an annual salary of more than $90,000. Cressy's marriage ended when he came out as gay and his wife filed for divorce in 1993. During that process, Cressy cashed out his retirement savings and paid off debts, being left with a small amount of cash which he used to pay for some of his personal expenses during his courtship with Proctor, which led to a romantic relationship in 1993, when Cressy moved into Proctor's house and took paid mental health leave from his employer. He subsequently quit his job and took time off to recuperate. At that point, Proctor owned his business, his home (without a mortgage), and a collection of antiques, and had substantial personal savings.

The men's relationship continued for almost two decades. They considered themselves domestic partners. Proctor supported Cressy financially throughout the relationship. Cressy began working in Proctor's business on a part-time basis, but over time his responsibilities increased and he eventually took over the responsibilities of a paid employee

who left the business. The paid employee had been earning $40,000. After that employee left, a neighbor who was working part-time and Cressy were the only employees aside from Proctor in the business, and eventually the part-timer cut back substantially. In 1996, Proctor decided to relocate to Vermont. Proctor claimed that Cressy begged him to take him to Vermont, but the court found that Proctor always intended to take Cressy with him, and involved Cressy in the selection of their new home over an 18-month period during which they traveled to New England together. Proctor decided to buy a farm in Ryegate, Vermont, using the proceeds from sale of his Long Beach house, personal savings, and profits from his business. Cressy made no financial contribution to the purchase and his name is not on the deed. Only Proctor signed the sales documents and was present at the closing. The court found Cressy's testimony that Proctor promised to put Cressy's name on the deed as not credible. They moved to the farm over Labor Day weekend in 1998, prior to which they disposed of "a significant amount of Synergy records." A home office in the farmhouse contained the remaining business records. Proctor eventually bought six additional adjoining properties over the next three years, but Cressy was not on the title for any of those purchases and did not contribute to them. Judge Sessions found that whatever he said to Cressy about the properties beings "ours," Proctor never intended to give Cressy a half interest in them as Cressy alleged. All the properties together had an assessed value of nearly a million dollars, and at trial Cressy's real estate expert testified they were worth $1.5 million. Cressy helped with farm chores together with Proctor. Eventually Cressy moved the Synergy records to another building, which subsequently burned down, so at the time of trial there were no business records to confirm testimony about Cressy's role in the business.

The business continued for some time after the move, becoming mainly an on-line business. Proctor's father became ill and moved to the property, with Proctor taking primary responsibility for his care and Cressy taking over more responsibility for operating the business, in approximately 2004. By 2008, Proctor wound down the business and they lived off Proctor's savings and remaining funds from the business. By 2012, "these reserves were depleted and Proctor asked Cressy to pay for some household bills out of his own savings. Shortly after, Cressy left Ryegate and their relationship ended after nineteen years of cohabitation." Judge Sessions found that Proctor's total assets "are worth well over $1 million," and that "a substantial portion of Proctor's personal and real property were purchased with Synergy funds. When Cressy left he had less than $500 in his bank account and no other assets."

During the course of their relationship, the men never took any steps to formalize their relationship in a civil union, which they could have done in Vermont after the civil union law was enacted in 2000. They never registered as domestic partners, as they could have done in California before they moved to Vermont. They never adopted wills or trusts designating the other as a trustee or beneficiary. Even after same-sex marriage became legal in Vermont in 2009, they did not marry, although Cressy proposed that to Proctor. "Proctor did make Cressy the beneficiary of a small IRA when Cressy told Proctor that he was feeling insecure about his financial position," wrote Sessions, "but this was the only time Proctor made any provision for Cressy." Since Cressy moved out, Proctor took out a home equity loan to supplement his savings and cover living expenses. Cressy, who lives with his parents in California, works part-time in a travel agency.

Judge Sessions found that Cressy worked full-time for many years in Proctor's business without pay, despite Proctor's claim that Cressy was only part-time and a volunteer who did not expect compensation. In the absence of the destroyed records, this conclusion rested on testimony from family members and former co-workers. Proctor claimed that Cressy's work was in exchange for his room and board and expenses all being covered by Proctor for the duration of their relationship. Although Cressy testified that "he was glad to help Proctor out and it was a 'natural thing' for him to help out with his 'partner's business," Sessions found that "by the time he became a full-time employee, however, it was understandable that he expected to receive some benefit for his labor other than room and board," but that he never received any direct compensation for his work in the business.

Wrote Sessions, "the court is persuaded that, regardless of the reason why, Cressy contributed a significant amount of labor to Synergy without pay and with a reasonable expectation that he was building something with Proctor for their mutual benefit. Even though Cressy was in a precarious financial situation, he never confronted Proctor to insist that he be paid or to disrupt his assumption that the business would ultimately be shared because of Proctor's 'very strong personality.' Cressy, more timid and quiet, tended to avoid confrontation. While Cressy might have spared himself some surprise and disappointment by confronting Proctor earlier and clarifying whether Proctor had the same expectations, it appears to be consistent with the nature of their relationship for Cressy to defer to Proctor and avoid raising potentially controversial topics." The court also found that Proctor's antique collection, which predated the relationship, continued to grow as they invested Synergy funds and went antiquing together. Cressy testified that Proctor told him that "these are our retirement." They intended to start an antique business and Proctor got a resale license from the state of Vermont so he could acquire antiques without paying sales tax, but the business never got started.

While Judge Sessions found that these facts would not support Cressy's claim that the men had an implied contract under which he had an ownership share in the business and property and thus was entitled to be compensated on

that basis, and that the lack of express promises by Proctor undermined Cressy's claim under a theory of "promissory estoppel," he decided that Cressy's alternative quantum meruit claim was substantiated. Sessions found that "the professional aspect of the relationship is, in this case, entirely severable from the domestic aspects of the relationship." He found that Cressy's household contributions cannot form the basis of equitable claims, because services between living-together partners are not compensable, but just part of their relationship. On the other hand, he found that services in the business should be compensable, and rejected Proctor's argument that "Cressy's work should be presumed to have been performed gratuitously." Sessions credited Cressy's testimony that he considered what he was doing in the business as his contribution towards a joint investment in their future.

Sessions found the equities sufficiently in Cressy's favor to determine that he should be paid for the reasonable value of the services he provided in the business, and decided to calculate those with reference to the salary of the full-time employee in California whose work Cressy had taken over when she left the business, $40,000 a year. On the other hand, he rejected Proctor's argument that offset against this should be the significant amount he spent on trips, clothes, and other personal expenses for Cressy, finding that "there can be no claim for household services between domestic partners." Ultimately, he performed a calculation, following the suggestions of Cressy's economic expert witness, and concluded that "the present value of Cressy's lost annual savings, including interest, added up to $173,685. He rejected various equitable defenses by Proctor, including the failure of Cressy ever to demand compensation while he was working in the business and Cressy's enjoyment of living tax free all those years by not receiving a salary. Sessions also rejected an argument that Cressy should be estopped from asserting these claims after having left the relationship. "Cressy is not estopped from bringing his quantum meruit claim now because he had no notice that Proctor did not actually consider him a partner until after their personal relationship ended," wrote Sessions. "Neither Cressy nor Proctor sought outside work after the close of Synergy and the domestic life of the parties after 2008 is not relevant to Cressy's quantum meruit claim," he continued. The court also rejected Proctor's attempt to assert a counterclaim for the value of the room, board, clothing, travel expenses, health insurance, recreational expenses and other sundry goods, services and provisions, as to which Proctor sought restitution, having concluded that these were considered gratuitous within the personal relationship of the two men.

In finding that Sessions did not abuse his discretion in reaching these conclusions, Judge Garaufis wrote, "The court heard conflicting testimony regarding the materiality of Cressy's labor at Synergy, and, in its role as fact finder at a bench trial, resolved these factual conflicts with its findings that Cressy was a full-time employee with administrative and clerical responsibilities who ran the day-to-day operations of the company. The evidence adduced at trial permitted this interpretation. It was not clear error for the district court to find that Cressy's labor rendered a material benefit to Proctor." The 2nd Circuit upheld Sessions' finding that one could separate out the personal and the professional in the relationship, and treat the benefits Cressy enjoyed from Proctor's support of his "lifestyle" during their relationship as completely apart from the value Proctor derived from Cressy's work in the business. "As Proctor's domestic partner," wrote Garaufis, "Cressy would have expected to enjoy these sorts of lifestyle benefits, regardless of whether he contributed to Proctor's business. By contrast, Cressy's labor as a full-time employee of Synergy was not within the scope of the normal exchange of domestic benefits; Proctor could not have reasonably expected to enjoy the benefits of Cressy's labor as a matter of course by virtue of the fact of their relationship alone." The court cited to a Vermont Supreme Court case, *Harman v. Rogers*, 510 A.2d 161 (1986), which reached a similar conclusion regarding an unmarried couple, "one of whom ran the day-to-day operations of a business owned by the other and was not compensated." Cressy lives in California and sued Proctor in Vermont under diversity jurisdiction, so Vermont law on these questions is controlling.

The 2nd Circuit upheld Sessions' finding that one could separate out the personal and the professional in the relationship.

The 2nd Circuit panel also saw no "clear error" in Sessions' calculation of damages, finding that the evidence presented at trial provided a sufficient basis for Sessions' conclusions. The court also rejected Proctor's argument that it was "clear error" for Sessions to fail to credit Proctor in this calculation for the value of his support for Cressy's lifestyle expenses during the relationship.

Cressy was represented in the litigation by Cevin McLaughlin of the Middlebury firm of Langrock, Sperry & Wool LLP (a firm with a long history of advancing LGBT rights in Vermont; the firm was co-counsel, back in the 1990s, on the case that eventually brought civil unions to Vermont). Proctor was represented at trial by Richard Thomas Cassidy of the Burlington firm Hoff Curtis. Mark Scherzer of New York brought Proctor's appeal to the 2nd Circuit. ■

Louisiana Court Finds Civil Rights Executive Order of Governor Edwards Unconstitutional

A trial judge in Louisiana ruled on December 14 that an Executive Order by Governor John Bel Edwards, forbidding anti-LGBT discrimination in the executive branch of the state government and by state contractors, violates the Louisiana constitution and laws. 19th Judicial District Judge Todd W. Hernandez, in the Parish of East Baton Rouge, said that this Order violates the separation of powers established by the Louisiana Constitution, is outside the governor's authority to "faithfully execute the laws," and should be enjoined. Governor Edwards promptly announced that he would appeal this ruling. *Louisiana Department of Justice v. Edwards*, No. 652,283 (19th Judicial District).

Hernandez's decision came in a lawsuit filed by the Louisiana Department of Justice and Attorney General Jeff Landry, who challenged the authority of the governor to extend anti-discrimination rules to categories not already covered by state statutes.

Hernandez's decision came in a lawsuit filed by the Louisiana Department of Justice and Attorney General Jeff Landry, who challenged the authority of the governor to extend anti-discrimination rules to categories not already covered by state statutes. At the same time, Hernandez ruled on a countersuit filed by the governor, as part of his response to Landry's lawsuit, in which Gov. Edwards challenged Landry's refusal to approve attorneys who were being retained by executive branch agencies to represent them in litigation.

Landry argued that JBE 16-11, the order signed by Edwards shortly after he took office early in 2016, inappropriately creates "a newly created protected class of persons not recognized by current law." He also contended that the restrictions placed on state contractors violated the Commerce Clause of the U.S. Constitution and "certain First Amendment rights and privacy interest rights established by the Louisiana and United States Constitutions," according to Judge Hernandez. Landry's reference to "class of persons" mischaracterizes the Executive Order, which does not create protected classes, but rather, in the general approach of civil rights laws, forbids discrimination because of particular characteristics, in this case sexual orientation and gender identity. Thus, everybody is protected from discrimination because of those characteristics, including non-gay people and cisgender people.

Hernandez declared that the Executive Order "constitutes an unlawful ultra-vires act because, regardless of the defendant's intent, the effect of its adoption and implementation, creates new and/or expands upon existing Louisiana law as opposed to directing the faithful execution of the existing laws of this state pursuant to the authority granted unto [sic] the office of the Governor to issue executive orders." Hernandez proclaimed that the governor was improperly exercising legislative authority, which is "an unlawful usurp [sic] of the constitutional authority vested only in the legislative branch of the government."

Judge Hernandez did not cite any prior Louisiana court decisions to support his ruling. One suspects the state courts have never before addressed this question, or at least not in a way that would support the court's ruling. Instead, the judge embraced his literalistic reading of the state constitution, which "declares the office of the Governor as the 'Chief Executive Officer' of the State of Louisiana and he/she shall see that the laws of this state are faithfully executed," and goes on to cite a statute that says, according to the judge, that "the sole purpose for the issuance of an executive order is to provide the office of the Governor with a mechanism to 'faithfully execute the laws of the State of Louisiana.'"

Hernandez was not accurately quoting the statute, LRS 49:215, which says: "The authority of the governor to see that the laws are faithfully executed by issuing executive orders is recognized." This is not, on its face, restricted to the laws of Louisiana, and the oath of office of the governor, together with all other state elected officials, requires them to support both federal and state laws, including the federal and state constitutions, both of which provide "equal protection of the laws" to all people in the state.

The U.S. Supreme Court established in 1996 in *Romer v. Evans* that anti-gay discrimination violates "equal protection of the laws" under the 14th Amendment to the U.S. Constitution, unless the state has a rational basis to treat people differently because of their sexual orientation. Thus, an Executive Order banning anti-gay discrimination in the executive branch of the state government is consistent with the governor's obligation to see that the laws are faithfully executed, although there might be some controversy about extending this to "gender identity" in the absence of U.S. Supreme Court authority. The 11th Circuit U.S. Court

of Appeals, whose jurisdiction covers Alabama, Florida, and Georgia, is so far the only federal appeals court that has recognized a constitutional equal protection claim by a transgender public employee, but the logic of *Romer v. Evans* would surely cover such a claim as well.

Hernandez found that the Executive Order "extends beyond the lawful parameters of executive order authority and its adoption and implementation is found to be either a creation of new law and/or an expansion of existing law. In either case," he continued, "this is a violation of the separation of powers doctrine of the Louisiana Constitution and is an infringement upon the constitutional authority vested solely upon the Legislature of the State of Louisiana."

However, Hernandez rejected without explanation Landry's claim that other federal or state constitutional provisions were violated by the executive order.

Turning to the governor's counterclaim, Hernandez found that Louisiana statutes specifically authorize the attorney general to approve or disapprove lawyers whose engagement is sought by executive branch agencies, but that once those lawyers have been engaged, the attorney general has no supervisory authority over them and cannot dictate what positions they take in their representation.

As to the governor's request for a ruling that the office of the governor is superior to the office of the attorney general when a dispute about legal policy arises, Hernandez declined to rule, finding that without the presentation of an actual dispute between the two officers, the question was not "ripe" for judicial consideration. "There is no evidence of a justiciable controversy concerning which constitutionally created officer of this state should prevail if a dispute were to arise between them relating to a legal matter concerning the legal interest of the State of Louisiana," he wrote. To express a view in the abstract would be akin to rendering an "advisory opinion" beyond the authority of the court. ■

Eleventh Circuit Allows Gay-Straight Alliance at a Public Middle School in Florida

On December 6, 2016, the 11th Circuit Court of Appeals ruled that the Equal Access Act (20 U.S.C. § 4071) requires Carver Middle School ("Carver") in Florida to permit the formation of a Gay-Straight Alliance there. *Carver Middle School Gay-Straight Alliance v. School Board of Lake County, Florida*, 2016 WL 7099781, 2016 U.S. App. LEXIS 21702. Arguably, the ruling requires all Florida middle schools to permit gay-straight alliances, so long as they offer courses that qualify for high school credit.

The opinion was written by Judge William Pryor, who was appointed to the court in 2005 by President George W. Bush and is reportedly one of the candidates being considered by President-elect Donald Trump to fill the current vacancy on the Supreme Court of the United States.

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The court's decision reinstates a 2014 lawsuit brought by the Carver Middle School Gay-Straight Alliance (the "Alliance"), as well as an individual plaintiff-student at Carver, H.F., against the School Board of Lake County, Florida (the "Board"). The Alliance's suit alleged violations of the federal constitution and Equal Access Act by the Board after it denied the Alliance's application to form a student club at Carver. On appeal, the Alliance and H.F. only challenged dismissal of their Equal Access claims.

The Alliance had submitted three applications for three separate school years, but this suit dealt only with denial of the application for the 2013-2014 school year. The first application for the 2011-2012 school year was denied outright; the second application for the 2012-2013 school year was denied, but then approved, when a student not associated with the current case sued the Board to compel approval of that application. The Board requires student clubs to reapply each year.

The Board's denial of H.F.'s and the Alliance's 2013-2014 application was premised on its failure to describe in its application how the Alliance would "strengthen and promote critical thinking" at the school, a prerequisite for formation under then-Board policy. When the Board denied the 2013-2014 application, it indicated that it would be inclined to approve one revised by the Alliance and H.F. to address the critical thinking requirement. However, rather than resubmit an application, the Alliance and H.F. brought suit.

The district court then granted the Board's motion to dismiss for mootness and lack of ripeness and, in the alternative, because Carver, as a middle school, did not provide "secondary education."

The district court found the claim not ripe, given that the Alliance and H.F. could simply have resubmitted an application and, therefore, no "binding conclusive administrative decision" had been made. The district court further dismissed the claim as moot because "the Alliance applied for the 2013-2014

school year, which had ended, and the Alliance did not submit a new application for the 2014 school year," resulting in there being "nothing to enjoin the School Board to do or not to do." Finally, as an alternative, the district court dismissed the Equal Access Act claim on their finding that "in Florida, a secondary school means a high school."

The appellate court, however, disagreed on all points.

Judge Pryor adopted the Alliance's argument that the Board's critical-thinking requirement violated the Equal Access Act. The Equal Access Act "permits noncurricular student groups to use school facilities" and "if a public school 'provides secondary education as determined by State law,' [a] school must give extracurricular clubs equal access to school resources." In short, the Act does not have a critical thinking requirement and the Board went too far in imposing one.

Judge Pryor further found the Equal Access Act applicable to Carver because, even though it is a middle school, it offers courses qualifying for high school level credit, and therefore provides "secondary education" under Florida State law. Judge Pryor wrote that the claim was indeed ripe because the fact the Alliance could have resubmitted an application in no way altered the fact the Board had denied the application in the first place and such rejection which was a binding and conclusive decision.

Finally, the appellate court disagreed that the case was moot because, even though injunctive and declaratory relief was no longer available to the Alliance given the end of the 204-2015 school year, the requirement for clubs to resubmit applications every year, and H.F.'s graduation from Carver, the district court could nevertheless still find H.F. and the Alliance had been nominally damaged and make an award.

Judge Pryor, however, did not address whether nominal or monetary relief can be even be awarded for violations of the Equal Access Act and left that question to be decided by the district court to which the case was remanded after its initial order was vacated. – *Matthew Goodwin*

Matthew Goodwin is an associate at Brady Klein Weissman LLP in New York, specializing in matrimonial and family law.

Termination of Court Clerk for Refusing on Religious Grounds to Process Same-Sex Marriage License was Permissible

Judge Richard L. Young of the U.S. District Court for the Southern District of Indiana has granted summary judgment and dismissed a former deputy court clerk's lawsuit against the Harrison County Clerk's Office for terminating her after she refused to process a same-sex marriage license, alleging it was against her religious beliefs, in *Summers v. Whitis*, 2016 U.S. Dist. LEXIS 173222, 2016 WL 7242483 (D. Ind., Dec. 15, 2016).

Following a 7th Circuit ruling resulting in the enjoinment of the state of Indiana from enforcing its former ban on same-sex marriage, *Baskin v. Bogan*, 766 F.3d 648 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014), Linda Summers, a deputy clerk at the Harrison County Clerk's Office, whose duties included processing marriage licenses, refused to process the license of a same-sex couple on the basis that she was Christian and that her interpretation of "select chapters in the Christian Bible" led her to believe that "it's not God's law to have [same-sex couples] marry." When reminded by her supervisor that processing the license was required as part of her job duties, Summers refused. The next day, Summers submitted a religious accommodation request and that same day her supervisor terminated her employment for insubordination. Summers filed an action under Title VII of the Civil Rights Act of 1964, alleging religious discrimination in the decision to discharge her. All parties moved for summary judgment.

Judge summarized the undisputed facts of the case, including that same-sex marriage was legal in Indiana at the time and that Summers' duties included processing marriage licenses. Judge Young held that here summary judgment was appropriate because no material facts were in dispute.

Young pointed out that while both parties offered the same legal framework in their arguments, that framework had been superseded in *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015), and was actually as follows: that to succeed in a religious discrimination claim, a plaintiff must show: "(1) her religious belief or practice conflicted with an employment requirement, and (2) her need for an accommodation of that religious belief or practice was a motivating factor in the employer's adverse employment decision."

Judge Young cited case law establishing that assessing whether a genuine conflict exists requires an "objective analysis," and that "the fact that an employee subjectively perceives a conflict between her religious beliefs and her job duties is not, in and of itself, conclusive."

Looking to the first element, Judge Young cited case law establishing that assessing whether a genuine conflict exists requires an "objective analysis," and that "the fact that an employee subjectively perceives a conflict between her religious beliefs and her job duties is not, in and of itself, conclusive." Here,

Young held that because Summers' job required her to process information and certify on behalf of the state of Indiana that the couple was qualified to marry under Indiana law, but not to "perform marriage ceremonies, personally sign marriage licenses or certificates, . . . or attend ceremonies, say congratulations, offer a blessing, or pray with couples," her employer did not "make her express religious approval or condone any particular marriage" and in performing her duties she "remained free to practice her Christian faith and attend church services." Judge Young added that the sincerity of Summers' belief was not in question, but instead that "Summers' desire to avoid handing forms related to activities of which she personally disapproves is not protected by federal law."

In the event of an appeal and the overruling of his analysis, Judge Young further proffered a finding in the alternative: that *arguendo*, if Summers *had* established a religious conflict, the conflict was not with her employer, stating that while her supervisor "may have instructed Summers to process same-sex marriage licenses, that directive was merely an effort to comply with the Seventh Circuit's mandate," and that "Summers' dispute was not with her employer, but the Seventh Circuit." In support, Judge Young cited to a persuasive decision, *Seaworth v. Pearson*, 203 F.3d 1056 (8th Cir.) (per curiam), *cert. denied*, 531 U.S. 895 (2000), in which an applicant had refused to provide his Social Security Number to an employer for religious reasons. In that case, the court ruled "the IRS, not defendants, imposed the requirement that [he] provide an SSN. Thus [his] beliefs do not conflict with an employment requirement."

Judge Young concluded: "In the end, Summers should have put her personal feelings aside and heeded the command of her employer. She was certainly free to disagree with the Seventh Circuit's decision, but that did not excuse her from complying with it." Finding that Summers' termination was within defendants' rights and not in violation of the Civil Rights Act, Judge Young granted summary judgment to defendants. – *Bryan Johnson-Xenitelis*

Missouri Appeals Court Reverses Conviction of HIV-Infected College Wrestler

The Missouri Eastern District Court of Appeals has reversed the jury conviction of Michael L. Johnson, an HIV-positive African-American man, on felony charges of recklessly infecting another with HIV and exposing others to HIV, for which he was sentenced to 30 years in prison. The appeals court found in a December 20 ruling that the prosecution had violated court discovery rules by ambushing Johnson at trial with selective excerpts from recordings of telephone conversations he had in jail, thus depriving Johnson of a fair trial. The St. Charles County prosecutor now has to decide whether to retry Johnson, who was convicted in May 2015 for events that occurred in 2013. *State of Missouri v. Johnson*, 2016 WL 7388617.

Johnson, a championship high school wrestler from Indianapolis, moved to St. Charles, Missouri, in 2012 to attend Lindenwood University, where he had had been recruited for the wrestling team. On January 7, 2013, he went to the student clinic complaining of perianal warts and seeking STD testing. He tested positive for gonorrhea and HIV.

A few weeks later, Johnson had unprotected oral and anal sex with another Lindenwood student whom he had met through social media. That student testified at the trial that Johnson had not disclosed he was HIV-positive. The student experienced symptoms a few weeks later, went to a hospital emergency room, and was diagnosed with gonorrhea and HIV. A follow-up HIV test led doctors to inform the student that his HIV infection was recent. The student testified that before having sex with Johnson, he had not had sex with anyone else for a year, so Johnson was the only person who could have infected him.

The student contacted Johnson and they met in Johnson's dorm room, where the student told Johnson he was HIV-positive, and they had sex again. The student maintains that Johnson still did not disclose that he was HIV-positive. When the student noticed that Johnson was still using social networking and "dating internet applications," but was not mentioning in his profile that he was HIV-positive, the student contacted the St. Charles Police Department, whose investigation turned up five other people who had sex with Johnson, all of whom claimed Johnson had not disclosed to them that he was HIV-positive.

In the subsequent jury trial, Johnson admitted that he learned of his HIV diagnosis on January 7, 2013, so the critical issue at trial was whether he disclosed his HIV status to his sexual partners. Johnson testified that he had informed each of them before engaging in sex, except for one man with whom he had sex only in November 2012, before he learned of his infection. Prosecutors impeached Johnson's testimony by playing excerpts from the jail telephone recordings, in which Johnson had stated that he was worried that people would not want to be his friend if they learned about his HIV status, that he was "pretty sure" he had disclosed his HIV status to his sexual partners, and that he was "unsure" about how to tell people about his status. This summary in the court's opinion of the prejudicial statements extracted from more than 24 hours of telephone calls does not indicate who the other parties were on the calls, and whether all three statements came from the same call.

Johnson's lawyer had objected to the introduction of these edited recordings, which were only revealed to her the Monday morning of the trial, May 11, 2015. The prosecutor claimed that the information had been sent to the lawyer's office the previous Friday, but that was a holiday and the law office was closed. A year and a half earlier, on November 26, 2013, the defense had filed a request for discovery as authorized by court rules, asking for "any written or recorded

statements and the substance of any oral statements made by the defendant" that was relevant to the charges against him. The court rule says that such requests shall be answered within ten days after the prosecutor receives the request, and imposes an ongoing duty on the prosecutor to supplement its response if it acquires new relevant information, and the disclosure duty extends beyond information known to the prosecutor to include any information that might be obtained through reasonable inquiry.

It is, of course, common practice that jails record prisoner calls and that prosecutors can get access to the recordings. In this case, there were more than 24 hours of recordings of Johnson's phone calls made while he was in jail, two calls from as far back as October 17, 2013, just weeks before the defense filed its discovery request, and one call from just a few days before the request. Yet the state waited a year and a half to turn this information over, and even then playing games to avoid defense counsel learning of them until the morning of the trial by sending them over on a holiday before a weekend. Defense counsel objected, but the trial judge reserved ruling on the objection, since the evidence would not be presented until later in the trial, and then the judge overruled the objection, stating that the defense had a few days in possession of the recordings and so was not prejudiced.

The jury convicted Johnson on every count except the charge involving the man with whom he had sex in November 2012 – an instance of classic overcharging by the prosecution, since Johnson did not know he was HIV positive at the time. He was sentenced to 30 years for infecting the other student, 14 years for recklessly exposing another person, and 5-1/2 years on each of three charges of "attempting" to expose other people, with the sentences to run concurrently.

Johnson raised two issues on appeal. First, he challenged the fairness of his trial because of the state's "ambush" tactics with the recording. Second, he claimed that the prison sentence was "grossly disproportionate" to the offenses, in violation of the 8th Amendment ban on cruel and unusual punishment. Because the appeals court agreed with his first issue, it did not rule on the 8th Amendment claim.

The State candidly admitted on the record before the appeals court that it "intentionally withheld the recordings from the defense to gain a strategic advance," wrote Presiding Judge James M. Dowd for the appellate panel. "The State explained: 'If we disclose to the defense they'll tell their client. And I'm not impugning anyone's integrity, I'd do the same thing: Hey, they're listening to your conversations, shut up. So we don't disclose them until towards the end."

The court rejected the State's argument that because everybody knows that their prison phone calls are being recorded, there is no fundamental unfairness in failing to disclose them before trial.

Judge Dowd pointed out that the state's strategy was exactly what the discovery rule was intended to avoid. "We find that this discovery violation likely resulted in Johnson's genuine surprise at learning on the first day of trial that the State had prepared to use the untimely-disclosed recordings against him, since at no earlier point had Johnson learned that the State [that is, the prosecutors]—and not just the county jail – had the recordings in its possession, nor had he learned that the State planned to use them at trial."

The court rejected the State's argument that because everybody knows that their prison phone calls are being recorded, there is no fundamental unfairness in failing to disclose them before trial. Judge Dowd pointed out that there were prior Missouri court rulings directly addressing this point. It is not enough to show that the defendant knows the jail is recording the phone conversations. The relevant knowledge would be that the prosecution has the recordings and is planning to use them at trial, with an opportunity for the defense to learn what recordings were going to be used. Furthermore, the court rejected the trial judge's conclusion that the problem was cured because a few days went by before the recordings were offered in evidence.

"Johnson was forced to make critical strategic decisions – such as whether to seek to avoid trial by pursuing a plea bargain, whether to waive his right to silence and testify, and what particular defense to raise – without being timely furnished highly prejudicial, properly-requested discovery," wrote Dowd. "The State had more than a year and half to prepare its case with the benefit of its chosen excerpts of Johnson's jail phone recordings but failed, in violation of Rule 25.03, to disclose to Johnson before the morning of the first day of the trial any part of the more than 24 hours of recordings. Even as an inadvertent mistake, such untimely disclosure would be suspect under Missouri law, but here the State admitted that it purposely withheld the recordings from Johnson so as not to tip off the defense counsel that her client was being recorded making incriminating statements."

Dowd said that the "pretty sure" statement was "profoundly prejudicial" when it was used out of context to impeach Johnson's testimony that he had disclosed his HIV status to his sexual partners. Thus, concluded Dowd, the state's tactic had likely "prevented Johnson from preparing a meaningful defense – i.e., one that was not sabotaged by the State's deliberate untimely disclosure of highly prejudicial evidence – and that timely disclosure of the statement would have affected the result of Johnson's trial."

Dowd also rejected the argument that Johnson's counsel had enough time to deal with the recordings during the first three days of trial before Johnson's testimony. "The solution to the State's blatant discovery violation should not be to put the defense at an additional disadvantage by forcing the defense to spend its time during trial analyzing improperly-withheld discovery instead of preparing for the next witness, next day of trial, or the other work-intensive matters a trial lawyer must deal with," wrote Dowd. This violation, he said, "is inexcusable, should not be repeated, and supports a finding of fundamental unfairness in this case," calling it a "bad faith strategy" that "clearly was intended to disadvantage Johnson." In other words, they were out to get him!

Thus, it was an abuse of discretion for the trial judge to let the State use this evidence, and the conviction was reversed and sent back to the county Circuit Court for a new trial. It is up to the prosecutor to decide whether to go forward. Since Johnson has served but a small fraction of the 30-year sentence, there may be local pressure to have a new trial. In light of the evidence, which would be admissible the second time around now that it has been disclosed, it is possible that Johnson will seek to strike a plea bargain for a shorter sentence rather than risk another trial.

In the meantime, this case, which has attracted lots of attention, shows that Missouri's HIV-exposure law requires reconsideration, especially in light of the developments in medical treatment that have changed the calculus of risk in terms of HIV transmission and the consequences of infection from what they were when the law was passed in 1988. Laws on HIV exposure passed before these medical developments are now inadequately sensitive to evidence that people on PREP may be infected without presenting a risk of transmission, and of course the mortality and morbidity issues have changed drastically since protease inhibitors became part of the standard treatment regimen for HIV in the mid-1990s.

Johnson's attorney was Sam Buffaloe. The Center for HIV Law & Policy filed an amicus brief on behalf of Johnson. ■

Pennsylvania Superior Court Extends Comity to Vermont Civil Union for Purposes of Dissolution

A three-judge panel of the Pennsylvania Superior Court, an intermediate appellate court, unanimously ruled on December 28 that Pennsylvania should extend comity to a Vermont civil union contracted in 2002 so that the Family Court Division of the Philadelphia Common Pleas Court could entertain a complaint by Pennsylvania residents seeking the dissolution of their Vermont civil union. Reversing the Family Court Division's dismissal of the complaint, the court remanded for further proceedings in *Neyman v. Buckley*, 2016 Pa. Super LEXIS 805, 2016 PA Super 307, 2016 WL 7449227.

Freyda Neyman and Florence Buckley, then Pennsylvania residents, went to Vermont to enter into a civil union on July 12, 2002. At the time, Vermont was the only jurisdiction in the United States that allowed same-sex couples to form civil unions, and no jurisdiction in the U.S. had same-sex marriages. (Indeed, it wasn't until the following year that they could have gone to Canada to get married, and Massachusetts did not begin letting same-sex couples marry, the first U.S. jurisdiction to do so, until May 2004.) They returned to Pennsylvania after the ceremony, but things didn't work out and by December 2002 they were living separately. But they took no steps to formally dissolve the civil union, since one of them would have to establish residency in Vermont at that time to do so, although relatively recently Vermont, acknowledging the problems being encountered by out-of-staters seeking to dissolve their Vermont civil unions, did amend the state law to allow non-citizens to seek dissolutions in the Vermont courts. Anyway, in 2014, Newman and Buckley signed affidavits of consent, specifying that their civil union was "irretrievably broken" and stated an intention to request a final decree of divorce/dissolution, wrote Senior Judge James Fitzgerald for the Superior Court panel. On June 2, 2014, Neyman filed a complaint in the Family Court Division in Philadelphia stating that the parties were Pennsylvania residents who sought a divorce/dissolution decree from their Vermont civil union. This was two weeks *after* a federal district judge in Pennsylvania had ruled in *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014), that Pennsylvania's ban on same-sex marriage was unconstitutional and enjoined state officials from enforcing the ban, a decision that the governor ultimately decided not to appeal.

Although Neyman's petition was unopposed, the Family Court judge let it sit for over a year, and then dismissed it on the court's initiative in June 2015, stating: "The Family Court Division may only divorce parties from the 'bonds of matrimony.' Pa. R. C. P. 1920.1(a). This court cannot issue a Decree or Order dissolving the Vermont Civil Union that is the subject of this action. Therefore, the Complaint in Divorce is hereby dismissed. The Civil Trial Division of Philadelphia County has jurisdiction over complaints seeking dissolution of civil unions as actions in equity and has entered order/judgments dissolving same." Neyman contested this ruling and received another negative response on February 23, 2016, in which the trial court insisted that the Pennsylvania Constitution's grant of jurisdiction to the Family Court Division only dealt with domestic relations, including divorce and annulment and property matters relating thereto, but not to dissolutions of civil unions, a status not recognized in Pennsylvania. The court concluded that because Vermont recognized a distinction between civil unions and marriages, even after it had legislated in favor of same-sex marriage, the court had to note that distinction, and again insisted that Neyman should go to the Civil Trial Division to seek equitable

relief. But, undeterred, she appealed to the Superior Court.

Judge Fitzgerald wrote that the Family Court Division has "broad equitable power" to dispose of family law issues, and provided a detailed history of the issue of same-sex marriage, beginning with the 1996 enactment of federal DOMA, Pennsylvania's response amending its marriage laws to make explicit that the state did not allow or recognize same-sex marriages, the Vermont enactment of civil unions and its preservation of the distinction between civil unions and marriages, while purporting to confer on civil unions almost all the state law rights of marriage, and a 2012 amendment of the Vermont law allowing out-of-state same-sex couples who had Vermont civil unions to get a dissolution from a Vermont court without having to establish residency there. He noted that there is a Pennsylvania case that addressed the issue of recognizing civil unions in 2011-12. The surviving partner of a same-sex couple who had a New Jersey civil union filed an action in 2011 in Berks County, seeking to have the civil union recognized for purposes of avoiding tax on an inheritance. Wrote Judge Fitzgerald of the trial court's opinion in that case, "The court concluded the petitioner's argument to extend full faith and credit to New Jersey's civil union law failed because DOMA 'forgave Pennsylvania from recognizing New Jersey's law.'" That ruling was upheld by the Superior Court in *Himmelberger v. Dept. of Revenue*, 47 A.3d 160 (Pa. Cmwlth. 2012), based on the trial court's opinion. The next year, of course, the U.S. Supreme Court struck down DOMA in *U.S. v. Windsor*, 133 S. Ct. 2675 (2013), knocking the props out from under the *Himmelberger* decision, in a case that, ironically, involved estate taxes on the survivor of an out-of-state same-sex marriage! Then in 2014, the federal court struck down Pennsylvania's same-sex marriage ban just weeks before Neyman filed her dissolution complaint and, a year later, in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the U.S. Supreme Court found that same-sex couples have a federal constitutional right to marry, to have their marriages recognized by the states, and to enjoy equal treatment for those marriages.

Judge Fitzgerald opined that "*Obergefell* does not resolve all questions regarding the status of civil unions and divorce." The question for the court, in his view, was whether "the legal principle of comity mandates recognition of a Vermont Civil union as the legal equivalent of marriage for purposes of dissolution pursuant to the Divorce Code in Pennsylvania." Extending comity in the wake of this history and the arrival of legal same-sex marriage in Pennsylvania was not difficult, since any public policy arguments against recognizing the civil union as such an equivalent were vitiated by the same-sex marriage legal developments. "In the instant case," wrote Fitzgerald, "we conclude that the legal properties of a Vermont civil union weigh in favor of recognizing such unions as the legal equivalent of marriage for purposes of dissolution under the Divorce Code. The Vermont legislature created civil unions in order to provide same-sex couples with a statutory equivalent to marriage at a time when same-sex marriage was not yet available anywhere in the United States. The Vermont statute specifically grants parties to a civil union all the same 'benefits, protections and responsibilities under law' as are conferred to 'spouses in a marriage.' 15 V.S.A. sec. 1204(a). Further, Vermont law explicitly provides that the law of domestic relations, including divorce and property division, are applicable to parties to a civil union." Since no current public policy of Pennsylvania would be violated by extending comity to the civil union, it would be appropriate to bring an action for dissolution within the jurisdiction of the Family Court Division, recognizing the significance of the 2014 federal court ruling in Pennsylvania and the subsequent ruling by the U.S. Supreme Court.

"In this case," wrote Fitzgerald, "when the parties entered into a Vermont civil union in 2002, civil marriage was not available to them because they are of the same sex. Moreover, the parties separated before other states began to recognize same-sex marriage. Therefore, declining to acknowledge the parties' civil union as the equivalent of marriage would essentially penalize the parties simply for their same-sex status because the Vermont civil union statute explicitly granted same-sex couples equivalent rights to those only available to opposite-sex couples through marriage at that time." The court found that recognizing the civil union in this case "would promote the strong Pennsylvania public policy interest in uniformity of result, particularly in the context of the recognition of marriage." He pointed out that if states did not recognize civil unions for the purpose of dissolution, a party who wanted to resist their civil union partner's desire to get out of the relationship could forum shop, moving to a state that would refuse to grant a dissolution. This would be a particular problem if, for example, one partner wanted to dissolve the civil union in order to be able to marry another person, and the state would object to issuing a marriage license to a civilly partnered person.

"Under the legal precept of comity," wrote Fitzgerald, "Pennsylvania residents should not have to travel to Vermont to avail themselves of the rights and obligations they undertook when they entered into a Vermont civil union," citing a 1930 Pennsylvania case establishing the principal that Pennsylvanians who married out of state did not have to go out of state to get divorced! Since Vermont gave family courts the role of dissolving civil unions, he concluded, so should Pennsylvania. After all, those are the courts with expertise in deciding the issues surrounding dissolution of a marriage. "Accordingly, we reverse the family court's order dismissing Appellant's complaint for dissolution of her Vermont civil union and remand for further proceedings consistent with this opinion." ■

6th Circuit Refuses to Stay Preliminary Injunction in Ohio Elementary School Transgender Restroom Access Case

U.S. District Judge Algenon L. Marbley (S.D. Ohio) issued a preliminary injunction in a suit brought by the U.S. Department of Education on behalf of an 11-year-old transgender girl, ordering the Highland Local School District to allow her to use the girls' restroom facilities at her school pending a final resolution of the case on the merits. The school district appealed to the 6th Circuit, seeking that the preliminary injunction be stayed pending appeal, citing the U.S. Supreme Court's action in staying an injunction pending appeal in the *Gloucester County School District* case from Virginia. But a 6th Circuit panel voted 2-1 to deny the motion, in a *per curiam* order issued on December 15, 2016, with a dissenting opinion by Circuit Judge Jeffrey Sutton, a George W. Bush appointee. *Dodds v. U.S. Department of Education*, 2016 U.S. App. LEXIS 22318, 2016 WL 7241402, 2016 FED App. 0291P (6th Cir.). The other members of the panel are Senior Judge Damon Keith, appointed by Jimmy Carter, and Judge Bernice Donald, appointed by Barack Obama.

"The crux of this case," wrote the majority of the panel, "is whether transgender students are entitled to access restrooms for their identified gender rather than their biological gender at birth. . . . While the Supreme Court has stayed a similar case from another Circuit, *see G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 136 S. Ct. 2442 (Mem), that fact does not satisfy the test required of us here, and does nothing more than show a possibility of relief, which is not enough to grant a stay."

The majority found this case significantly distinguishable from the case of Gavin Grimm, where the stay preserved the status quo that high school student Grimm had been barred from using the boys' restroom for a significant period time (and will, due to the Supreme Court's action, probably never get use the restroom before he graduates). "Doe's personal circumstances – her young age, mental health history, and unique vulnerabilities – and her use of the girls' restroom for over six weeks, which has greatly alleviated her distress, differentiate her case from *Gloucester County*. Permitting Highland to again single her out, and disrupt the status quo, is distinct from the stay granted in *Gloucester County*, which maintained the status quo as opposed to disrupting it. Maintaining the status quo in this case would protect Doe from harm that would befall her if the injunction is stayed." The difference is largely due to timing. By the time the district court in the Virginia case issued its preliminary injunction, the school year was at an end, and although both the district court and the 4th Circuit refused to stay the preliminary injunction, the Supreme Court granted the stay application before the resumption of school after the summer vacation. As a result, the stay preserved a status quo – Grimm's exclusion from the boys' room – that dated back a long time, and the preliminary injunction, although it was in technically effect for a few months, never had any application because they were the months of summer vacation.

The majority found this case significantly distinguishable from the case of Gavin Grimm.

"We are not convinced that Highland has made its required showing of a likelihood of success on appeal," the majority continued, pointing out that under Title VII, the 6th Circuit has ruled that sex-stereotyping based on a person's gender non-conforming behavior is "impermissible" (in *Smith v. City of Salem*, 378 F.3d 566, 575 (2004), and citing to both the 4th Circuit's decision in *Gloucester County* and the 11th Circuit's decision in *Glenn v. Brumby*, a 2011 equal protection claim by a transgender state employee. Thus, the panel majority considers the proposition that gender identity discrimination is impermissible sex discrimination to be "well established" in light of three different circuits' rulings. The court also doubted that Highland would suffer irreparable harm by letting an 11-year-old transgender girl use the girls' restroom facilities while this case gets litigated. Furthermore, as already noted, the court considers the girl, Jane Doe, who is participating as an intervenor through her parents, to be "a vulnerable eleven year old with special needs," who would suffer significant harm if the exclusion is applied. Since the injunction is intended to "protect Doe's constitutional and civil rights, a purpose that is always in the public interest," that factor weighs in favor of denying the stay.

Judge Sutton, who authored the 6th Circuit's decision that was reversed by the Supreme Court in *Obergefell v. Hodges*, insisted in dissent that the Supreme Court's grant of the stay in the *Gloucester County* case was determinative here. "The only material difference between this stay request and the stay requests in *Gloucester County*," he argued, "is that the Supreme Court has now *granted* the school board's certiorari petition – something the Fourth Circuit could not have known at the time it acted and something the district court in our case did not know at the time it acted. But that distinction makes a stay *more* appropriate in our

case. Just as the plaintiff in *Gloucester County* must wait for Supreme Court review before changing the status quo, so should the plaintiff in our case be required to wait for that decision before changing the status quo. Similar treatment of similar plaintiffs is the essence of equal justice under the law." C'mon, Jeff! Gavin Grimm, a transgender male high school senior, and Jane Doe, a transgender female grade school student, are not "similar plaintiffs."

Also, Sutton seemed to be airing some sour grapes. He pointed out that during the frenzy of marriage equality litigation following the *Windsor* decision in 2013, the Supreme Court and lower federal courts stayed several marriage equality rulings while cert petitions were pending before the Supreme Court, then allowed them to go into effect when it denied cert in several cases. He pointed out that after the Supreme Court had stayed the Utah marriage equality ruling in January 2014, the 6th Circuit stayed "a series of district court decisions recognizing a right to same-sex marriage" pending their appeals to the 6th Circuit. "We should take the same path here," he asserted, pointing out how other circuits had done the same thing during that time period leading up to the Supreme Court's cert denial in October 2014. He disputed the majority's analysis of the "status quo" issue, and argued: "The Supreme Court presumably will resolve the Title IX issue in 2017. In the meantime, the Court has indicated that we should wait for further instructions before granting relief on these sorts of claims. These lawsuits pose novel questions and, if successful, will require novel changes to school restrooms and locker rooms. If past is precedent, the Court does not want a patchwork of provisional answers to emerge while it deliberates."

Sutton's assertion that the Supreme Court will "presumably" resolve the Title IX issue in 2017 is open to some question, however, given the imponderables of the impact of the change of administration on January 20. Although *Gloucester County* is private litigation, it is premised on the 4th Circuit's deference to the Education Department's position on Title IX, a position that the incoming administration may change, rendering at least one of the two questions on which the Court granted certiorari arguably moot, making it possible that the Supreme Court will then dismiss the writ or, without hearing argument, remand the case to the 4th Circuit for reconsideration in light of the changed position of the Education Department. Additionally, the 6th Circuit's decision to deny the stay may be a short-lived victory for Jane Doe, since the lead plaintiff in the case is the Education Department, and it is possible that the Department, having a change of heart under now, under the historically anti-LGBT leadership of Betsy DeVos, may seek to abandon this case. In which case, the district court's decision to allow Jane Doe to intervene as a co-plaintiff may be all that keeps the case alive. Who knows what will happen to pending LGBT rights litigation involving federal agencies after President-elect Trump is inaugurated on January 20? ■

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Canadian Court Rejects Marriage Commissioner's Challenge to Cancellation of His Registration for Refusing to Marry Same-Sex Couples

On September 16, 2004, the Court of Queen's Bench of Manitoba decided the landmark decision, *Vogel v. Canada*, which held that the opposite-sex requirement for marriage violated the equality provision of the Canadian Charter of Rights and Freedoms ("the Charter"). This decision effectively legalized same-sex marriage in Manitoba and was one of a string of favorable marriage equality decisions across Canada, which ultimately resulted in the Canadian legislature legalizing same-sex marriage in Canada through the enactment of the Civil Marriage Act on July 20, 2005. The same day the Manitoba Court decided *Vogel*, the Vital Statistics Agency ("the VSA") issued a direction requiring all marriage commissioners to marry legally eligible partners, including same-sex couples.

Kevin Richard Kisilowsky, the applicant in *Kisilowsky v. Her Majesty the Queen*, 2016 MBQB 224, reported in *Canadian Government News* on December 3, 2016, sought a declaration that the cancellation of his registration as a marriage commissioner due to his refusal to marry same-sex couples violated his religious freedom. Kisilowsky, a Christian, was appointed as a marriage commissioner by the VSA in 2003. While Kisilowsky was not registered by the VSA as an official of a religious denomination, he was appointed as a civil marriage commissioner to marry members of his ministry, the House of the Risen Son Ministries and the Bondslave Motorcycle Club. Between 2007 and 2011, Kisilowsky solemnized six marriages within his ministry, a group composed primarily of inner city gang youth, prison inmates, and outlaw motorcycle gang members.

Following the issuance of the September 16, 2004 VSA policy, Kisilowsky filed a complaint with the Manitoba Human Rights Commission, arguing that marrying same-sex couples violated his religious freedom. Ultimately, his complaint was dismissed and the VSA cancelled his registration as a marriage commissioner, prompting the present lawsuit. Kisilowsky argued that this action taken by the VSA in cancelling his registration infringed his right to freedom of religion guaranteed to him by Section 2(a) of the Charter.

Justice Karen I. Simonsen, who heard the case, referred to the real question at issue as the validity of the underlying policy, or whether marriage commissioners must perform marriages for same-sex couples. In analyzing the VSA's decision to cancel Kisilowsky's marriage commissioner registration, the court assessed the "proportional balancing of the Charter protections at play." Essentially, the court weighed the purported interference of Kisilowsky's freedom of religion against the equality protections, guaranteed under the Charter, of same-sex couples wishing to marry.

While the court acknowledged the sincerity of Kisilowsky's held religious beliefs, it found that the VSA's interference with Kisilowsky's ability to act in accordance with those beliefs was no more than trivial or insubstantial.

While the court acknowledged the sincerity of Kisilowsky's held religious beliefs, it found that the VSA's interference with Kisilowsky's ability to act in accordance with those beliefs was no more than trivial or insubstantial. Notably, the court recognized that Kisilowsky was not *required* to perform same-sex marriages. The VSA's policy provided Kisilowsky with two alternative options: First, he could apply to be an official of a religious denomination, whereupon he could refuse to marry individuals for religious purposes; or second, he could apply for a "temporary marriage commissioner" appointment to perform singular marriages of his choosing.

Weighing equal protection interests, the court noted the positive effects of the VSA's policy and its rejection of discrimination against gays and lesbians. Kisilowsky, according to the court, overlooked "the importance of the impact on gay or lesbian couples of being told by a marriage commissioner that he or she will not solemnize a same-sex union." Furthermore, the court recognized the potential hardship on same-sex couples in finding marriage commissioners who are willing to solemnize their marriages if a significant number of commissioners choose not to perform same-sex marriages, especially in rural and more conservative areas.

Therefore, the court held that the cancellation of Kisilowsky's marriage commissioner registration reflected a proportional balancing of the Charter protections at play. The VSA's policy provided Kisilowsky with reasonable alternatives, such that any interference with his religious freedom was trivial at best, while ensuring that same-sex couples are treated equally under the law. – *Michael Leone Lynch*

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CIVIL LITIGATION

ARKANSAS – In a letter issued on December 13 by the U.S. Department of Justice's Civil Rights Division, the government asserted that Pea Ridge School District violated Title II of the Americans with Disabilities Act by excluding some students in 2013 until they submitted to HIV testing. The students, all foster children, according to a December 22 article in the *Arkansas Democrat Gazette*, were sent home by the school district after it received documents about the HIV-positive status of a family member of those students. Writing for the agency, Rebecca Bond, Chief of the Disability Rights Section, said, "A student's HIV status, actual or perceived, is not a permissible basis for the exclusion of a student from a public school setting." It feels strange to read about such an occurrence in 2016, since this issue was litigated beginning in the mid-1980s under Section 504 of the Rehabilitation Act, when federal courts ruled against exclusion of HIV-positive children from public schools. Arkansas has a *lot* of catching up to do. The students were allowed to return to school several days later after producing negative HIV test results, and district responded to the Justice Department's assertions by claiming that it had acted on advice of counsel. The school district's attorney at the time, David Matthews, reportedly said during a school board meeting that he feared that staff members and other students could be exposed to HIV, which justified requiring the students to be tested. It sounds like he spoke without doing some rudimentary legal research. Bond's letter informed the school board that it should revise its policy on communicable diseases to clarify that HIV is not a condition requiring a student's exclusion from school. There are no reported cases of HIV-positive students transmitting the virus to other students, teachers or staff members in school in the 35+ years history of the HIV epidemic.

CALIFORNIA – On December 13, a federal jury in San Diego rejected Will X. Walters' claim that San Diego police officers violated his constitutional rights at the 2011 San Diego Pride Parade when they arrested him for "public nudity." Walters, who was wearing a leather gladiator costume that showed lots of skin, asserted that he was the victim of selective enforcement because he was gay. The federal district court granted summary judgment to the city, but Walters won a reversal from the 9th Circuit in *Walters v. Nieslit*, 647 F. App'x 759 (9th Cir., April 5, 2016), the court holding that Walters' complaint had stated a plausible constitutional claim and he should be entitled to a trial on contested facts. The court seized upon Walters' allegation that a police officer had referred to him as a "drama queen" at the time of the arrest. The City managed to convince the jury that the police have followed the same enforcement guidelines at special events since long before the 2011 Pride event. If Walters had not reacted with hostility and non-compliance to a request by a police officer to "cover up," he would not have been arrested. There was some evidence that members of the Pride Committee had urged the police to enforce public decency rules in order to make the Pride event family friendly. Police Chief Shelley Zimmerman, responding to the verdict, said that the jury "confirmed our officers acted appropriately in the way they addressed the municipal code regarding nudity at special events throughout our city," according to a report on the verdict in the *San Diego Union Tribune*. By the time of the verdict, Walters, who was represented by Chris Morris, had incurred about $1 million in legal fees and costs, for which he could have sought reimbursement from the City had he prevailed in his Section 1983 civil rights action. According to a December 30 report in the *San Diego Union-Tribune*, Walters immediately left the courthouse when the verdict was announced, reportedly shocked at the result, and Morris and other friends had been unable to contact him for several days when a neighbor called the police to check his apartment on December 28. Walters was found dead, and the police suspected he had committed suicide. There was no sign of foul play and the cause of death was not immediately announced. City Human Relations Commissioner Nicole Murray-Ramirez, an LGBT community leader, said, "He was a young activist, and many of us thought he had a bright future in our community, and it's a loss to our community."

CALIFORNIA – In *Hardy v. Watts Healthcare Corporation*, 2016 Cal. App. Unpub. LEXIS 9028 (Dec. 15, 2016), the California 2nd District Court of Appeal reversed a ruling by Los Angeles County Superior Court Judge Holley E. Kendig, who had granted summary judgment to the employer on a complaint by a heterosexual woman that she suffered sexual orientation discrimination at the hands of the openly gay director of the program in which she was working as a substance abuse counselor, in violation of the state's Fair Employment and Housing Act. Sharon Hardy submitted plenty of evidence showing that the manager treated her poorly compared to other employees who were straight males, gay males, or lesbians. Indeed, based on her allegations, one would conclude that the only class of oppressed workers at the House of Uhuru were straight women. But Judge Kendig concluded that Hardy had not suffered sufficient adversity to constitute unlawful employment discrimination, noting that after Watts Health Corporation investigated her complaints about the boss's management style, they fired the boss and she was ultimately awarded the permanent position she sought with full benefits and a mutually agreeable work schedule. (The work schedule had been a sticking point, since the gay boss refused to

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accommodate her need for a flexible schedule so that she could complete the community college courses she need for certification as a professional substance abuse counselor, a requirement for her to obtain the permanent full-time position she sought.) This reads as an interesting "person bites dog" case, helping to illustrate that gay people don't get "special rights" under laws banning sexual orientation discrimination; rather, everybody, gay, straight or otherwise inclined, is protected against discrimination because of their sexual orientation under such laws.

CALIFORNIA – On December 5, U.S District Judge Jeffrey S. White ruled on a partial motion to dismiss a claim by a surviving same-sex spouse that he was wrongly denied survivor's benefits under the collectively-bargained pension plan provided by his deceased partner's employer and union. The defendants did not seek dismissal of the main ERISA claim against the Plan, but were successful in getting the court to dismiss the claim against the employer, Judge White concluding that the ERISA claim asserted by the plaintiff sounded against the plan and its administrator, not the employer, even though employees in the human resources department allegedly violate the terms of the plan and ERISA in dealing with the plaintiff and his deceased spouse. Judge White rejected as premature a claim that the first and third claims for relief, under different subsections of ERISA, were duplicative. The essence of the case is that the plaintiff, David Reed, and his late husband, Donald Lee Gardner, California residents, became registered domestic partners in 2004 and were married in 2014. Reed alleges that their relationship was well known to the employer, including its human resources department. Gardner retired in 2009, at which time the men met with the human resources department to discuss Gardner's pension options. According to Reed, the department representatives did not mention the option of a joint-and-survivor form of benefit, under which he would continue to receive payments if he survived Gardner, in exchange for which Gardner's monthly payout during his lifetime would be reduced. The Plan provides (in compliance with ERISA requirements) that a married employee must be paid a joint-and-survivor form of benefit "unless he elects otherwise after written notice of his right to the joint-and-survivor annuity and with the witness or notarized consent of his spouse." In other words, ERISA seeks to protect spouses of plan participants by requiring their written consent for the married employee to waive any pension payments after his death to his surviving spouse in order to get a larger payout during the retired employee's lifetime. Since Gardner took the full single pension, after he died in June 2014 the plan ceased making benefits payments, even though Reed and Gardner had married shortly before Gardner died. Reed submitted a claim for a survivor benefit to the Plan on March 30, 2016, but as of the time he filed suit on August 9, 2016, he had received no response from the Plan. A week later, his claim was formally denied. He argues in this suit that as a California registered domestic partner, he was entitled to be treated under the plan as if he was married to Gardner at the time Gardner retired in 2009, so the administrator violated the Plan's rules by not offering the joint-and-survivor option or obtaining Reed's written agreement to let Gardner take a non-survivorship payout. Reed seeks the survivor benefits to which he claims entitlement. It will be interesting to see how this plays out. *Reed v. KRON/IBEW Local 45 Pension Plan*, Case No. 16-cv-04471-JSW (N.D. Cal., Dec. 5, 2016). As of January 1, neither Westlaw nor Lexis was providing the text of this decision, which was obtained from the court's website, and the slip opinion does not identify counsel for the plaintiff.

CONNECTICUT – Connecticut Superior Court Judge Edward T. Krumeich II granted in part and denied in part defendant employer's motion for summary judgment in *Velazquez v. State of Connecticut Department of Correction*, 2016 WL 7443972 (Conn. Super., Fairfield District, Nov. 16, 2016), in which a gay former corrections officer claims to have been the victim of a hostile environment due to his sexual orientation in violation of Connecticut's law expressly barring such discrimination. Judge Krumeich found that certain incidents alleged by the plaintiff were time-barred because they occurred more than 180 days before the filing of his complaint and his allegations did not suffice to link them to the timely incidents. Velazquez was frequently transferred between facilities in reaction to his complaints about harassment by fellow corrections officers, and the court was not willing to buy his claim that transfer of other workers resulted in the pattern of harassment following him from one place to another. The Department defended the main charges with evidence that it had launched investigations into his complaints, but that the investigators concluded they were unsubstantiated. Velazquez challenged the sufficiency of the investigations, and the court found that there was a question of fact whether the investigations were sufficient to relieve the Department of liability. Frequent transfers in response to his complaints "is no remedy," wrote the court, "but rather may be seen as punishment for the complaint. Under the totality of the circumstances, a reasonable jury may conclude the DOC was negligent and the co-workers' discriminatory conduct would be imputed to the DOC." Furthermore, the factual allegations, if believed, depict a sufficiently severe and pervasive atmosphere of verbal harassment to meet the test of sexual orientation discrimination under the statute, so the hostile environment claim may go to trial. However, the court

rejected a retaliation claim or a claim of constructive discharge, noting that after his last transfer Velazquez did not claim any incident of harassment. "There is no allegation the discriminatory conduct carried over to his new assignment," wrote Krumeich, "which fails to prove the required link of the resignation to wrongful conduct of the employer. That other alternatives were available to him as well as his requests for other assignments undercut his claim that working for the DOC was so intolerable that he was forced to resign."

GEORGIA – A three-judge panel of the 11th Circuit Court of Appeals heard an unusual argument on December 15 in the pending case of *Evans v. Georgia Regional Hospital*, in which a lesbian former security guard who was discharged by the hospital claims a violation of her rights under Title VII. Jameka Evans was represented in the oral argument by Lambda Legal's Greg Nevins, who just a few weeks earlier made a similar argument to the 7th Circuit in an en banc rehearing in the *Hively* case, arguing that sexual orientation discrimination claims come within the ban on discrimination "because of sex" under Title VII. The district court dismissed Evans' suit, finding that Title VII does not forbid sexual orientation discrimination under circuit precedent. Surprisingly, the hospital did not respond to the appeal, so Nevins argued without vocal opposition. The panel included William Pryor and Jose Martinez, appointees of George W. Bush, and Robin Rosenbaum, an Obama appointee. A press account reported that Pryor, without taking a position as to whether Title VII should be construed to cover sexual orientation discrimination as a matter of interpretation, stated that the three-judge panel was bound by a 37-year-old circuit precedent, which could only be overturned in a *en banc* proceeding. Rosenbaum appeared to disagree, responding to Nevins' argument that subsequent developments broadening the meaning of "discrimination because of sex" under Title VII, including Supreme Court cases such as *Price Waterhouse v. Hopkins*, had reduced the precedential value of the old 11th Circuit case. Martinez, a district court judge from Florida sitting by designation, did not ask any questions and appears to hold the tie-breaking vote. Pryor was a member of the 2011 panel in *Glenn v. Brumby* which unanimously held that a transgender state employee could bring an equal protection claim for gender identity discrimination as a form of sex discrimination, to be analyzed under the heightened scrutiny standard, but in that case there was no prior circuit precedent on the question. Pryor did comment that Evans could possibly pursue a sex stereotyping claim, since she does not comply with feminine dress norms. *Atlanta Journal Constitution*, Dec. 15.

ILLINOIS – A woman suffering from HIV/AIDS and various addictions and dependencies who had not worked for more than 20 years when she applied for Social Security disability benefits won a ruling from U.S. Magistrate Judge Susan E. Cox reversing an administrative law judge's denial of benefits in *Hernandez v. Colvin*, 2016 U.S. Dist. LEXIS 172454, 2016 WL 7231607 (N.D. Ill., Dec. 14, 2016). Judge Cox remanded the case back to the agency for reconsideration, having found that the ALJ "improperly assessed the plaintiff's allegations" by unduly heavy reliance on the written medical records and had failed to support his rejection of her treating physician's opinion that she was disabled. As to the first finding, Judge Cox wrote: "In sum, in assessing plaintiff's allegations, the ALJ relied too heavily on recitation of the medical evidence, and did not sufficiently explain why that evidence failed to support plaintiff's claims of disabling fatigue from HIV/AIDS. The ALJ's other reasons for rejecting plaintiff's claims – failing to adhere to treatment and inconsistent statements – are similarly unconvincing. Thus, this case must be remanded. On remand, the ALJ must bear in mind the dictates of SSR 16-3p, and not stray into the area of 'character' when assessing plaintiff's claims about her symptoms and limitations." Judge Cox scolded the ALJ for "playing doctor," referring to his statement that "plaintiff consistently stated that she drank because she was depressed but he felt it was more likely that her drinking was a factor leading to her depression. The Seventh Circuit often criticizes ALJs for playing doctor," she continued, "and the role is especially challenging in cases dealing with mental illness, which is commonly misunderstood. While it is possible that plaintiff's alcohol use triggered her symptoms, but the ALJ was merely speculating and that's not a valid basis for rejecting testimony." As to the reasons why the ALJ rejected the opinion of the plaintiff's treating physician, Judge Cox wrote, "The ALJ's main reason for disregarding the opinion from plaintiff's treating physician was, again, the ALJ's rejection of plaintiff's allegations. Because the reasons the ALJ gave for disbelieving the plaintiff's allegations didn't hold water, neither does his rejection of Dr. Bleasdale's opinion. Moreover, the Seventh Circuit has pointed out that, when an ALJ rejects a physician's opinion because it relies on a claimant's subjective statements, the ALJ is, again, focusing too narrowly on objective evidence." She noted that the ALJ criticized the doctor's opinion as relying on "only a handful" of appointments with the plaintiff, but on the other hand the ALJ chose to rely on the opinions of agency doctors "who did not examine plaintiff" and were relying solely on her medical file. "It certainly strains logic to favor doctors who have never seen plaintiff over one who has treated her regularly, while at the same time rejecting the opinion of that treating doctor for not seeing the

plaintiff enough." She also pointed out that the agency doctors' specialties were not relevant to the claimant's medical conditions, whereas her treating physician "is a specialist in the area of infectious diseases, particularly HIV," on the faculty of University of Chicago Medical School. "This would certain seem to imbue her opinion with greater weight" than the agency's doctors, Cox wrote, "but the ALJ ignored this factor."

MARYLAND – Good luck trying to persuade a federal district court that an employment discrimination dispute is not subject to arbitration because of alleged technical flaws in the written arbitration provision of an employment contract. In *Owen v. CBRE, Inc.*, 2016 U.S. Dist. LEXIS 166378, 2016 WL 7033973 (D. Md., Dec. 2, 2016), Washington attorney Christopher Mayfield Brown launched a barrage of arguments at U.S. District Judge Paul W. Grimm, seeking to persuade Grimm not to dismiss his client's sexual orientation discrimination and retaliation claims against his financial industry employer. Dennis Owen signed a Broker-Salesperson contract when he was hired by CBRE upon its acquisition of Owen's prior employer, Trammel Crow Company. The contract provides an arbitration clause under which the employee agrees to arbitrate almost every kind of dispute he might have with the employer but the employer's obligation is not quite coextensive, as it excludes certain designated kinds of claims. The arbitration clause is set in the same type-face as surrounding provisions, is not particularly conspicuous, does not require separate initialing or signature (unlike various other provisions of the contract), and provides that arbitration will be conducted according the laws of the state where the employee works, with a preference for retired judges as arbitrators but some vagueness about the arbitration selection process. Owen claims the clause was not pointed out or explained to him when he was presented with the employment contract to sign, unlike other provisions that had to be separately initialed to signify his agreement to them. In response to CBRE's motion to dismiss on the ground that the dispute is subject to mandatory arbitration, plaintiff contended that the arbitration agreement lacked consideration and was thus not enforceable as a contract, and was also unconscionable as a one-sided adhesion contract. But those kinds of arguments don't do very well, outside of California courts (which have been rebuffed in their more employee-oriented view from time to time by appellate courts), when employees try to raise them to avoid having their cases sent to arbitration. Exact mutuality of obligation is not required, opined Judge Grimm, and although any first-year law student presented with this case as an exam question would go to town on all the objections that might be made to its enforceability under basic contract law, in the context of agreements to arbitrate employment discrimination disputes federal district courts are decidedly in favor of clearing the disputes from their dockets, with the encouragement of numerous U.S. Supreme Court opinions. Even while noting that there is some disagreement among 4th Circuit panels about whether the better approach is to stay the lawsuit pending arbitration or to dismiss the lawsuit outright, Judge Grimm pointed out that most of the district courts in the circuit tend to dismiss such lawsuits, and he followed their example, although he did the plaintiff the courtesy of analyzing in some detail each of the objections raise to the arbitration agreement's enforcement. The opinion does not go into any detail about the nature of Owens' discrimination claim, other than to say that Owen, who filed suit in state court and then suffered removal to federal court by the employer under diversity jurisdiction, alleged that the company "discriminated against him based on his sexual orientation and then retaliated against him by terminating his employment when he complained of the discrimination, in violation of state and local laws." Maryland has a statutory ban on sexual orientation discrimination, as do several municipalities in the state. Some commentators contend that employees with discrimination claims actually do better, on average, in arbitration than before federal district judges, who reportedly hate employment discrimination cases and seize upon any justification to grant employer motions to dismiss for failure to state a claim based on pleading deficiencies or, failing that, to grant summary judgment in favor of the employer. (Several years ago, the *NY Law School Law Review* hosted a symposium on the subject and published papers documenting that employment discrimination claims are rejected on pretrial motion rulings at a much higher rate than any other category of civil claims in the federal district courts.) So it may be that Judge Grimm did Owens a favor by sending him to arbitration. Only time will tell.

MASSACHUSETTS – A settlement agreement was filed on December 2 in the U.S. District Court for Massachusetts in *Cote v. Wal-Mart Stores, Inc.*, Civil Action No. 15-cv-12945-WGY, in which a purported class action challenged Wal-Mart's failure before January 1, 2014, to extend spousal health insurance to same-sex spouses of employees. Although same-sex couples began marrying legally in Massachusetts in 2004, and within a decade the number of states that allowed same-sex marriages had mushroomed to include California, New York, New Jersey, Iowa, and several other jurisdictions where Wal-Mart did business, it wasn't until the aftermath of *U.S. v. Windsor* that the nation's largest private sector employer decided to "get with the program" and recognize same-sex marriages for employee benefits purposes, not putting

its new policies into effect until the beginning of 2014. Wal-Mart, like many other businesses, had taken the position that their benefits plans had to comply with ERISA, and because of DOMA, federal non-recognition for state same-sex marriages preempted any state law benefits requirements. (Indeed, prior to *Windsor*, any attempt to litigate such benefits claims against private sector employers were likely to be stymied by ERISA preemption, or at least stalled while courts litigated ERISA arguments. But the Supreme Court's decision that DOMA was unconstitutional would arguably have retroactive effect, as some federal agencies subsequently conceded in confronting claims for benefits by same-sex couples who married prior to that decision.) The settlement will provide compensation for employees whose marriages should have been recognized, although as usual with formal settlement agreements, Wal-Mart will not concede that it has any legal liability in the matter, the settlement being entered, according to the Preamble of the agreement submitted to the court, "in the interest of resolving this dispute between the Parties without the significant expense, delay, and inconvenience of further litigation of the collective and individual issues raised in this Case." The case is pending before District Judge William G. Young. Wal-Mart will reportedly spend up to $7.5 million to compensate class plaintiffs.

MASSACHUSETTS – The Massachusetts Commission Against Discrimination and Attorney General Maura Healey backed down from their interpretation of the recently-enacted amendment to the state's public accommodations law adding gender identity as a prohibited ground of discrimination, prompting four Massachusetts churches and their pastors, represented by Alliance Defending Freedom, to withdraw a lawsuit challenging the interpretation, under which churches were deemed to be subject to the gender identity requirements, including restroom access, when they were conducting activities other than religious services, such as community outreach events. After enactment of the law, the Commission had issued a "Gender Identity Guidance" stating, "Even a church could be seen as a place of public accommodation if it holds a secular event, such as a spaghetti dinner, that is open to the public." This stirred up religious freedom advocates, who strenuously argued that churches should be totally exempt from compliance if their religious tenets compelled refusal to accept gender identity as a real phenomenon. The case was styled *Horizon Christian Fellowship v. Williamson*, Civ. Action No. 1:16-cv-12034, and was filed in the U.S. District Court in Boston on October 11. A notice of voluntary dismissal of the suit was filed on December 12, after a spokesperson for the Attorney General's office said that the law never threatened the religious facilities exemption from public accommodations laws. The Commission issued a "clarification" to its guidance, stating that "the law does not apply to a religious organization if subjecting the organization to the law would violate the organization's First Amendment rights." *Boston Globe*, Dec. 13; GLAD News Release, Dec. 12.

MICHIGAN – Fox News reported on December 19 that family members of three victims of the Pulse nightclub shooting on June 12 in Orlando – Tevin Crosby, Javier Jorge-Reyes, and Juan Ramon Guerrero – have filed a lawsuit in the U.S. District Court for the Eastern District of Michigan against Facebook, Twitter, and Google, claiming that the three internet giants have provided "material support" to ISIS, whose work inspired Omar Mateen, the Pulse shooter. Most of the victims were gay men and women who were celebrating a Hispanic night event at the predominantly LGBT dance venue. Mateen told police negotiators during the standoff, prior to his death when police rushed the premises with guns blazing, that his attack was to protest U.S. airstrikes on ISIS targets in the Middle East, and he proclaimed allegiance to the organization, although there are no records of any formal ties. The lawsuit confronts a major roadblock, as the Communications Decency Act of 1996 insulates Internet service providers from liability for the speech of consumer users of their services. *Huffington Post* relayed the details of the Fox News report about the lawsuit on December 20.

NEW JERSEY – Should the same-sex partner of a mother who suffered severe emotional distress when her partner's two-year-old child was killed in a traffic incident in 2009 be able to sue under the bystander emotional distress doctrine? New Jersey common law precedent provides that somebody with a "close, substantial and enduring relationship" with the victim can make a claim for emotional distress damages when in the zone of danger when the incident occurred. But New Jersey Superior Court Judge William Anklowitz rejected the claim, finding that because the women were not married and the claimant had no legal relationship to the child, she fell outside the requirements of the doctrine. Judge Anklowitz outraged New Jersey LGBT rights advocates by using terms like "family-ish" and suggesting that the couple could have wed in another state that recognized same-sex marriages, while dismissing Valarie Benning as a co-plaintiff in the case involving the death of I'Maya Moreland. The lawsuit, filed in 2011 against multiple defendants, has been narrowed down to Trenton fire truck driver Ronald Hubscher and William Parks, a driver whose car was clipped by the fire truck and then killed the child, who was being carried by Benning as they crossed

Route 129 to watch "Disney on Ice" at the Sun National Bank Center. Robin Lord, the family's attorney, called the court's ruling a "horrific injustice." Same-sex couples in New Jersey did not win the right to marry until 2013, when state courts ruled in their favor in the wake of the Supreme Court's *Windsor* decision. Anklowitz's ruling will be appealed. *Trentonian.com*, Dec. 13.

NEW YORK – A 2nd Circuit panel bashed an Immigration Judge (IJ) who has repeatedly denied claims for protection by gay and bisexual men from Jamaica in *Brown v. Lynch*, 2016 WL 7234485, 2016 U.S. App. LEXIS 17747 (Dec. 14, 2016). Petitioner Brown, who was ordered removed based on controlled substance offenses, petitioned for review of two decisions by the BIA, the first affirming denial by the IJ of his application for deferral of removal under the Convention against Torture (CAT), the second for denial of his motion to reopen and reconsider the first decision. To quote the succinct summary order: "The IJ denied Brown's claim for CAT relief on the ground that Brown was not harmed during the three years he previously lived in Jamaica and had a relationship with a man. But in using Brown's testimony against him in this manner, the IJ disregarded Brown's testimony that he hid his relationship and went to underground meetings where LGBTQ persons discussed how to act in public to avoid discovery, and, further, that he did not intend to conceal his bisexuality if he returned to Jamaica. This testimony, which we assume to be credible, tends both to explain why Brown was not harmed previously and to show that he may be harmed in the future. That the IJ's denial was based solely on the observation that Brown was never harmed while in Jamaica, without discussion of Brown's testimony about his past concealment, 'compellingly suggests' that this critical testimony was ignored. The IJ therefore erred as a matter of law, and the BIA did nothing to rectify this error. Accordingly, Brown's petition for review of the final order of removal is granted." Ordinarily, that would be the end of the matter, but the court was aware of this IJ's failings! "This is not the first time this particular IJ has erred in adjudicating an application for deferral of removal by a gay or bisexual Jamaican man," wrote the court, citing *Walker v. Lynch*, 2016 WL 4191844 (2nd Cir., Aug. 9, 2016), which granted a petition for review on the ground that the same IJ had overlooked relevant evidence that "the Jamaican government acquiesces in the torture of gay and bisexual men." "The record in this case also contains examples of conduct potentially indicative of bias," the court continued. "For example, the IJ permitted the government to engage in a line of cross-examination asking Brown irrelevant, demeaning questions about, among other things, his genitalia and sexual performance. The BIA might consider, on remand, whether justice, or the appearance of justice, would be served by reassigning the remand to a different IJ." Wow! Will the BIA take the hint? Will the IJ be subject to "re-education" or dismissal? Although some opinions indicate the name of the IJ, it is missing from the Westlaw and Lexis reports of this unpublished case. The 2nd Circuit panel members are Circuit Judges Pierre N. Leval and Raymond J. Lohier, Jr., with District Judge Edward R. Korman (E.D.N.Y.) sitting by designation. Brown is represented by Allison M. Freedman of Katten Muchin Rosenman LLP, Chicago office, and Charles Roth of the National Immigration Justice Center, Chicago. Dorian Needham filed an amicus brief supporting Brown's appeal on behalf of Immigration Equality. Lawyering up really can pay off in a refugee case, but unfortunately not every petitioner has the kind of heavy guns representing him as appeared here for Mr. Brown. Having granted a remand to the BIA for a new hearing, the court dismissed the second petition (to reopen) as moot.

NEW YORK – New York Civil Rights Law Section 63 provides that judicial name-change orders be published in a newspaper in the county where the order is granted, but Section 64-a (1) allows that the publication requirement be waived if the court finds that "publication of an applicant's change of name would jeopardize such applicant's personal safety, based on totality of the circumstances." In *Matter of the Application of J.A.L., Jr. for Leave to Assume the Name of L.G.L.*, 2016 WL 7234140, 2016 N.Y. Slip Op. 51758(U) (Supreme Ct., Suffolk Co., Nov. 21, 2016), Justice James Hudson found that a transgender name change applicant was entitled to a waiver of the publication requirement. "The Court in the case of *In re E.P.L.*, 26 Misc.3d 336, 891 N.Y.S.2d 619 (Sup. Ct. Westchester Co. 2009) was presented with a fact pattern virtually identical to that found in the instant application," wrote the judge. "Mr. Justice Giacomo's meticulously researched and eloquently written opinion demonstrated that ' . . . there exist numerous documented instances of those targeted for violence based on their sexual orientation or gender identity.' (Id. at 338) The Petitioner in this case falls into the same category as the applicant in *In re E.P.L.* and will be afforded the same protection." Noah E. Lewis of Jackson Heights represents the Petitioner.

NORTH CAROLINA – Time for a chuckle. On December 16, 2016, U.S. District Judge Thomas D. Schroeder denied a motion to intervene filed by Chris Sevier and Elizabeth Ording in the pending case of *United States v. North Carolina*, 2016 U.S. Dist. LEXIS 174103, 2016 WL 7335627 (M.D. N.C., Dec. 16, 2016), in which the federal government challenges the constitutionality of

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North Carolina's notorious H.B.2, the law banning transgender people from using public restrooms consistent with their gender identity and barring local governments from outlawing any form of discrimination not covered by the state's anti-discrimination law (which, of course, does not cover sexual orientation or gender identity). With the possible exception of pending motions for preliminary relief, the case is on suspension while the Supreme Court considers related issues in *Gloucester County School Board v. G.G.* The proposed intervenors identify themselves as "soon-to-be employees of the University of North Carolina" and a self-identified "machinist" and "Zoophile", respectively. They complain that they visited the campus and failed to find restroom facilities specifically designated for use by machinists or zoophiles, among other things. Judge Schroeder quotes various nonsensical passages from their motion. For example, "If the Federal Government is going to potentially codify prospective 'non-realities' of a religious orthodoxy concerning 'sexual orientation,' it must legally codify the other denominations unproven faith based assumptions and identify narrative within the same religious orthodoxy as well. Allowing the Plaintiff to intervene will keep the Court, the original plaintiff, and the defendants from having the wrong conversation under the Constitution, which was the fundamental error that took place in *Obergefell* and *Windsor*." Huh? Judge Schroeder, in denying the motion, wrote: "The proposed intervenors seek to intervene to press their claim that 'laws and policies that legally codify "gay marriage," "gay rights," and "transgender rights" violate the first amendment establishment clause' under their contention that, 'like transgenders, both intervening Plaintiffs are members of the true minority in the church of western postmodern expressive individual relativism and the non-obvious class of sexual orientation, only they are in different but equal sects.'" And things degenerate from there. He found that their issues are irrelevant to the litigation and seem intended to distract the court with collateral attacks on the *Obergefell* and *Windsor* decisions. We should note, for the record, that named defendant Governor McCrory, having been defeated for re-election, will be replaced by Governor Cooper, a Democrat who was sworn into office a minute after midnight on January 1 and who opposed H.B. 2. Cooper struck a deal with Republican legislative leaders that if the city of Charlotte would repeal its controversial anti-discrimination ordinance, whose passage provoked the enactment of H.B. 2, then the legislature would meet in special session to repeal H.B. 2. The Charlotte city council reluctantly did its part, the special session met, and the legislators hemmed and hawed for a day and then adjourned because the Republican majorities could not coalesce around any one of several proposed repeal resolutions. So the deal was broken, Cooper was embarrassed, and the state continues to be the target of boycotts by professional and collegiate sports leagues, businesses, and star entertainers. Meanwhile, it was reported that Gov. McCrory was interviewing for a possible position in the Trump Administration.

NORTH DAKOTA – Furthering its agenda to establish that anti-gay discrimination violates Title VII, the Equal Employment Opportunity Commission (EEOC) filed suit on December 22 in the U.S. District Court for the District of North Dakota against Rocky Mountain Casing Co., on a complaint by Michael Allyn, a gay man who worked as a truck driver for the company, that he was subjected to offense and homophobic slurs by his supervisor and co-workers. Allyn complained about the harassment, but the company did not take any corrective action. The agency seeks compensatory damages for Allyn and injunctive relief. *EEOC v. Rocky Mountain Casing Co.*, No. 16-428 (D. N.D.). The complaint, signed by Deputy General Counsel James L. Lee, Regional Attorney John C. Hendrickson, and Associate Regional Attorney Jean P. Kamp, has been assigned to Senior Trial Attorney Laurie A. Vasichek in the agency's Minneapolis office for prosecution.

PENNSYLVANIA – Overruling a decision by the Orphans' court of the Allegheny County Court of Common Pleas, on December 21 the Superior Court of Pennsylvania unanimously concluded that the Orphans' court may dissolve a same-sex adult adoption in order that the parties can exercise their constitutional right to marry. *In re: Adoption of R.A.B., Jr.; Appeal of N.M.E.*, 2016 WL 7387884, 2016 Pa. Super. LEXIS 779, 2016 PA Super 295. The two men had been together for forty years, and decided in 2012 to apply for the older to adopt the younger, "for the purposes of becoming a family unit and for financial and for estate planning," wrote Judge Susan P. Gantman for the Superior Court panel. Just two years after their adoption petition was granted, the federal district court struck down Pennsylvania's ban on same-sex marriage, the governor declined to appeal, and, a year later, the U.S. Supreme Court ruled that same-sex couples have a fundamental constitutional right to marry. N.E.M. and R.A.B., Jr., were eager to marry, but were told they could not do so because they were in a legal parent-child relationship. N.E.M. petitioned the Orphans' court to exercise its equitable powers to annul or revoke their adoption so they could marry, but the Orphans' court Judge Lawrence O'Toole refused to do so, stating there was no Pennsylvania statutory authority to annul or revoke an adoption. N.E.M. appealed, arguing that the couple should

be allowed to exercise their fundamental constitutional right, and the Superior Court agreed. Judge Gantman quoted from *Adoption of Phillips*, 12 Pa. D. & C.2d 387 (Somerset Cty. 1957): "There is no specific statute in Pennsylvania relating to the revocation of decrees of adoption nor does our present adoption statute contain any provisions therefor. The weight of authority is to the effect that even in the absence of specific statutes in some jurisdictions, courts granting decrees of adoption do have jurisdiction to revoke those decrees for good cause, the proceeding being equitable in nature and the welfare of the child being a most important phase of the consideration by the court." "Our sister states have permitted adults in adoptive parent-child relationships to annul an adoption in order to marry, even where the relevant adoption statute does not expressly provide for that annulment," wrote Judge Gantman, citing cases from Delaware and New Jersey. "When the Orphans' court denied N.E.M.'s petition to annual or revoke his adult adoption of R.A.B., Jr., the court frustrated the couple's ability to marry. Sitting in equity, the Orphans' court had the power to grant the petition so that the parties could legally marry. . . Although the Adoption Act does not expressly provide for the annulment of the adult adoption, case law does allow it in certain scenarios; and this case presents wholly new and unique circumstances. Therefore, where a same-sex couple, who previously obtained an adult adoption, now seeks to annual or revoke the adoption in order to marry, the Orphans' court has the authority to annul or revoke the adult adoption." The court remanded "for entry of an order granting the relief requested." Happy ending! The *Pittsburgh Post-Gazette* (Dec. 22) reported that the happy couple, who have been together for nearly half a century, are Roland Bosee, Jr., 69, and Nino Esposito, 80. "If feels wonderful that this is finally over," Mr. Esposito told the newspaper. "And I'm glad we could help everybody who needed to be helped." The couple was represented by Andrew Gross and Mikhail Pappas, with amicus assistance from the ACLU of Pennsylvania.

PENNSYLVANIA – In the context of a suit for hostile work environment, sex discrimination and retaliation by Debora L. Lamb, a lesbian, against Montgomery Township, U.S. District Judge Wendy Beetlestone, granting summary judgment to the employer on all claims, rejecting the plaintiff's argument that there was a hostile environment in violation of Title VII based on her overhearing coworkers' comments about "faggots" and "gays" and learning that such comments were frequently made about her out of her hearing. *Lamb v. Montgomery Township*, 2016 U.S. Dist. LEXIS 177927 (E.D. Pa., Dec. 23, 2016). Lamb was employed as a laborer in the township's public works department. She asserted sex discrimination claims under Title VII and the Pennsylvania Human Rights Act, neither of which expressly forbids sexual orientation discrimination. In addressing the employer's motion concerning the hostile environment claim, Judge Beetlestone wrote, "As to the derogatory comments based on sexual orientation, Plaintiff advances a sex stereotyping theory of discrimination, arguing that the derogatory comments she overheard about 'faggots' and 'gays' after she returned from leave in September 2012 are actionable as sex discrimination under Title VII. Neither the Supreme Court nor the Third Circuit has held that Title VII prohibits discrimination based on sexual orientation. Even if the sexual orientation-based comments were actionable, these incidents, viewed cumulatively, are not sufficiently severe or pervasive to establish a *prima facie* hostile work environment. . . Although Plaintiff testified to overhearing coworkers' comments about 'faggots' and 'gays' and to hearing from Johnson that similar comments were made about her, no such comment was actually directed at Plaintiff herself." The main issue in the case was Lamb's claim of sex discrimination regarding her discharge. Here she fell down, according to the judge, because even though she had a decent argument that her discharge was unfair, being based on the mistaken belief that she had swiped a co-worker's iPhone, she failed to identify comparators – similarly situated male employees – who were treated more favorably under similar circumstances.

TENNESSEE – U.S. District Judge Jon P. McCalla found that he was bound by 6th Circuit precedent to dismiss a Title VII claim brought by a gay police officer alleging discrimination, harassment and retaliation against him because of his sexual orientation and his position at the police department as an LGBTQ Liaison. *Clemons v. City of Memphis*, 2016 U.S. Dist. LEXIS 179037, 2016 WL 7471412 (W.D. Tenn., Dec. 28, 2016). Davin Clemons, a tactical officer in the Memphis Police Department, also alleged discrimination on the basis of disability and religion. In addition to Title VII, he alleged claims under the Equal Protection Clause and the Americans with Disabilities Act. Judge McCalla was ruling on a motion solely as to the Title VII sex discrimination claim, which Clemons stated alternatively as sexual orientation discrimination or sex stereotyping. McCalla found that the 6th Circuit has been strict about not letting masculine appearing and acting gay men try to assert Title VII claims using the sex stereotyping theory, and has yet to accept the proposition (not accepted as of December 28, 2016, by any federal appeals court) that sexual orientation discrimination is, in fact, a form of sex discrimination. The 6th Circuit requires for sex stereotyping claims that the plaintiff allege that "he has been the subject of discrimination because of his appearance or mannerisms [that] are not

masculine," argued the City, and it is not enough to allege that "homosexuality is non-conforming" to gender stereotypes. McCalla rejected Clemons' argument that he should be afforded discovery before he has to deal with a dismissal motion, and found that the complaint "fails to contain sufficient factual matter on its face that, when accepted as true, states a claim for discrimination based on gender stereotyping on which relief can be granted," as such a claim requires that "an observable, gender non-conforming characteristic subjected the plaintiff to discrimination." While Clemons alleged that disparate treatment he received was "due to sexual stereotypes and, in particular, a belief that he was not sufficiently masculine, was too feminine, or due to a belief that men should only date women, not other men," this was not sufficient, since it did not allege "an observable, non-conforming gender characteristic that subjected him to discrimination." In a sort of compromise, McCalla dismissed the sexual orientation discrimination claim with prejudice, but dismissed the gender stereotyping claim *without* prejudice. Since Clemons' other claims are not the subject of this dismissal motion, he can get discovery and perhaps he will turn up something helpful on the stereotyping claim. In a footnote, McCalla wrote, "Notably, Plaintiff does allege one observable characteristic that became a specific focal point of harassment: his beard. Unlike other officers in his unit, Plaintiff was not clean-shaven. Plaintiff's Complaint highlights disparate treatment tied to this characteristic. This observable characteristic, however, does not qualify as a gender non-conforming characteristic in this case because Plaintiff is male, self-identifies as male, and facial hair is considered a masculine characteristic." In response to this, we are tempted to make a politically incorrect observation: a lesbian police officer who is harassed because she has a hint of a mustache could make out a gender stereotyping case before this judge . . . . Maureen T. Holland of Memphis represents Clemons.

TEXAS – A panel of the U.S. Court of Appeals for the 5th Circuit affirmed a decision by District Judge Vanessa D. Gilmore (S.D. Texas) to dismiss claims by a group of Houston-area pastors and a council representing the interest of Houston-area pastors (HARP, for Houston Area Pastors Council) who sought to sue the former mayor of Houston, Annise Parker, for rejecting petitions seeking a referendum to repeal the city's Equal Rights Ordinance on the ground that there were fraudulent signatures on the petitions. In any event, ultimately the Texas Supreme Court ordered in a separate lawsuit brought by some of the same plaintiffs that the referendum go forward, and the voters repealed the ordinance. *See In re Woodfill*, 470 S.W. 2d 473 (Tex. 2015) (per curiam). Mayor Parker stirred up a hornet's nest by have an attorney issue subpoenas to five Houston-area pastors, including three of the named plaintiffs in this case, requiring production of speeches and sermons related to the ordinance and communications with their congregations about the ordinance. The pastors and HARP then sued under 42 USC Section 1983, claiming that Parker's actions violated their First Amendment rights, and she removed the case from state to federal district court, where Judge Gilmore entered the dismissal order on the grounds of lack of standing and failure to state a claim. In his opinion for the 5th Circuit panel, Judge Jerry E. Smith asserted that none of the plaintiffs had standing to bring their constitutional claims against Mayor Parker. HARP's standing was premised on the expenses it incurred in the prior state court litigation, but Smith pointed out that "the payment of attorney's fees in previous cases – even where the litigation was to enforce federal rights – is not an injury in fact for subsequent litigation." Furthermore, under the "American rule," he pointed out, "each party is responsible for its own attorney's fees, regardless of result." (The exception, of course, is where a statute authorizes fees to prevailing parties for winning particular claims, but none applied to the state court litigation here.) As to the individual plaintiffs, their claimed injury was that Parker had violated their constitutional rights by failing to honor the petitions they submitted and schedule the referendum. However, Judge Smith pointed out, by the time they filed this suit, the Texas Supreme Court had ordered Parker to suspend enforcement of the ordinance and put it up to a vote of the public. "So, by the time plaintiffs filed this complaint," he wrote, "they were not suffering from any injury – it was already certain that either the ordinance would be repealed or the referendum would take place on time and without further issue." The court also rejected the contention by three plaintiffs that they had standing because of the subpoenas issued to them. Smith pointed out that "they cite no authority – from this circuit or any other – for the proposition that the issuance of a subpoena violates any constitutional right. Nor do they explain how, precisely, their rights were curtailed – there is no assertion, for example, that their speech or their practice of religion was chilled by the receipt of the subpoenas, no assertion that they felt compelled to alter their interactions with their congregations because of Parker's actions." In the absence of actual harm, there is no standing to sue.

WASHINGTON – U.S. District Judge Robert J. Bryan found that Lewis County Hospital District No. 1 had implicitly waived attorney-client privilege under a method of analysis used by the 9th Circuit in prior cases, and thus must disclose attorney-client communications that could show that the plaintiff's

discharge was based on reasons that were a pretext for sexual orientation discrimination, as devised by the defendant hospital's law firm. *Carlson v. Lewis County Hospital District No. 1*, 2016 U.S. Dist. LEXIS 173044 (W.D. Wash., Dec. 15, 2016). According to Eric Carlson's complaint, Hiram Whitmer, CEO of Morton General Hospital, hired Carlson on November 21, 2014, to be the new Chief Financial Officer of the hospital. Carlson immediately got to work addressing the "disaster" that was the hospital's accounting system, which was so faulty that the hospital had written off a million dollars in unbilled receivables, and was at risk of having to write off several million more because they had gone unbilled for too long. Carlson claims he did such a good job that within weeks Whitmer awarded him a large retention bonus. But after he met with the hospital's board, they were "disturbed" that he was gay and expressed their "distaste" at having a "homosexual man" as a leader at the hospital. Carlson claims several board members contacted Whitmer encouraging him to discharge Carlson. In an affidavit filed in support of Carlson's motion to compel disclosure and waive attorney-client privilege, Whitmer (who was discharged by the board several months after he discharged Carlson) swore that he had objected to firing Carlson but, "under duress" from the board, had consulted the hospital's outside attorney, Julie Kebler of Garvey Schubert Barer, a Seattle law firm, about the legality of such a discharge. Whitmer alleges that "after an extensive review of the situation, the attorney advised that the hospital use Mr. Carlson's prior bankruptcy and a court case in which a judge mentioned that Mr. Carlson 'may' have committed fraud . . . (but there was no evidence of a fraud) as a pretext for firing him." Whitmer said he followed the process set out for him by the lawyers, including a suspension and purported investigation, and then fired Carlson on January 5, 2015. The hospital subsequently fired Whitmer on March 11, 2015. From the court's recounting of Whitmer's affidavit description of the advice and instruction he got from Ms. Kebler, this writer would think that professional disciplinary charges might follow. Judge Bryan's ruling does not discuss why this case is in federal court as opposed to state court, or whether Carlson is alleging a Title VII sex discrimination violation. (Washington state law prohibits sexual orientation discrimination in employment.) But this ruling responds to Carlson's motion to compel disclosure of the legal advice given to Whitmer, including all documents related to the issue, and the hospital sought to assert privilege against the discovery request. While Judge Bryan concluded that an express waiver of privilege could not be found based on Whitmer's affidavit, because Whitmer was no longer employed by the hospital when he made the relevant disclosure in his affidavit and thus could not waive the privilege on its behalf, an implied waiver could be found under the 9th Circuit's decision in *Home Indemnity Co. v. Lane Powell Moss & Miller*, 43 F.3d 1322 (9th Cir. 1995), under the following analysis, quoting from that decision: "An implied waiver of the attorney-client privilege occurs when: (1) the party asserts the privilege as a result of some affirmative act, such as filing suit; (2) through this affirmative act, the asserting party puts the privileged information at issue; and (3) allowing the privilege would deny the opposing party access to information vital to its defense." Further, "an overarching consideration is whether allowing the privilege to protect against disclosure of the information would be manifestly unfair to the opposing party." Quoting another 9th Circuit case, *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156 (9th Cir. 1992), "The privilege which protects attorney-client communications may not be used both as a sword and a shield. Where a party raises a claim which in fairness requires disclosure of the protected communication, the privilege may be implicitly waived." In this case, Whitmer's affidavit discloses a scheme worked out with the lawyer to pretend that there was an investigation of Carlson justifying his discharge for having engaged in past fraudulent activity when, in fact, Whitmer swears there was no investigation and no finding of fraud, and this was a pretext to get rid of Carlson because the board was homophobic. In this circumstance, wrote Judge Bryan, "it would be manifestly unfair to deny Plaintiff access to the information regarding the basis for firing him contained in the documents he seeks. The complete picture of what happened here is only available if all the documents are turned over, including those with attorney-client communications. Defendants have implicitly waived the attorney-client privilege as to the basis for terminating Plaintiff's employment." What follows is that the court ordered Defendants (both the hospital and individual members of the board as named defendants) to "produce all documents relating to the evaluation of how to terminate Plaintiff's employment, including those that contain advice of counsel." The court noted that because the same law firm was now representing the hospital in this case, some thought had to be given to whether their representation could continue, in light of concerns about lawyers having to testify and now having a conflict of interest. He asked the parties to notify the court whether an extension of time might be necessary to comply with litigation deadlines if a new law firm was substituted for the defense. Carlson is represented by Joseph D. Frawley of Schefter & Frawley, Lacey, Washington.

WYOMING – A gay former employee of Skywest Airlines won a triple victory on December 21 when a panel of the U.S. Court of Appeals for the 10th Circuit, reversing the district court, revived his

claims for hostile environment sexual harassment and retaliation under Title VII, and intentional infliction of emotional distress under Wyoming law, in *Hansen v. Skywest Airlines*, 2016 U.S. App. LEXIS 22991, 2016 WL 7387139. The district court had granted summary judgment to the employer on all counts, but was only affirmed as to a disparate treatment discrimination claim that Hansen abandoned on appeal. To read 10th Circuit Judge Monroe McKay's opinion is to wonder how any rational employer could tolerate the kind of conduct that Skywest is alleged to have allowed in this case. The openly-gay plaintiff, David Hansen, claims to have been sexually harassed by gay co-workers and supervisors seeking sexual favors from him, subjecting him to repeated unwanted sexual solicitations, threatening him with adverse work consequences if he didn't engage in sex with them, and placing him in awkward situations despite knowing that he suffered from post-traumatic stress disorder. When he complained to management, his concerns were dismissed and he was threatened with adverse consequences if he pursued complaints. One gay employee allegedly told Hansen that if he wanted to keep his job he would have to suck his supervisor's cock, which is how that employee had kept his job. It is really difficult to believe that any company would behave as Skywest is alleged to have behaved in this case. It is unusual for courts to uphold intentional infliction of emotional distress claims, but in this case the 10th Circuit found that Hansen's allegations satisfied all the tests set forth by Wyoming courts for upholding such claims. The district judge, who erred repeatedly in dealing with issues in the case, including an issue concerning timeliness of the charges, and exhibited apparent disregard for or misunderstanding of relevant federal and state precedents, is not named in the opinion, but his initials on the District Court docket number indicate that he is Alan B. Johnson, born in 1939, who was appointed to the court by Ronald Reagan. Hansen is represented by Jeffrey C. Gosman of Casper, Wyoming. The EEOC filed an amicus brief in support of his appeal.

CRIMINAL LITIGATION NOTES

CALIFORNIA – The California 4th District Court of Appeal rejected Ronald Shaffer's claim that his appointed defense attorney rendered ineffective representation when, during his opening statement, he read "significant and sexually explicit portions of a letter the victim wrote to defendant while he was in jail awaiting trial." *People v. Shaffer*, 2016 WL 7422283 (Dec. 23, 2016). Writing for the panel, Judge Art McKinster pointed out that defense counsel's tactic was actually helpful to Shaffer, because the contents of the letter created enough sympathy for him that the jury convicted on a lesser offense, saving him from a possible sentence of life without parole. "The letter, in all its salacious detail, had some tendency to support the defendant's claim that he swung a pickax at the victim when the victim allegedly grabbed defendant's neck and penis from behind and, therefore, provided some support for the alternative arguments that defendant did not intend to kill or that the attempted murder was not willful, deliberate, or premeditated," he wrote. "Moreover, a reasonable defense attorney could conclude reading the sexually explicit portions of the letter to the jury was more beneficial than harmful to defendant by evoking some juror sympathy for defendant," which it did. The victim, a gay man, had a "crush" on the defendant (the brother of the victim's husband), which defendant did not reciprocate, although being friendly with the victim. The assault with the pickax arose out of a heated argument between the victim and the defendant that got out of hand. In one of the letters, the victim "told defendant he was upset and did not understand why defendant tried to kill him, and wrote, 'I'm not going to stop loving someone just because they stabbed me, tried to kill me and rob me. I don't even know why you went all Jeffrey Dahmer on my ass, but I do know you were all Warren Bates psycho when you attacked and stabbed me with the pickax." The victim said he wanted to stand by the defendant, for whom he still felt love. He also wrote, "This could have gone down so much better for us if you hadn't gone all ax murderer and Dillinger bank robber on my ass." "One of the more explicit sexual comments or jokes the victim wrote in the letter was a suggestion that defendant engage in a 'threesome' with the victim and his husband, i.e., the defendant's brother Bejasa," wrote the judge. "The victim testified that was 'a really crude joke based on my idea of what a really messed-up family reunion it would be." The defendant actually did significant damage to the victim with the pickax, causing serious injuries. The defendant ended up with a sentence of 16 years. We guess you had to be there. . . . If the victim normally spoke the way he wrote in those letter, one could easily become annoyed by the constant references to horror film characters and mass murderers. . . .

CALIFORNIA – The California 2nd District Court of Appeal rejected Maximo Tamayo Flores's contention that his conviction on murder and other charges must be reversed because during voir dire the prosecution used a peremptory challenge to exclude a gay male prospective juror from the panel. *People v. Tamayo-Flores*, 2016 Cal. App. Unpub. LEXIS 8835, 2016 WL 7157003 (Dec. 8, 2016). California courts recognize that excluding somebody from serving on a jury because of their sexual orientation is improper, but in this case the court concluded

that the prospective juror was not excluded for that reason. Judge Martin Tangeman wrote for the panel, "Here, the only *Batson/Wheeler* challenge was to Prospective Juror No. 3, whose past experience with law enforcement necessarily dispels any inference of bias. A juror's past experience with police harassment is a valid basis for a peremptory challenge. Prospective Juror No. 3 said he was 'wrongly arrested' in the 1970s for lewd conduct because 'the chief of police was spending a lot of time harassing gay people.' He wrote on his questionnaire that the 'police behaved very badly.' He said in voir dire that they 'behaved abominably.' He said the 'system worked,' and the charges were dismissed, but it 'did leave a little bitter taste in my mouth for a while.' He said, 'you move on,' but agreed with the prosecutor that 'you don't forget it.' He also made light of a stabbing that he witnessed, saying the victim 'taunted the perpetrator so badly that I kinda wanted to stab him.' And he served on a jury in a criminal assault and robbery trial that did not reach a verdict. That Prospective Juror No. 3 is gay and therefore a member of a cognizable group is not alone sufficient to establish a prima facie showing." The court also pointed out that the final jury that was seated included a lesbian, "indicating 'good faith' use" of peremptory challenges by the prosecutor. The court also rejected other challenges to the jury verdict, and affirmed the verdict and life sentence without the possibility of parole (plus a consecutive sentence for crimes involving a second victim and kidnapping) imposed on the defendant.

CALIFORNIA – U.S. District Judge Yvonne Gonzalez Rogers has agreed to stay proceedings in *Robinson v. Dignity Health*, 2016 U.S. Dist. LEXIS 168613, 2016 WL 7102832 (N.D. Cal., Dec. 6, 2012), in which a transgender employee challenges the hospital's refusal to cover "sex transformation" under its health plan, until the Supreme Court issues a ruling in *Gloucester County School District v. G.G.*. The hospital's motion to dismiss has been briefed and argued, but not yet decided. The plaintiff is alleging violations of Title VII (sex discrimination) and the Affordable Care Act's non-discrimination provision, Section 1557. Judge Rogers observed that although it is possible that the Supreme Court could decide the pending case of a transgender high school student seeking restroom access without determining on the merits whether the ban on discrimination "because of sex" in Title IX includes discrimination because of gender identity, that question is squarely before the Court. The question is relevant in this case because (1) the phrase "because of sex" in Title IX and Title VII are generally construed the same way, and (2) the phrase "because of sex" in Section 1557 of the Affordable Care Act incorporates by reference the Title IX sex discrimination provision. Furthermore, new regulations scheduled to go into effect on January 1, 2017, would specifically provide that health care institutions, such as the defendant hospital, may not discriminate because of gender identity. Judge Rogers concluded that it would be prudent to wait, as the employer suggested, since the Supreme Court's ruling could end up being dispositive of the pending dismissal motion. Furthermore, the judge found that putting this case on hold would not adversely affect the plaintiff, because the hospital had already announced that in order to comply with the new regulation, it was changing its policy effective January 1, 2017, to provide the coverage that the plaintiff is seeking, so plaintiff's claim, if any, might be for the denial of benefits from the time they were sought until January 1, and injunctive relief may not be necessary. Of course, Judge Rogers' order granting the stay occurred several weeks *before* U.S. District Judge Reed O'Connor (N.D. Texas) issued a nationwide preliminary injunction on December 31 against enforcement of the gender identity discrimination portion of the new ACA Rule. (See lead story in this issue of *Law Notes*.) One wonders whether the defendant hospital in this case will go ahead with its announced policy change in light of that preliminary injunction barring enforcement of the new regulation; if it decides to delay implementing expanded coverage, then Robinson could petition the court to reconsider the stay, to the extent that the court's willingness to grant it depended, at least in part, on the hospital's contention that Robinson would become eligible for the coverage beginning January 1. But one suspects that having represented to the court that Robinson will be entitled to the coverage as of January 1, the hospital would be disinclined to suddenly change its position, especially in light of the growing body of federal cases recognizing gender identity discrimination claims under Title VII.

INDIANA – In *Valenti v. Hartford City, Indiana*, 2016 U.S. Dist. LEXIS 15165618, 2016 WL 7013871 (N.D. Ind., Dec. 1, 2016), U.S. District Judge Theresa L. Springman partially enjoined the enforcement of Hartford City's Ordinance 2008-01 "Regulation of Sex Offenders" in response to a lawsuit filed by Brian Valenti. Valenti moved to Hartford City in 2014 with his wife and minor child. He had been convicted in California in 1993 of a sex offense involving a child, and thus was a registered sex offender in California. After the move, Hartford City police contacted him and told him he had to register under their Ordinance (enacted in 2008), which requires registration of anybody who lives in Hartford City who is required to register as a sex offender elsewhere. The Hartford City Ordinance is extremely restrictive, broadly defining "Child Safety Zones" which registered offenders may not enter, and prohibiting "loitering" within 300 feet of a child

safety zone. The initial definition of loitering in the ordinance was so vague that it was amended after Valenti filed this lawsuit to be more specific. Valenti alleged that the ordinance was so wide-ranging geographically in its application that he was precluded from going to the library with his child, entering his child's school (even if it was for a parent-teacher conference), bowling with his family, attending any church where youth services were held, joining the local YMCA or having his child participate in YMCA activities with himself in attendance, or even going to his designated polling place to vote. Despite having been a registered sex offender in California, the registration laws there did not preclude him from going to his child's school to meet with staff. He pointed out that the ordinance precludes him from fulfilling a variety of normal parental functions, like dropping off his child at various events. Indeed, he received a citation under the ordinance when he was sitting in his brother's parked car at his brother's house, waiting to be taken to pick up his child from school, because another school was within 300 feet of his brother's house. According to the police, sitting in the car waiting to be driven somewhere was "loitering." Judge Springman agreed with Valenti that application of the ordinance to him violated the ex post factor law prohibition in the Indiana Constitution, because it was oppressive as to be punitive and was enacted 15 years after his conviction in another state. Furthermore, the law was so rigid that it imposed a lifetime restriction and no mechanism for him to seek to be relieved of its restrictions on grounds of rehabilitation. Finally, even the amended definition of loitering was so subjective as to violate due process. Although Springman was unwilling to strike down the ordinance *in toto* as Valenti sought, she enjoined the City from applying it to Valenti, and held that the pre-amendment definition of "loiter" clearly violated due process, so there should be a hearing to consider appropriate damages for Valenti for his unlawful citation. She also ruled that the amended definition of loiter violates due process, and enjoined the City from imposing fines for any violation of the loitering prohibition. This is but one of several recent cases in which federal courts around the country have seriously questioned the constitutionality of various aspects of the ultra-restriction sex offender registration laws that have been passed in many communities.

MISSISSIPPI – Latin Kings gang member Josh Vallum has pleaded guilty a federal hate crime charge in the murder of Mercedes Williamson, a transgender woman, according to an on-line report on *Legal Monitor Worldwide*, 2016 WLNR 39380462 (Dec. 24, 2016). According to the report, this was the first federal hate crime charge involving the murder of a transgender person to be filed by the U.S. Justice Department. The charge alleged that Vallum "willfully caused bodily injury" to Williamson, age 17, by "tasing her, stabbing her multiple times in the head and body and striking her with a hammer, because of her 'actual and perceived gender identity.'" Vallum had previously pleaded guilty in state court to a charge of murder by deliberate design, getting a life sentence with the possibility of parole. At his federal sentencing hearing, scheduled for March 21, he faces the possibility of an additional life sentence, this time without parole, and up to $250,000 in fines. *United States v. Vallum*.

MONTANA – The Montana Supreme Court affirmed a ruling by Judge David Ortley of the 11th Judicial District Court rejecting a criminal defendant's argument that he could not be prosecuted for assaulting his girlfriend under a Partner or Family Member domestic violence charge because the failure of the relevant criminal statute to apply to intimate same-sex relationships violated Equal Protection. *State v. Theeler*, 2016 Mont. LEXIS 1019, 2016 MT 318, 2016 WL 7109676 (Dec. 6, 2016). Judge Ortley, rejecting Donald Theeler's motion to dismiss the charge against him, found that the statute, MCA Sec. 45-5-206, which defines "partners" as "persons who have been or are currently in a dating or ongoing intimate relationship with a person of the opposite sex," did not violate Theeler's equal protection rights because it "does not treat similarly-situated individuals unequally." Justice Beth Baker wrote for the Supreme Court, "Theeler acknowledges that he was not in a same-sex relationship, but points out that the statute exposes him to greater punishment than a same-sex abuser would face if charged with simple assault. Theeler argues that the statute facially discriminates against similarly-situated classes without justification." Theeler relied on cases such as *Obergefell* and *Windsor* to claim that the state must treat same-sex and opposite-sex non-marital relationships equally. "He also cites empirical evidence showing similar or higher incidence of domestic violence among same-sex partners as among heterosexual partners," and argued that this compels reversal of his conviction. Interestingly, Theeler was arrested in September 2012, and in 2013, the legislature amended the statute to strike the phrase "with a person of the opposite sex" from the statute, so it now equally penalizes same-sex and opposite-sex abusers. In effect, Theeler is arguing that the legislature recognized a constitutional error in reaction to *Windsor*, and so the prosecution against him under the previous version of the statute should be overturned. Justice Baker wrote that this change in the statute would not justify overturning Theeler's conviction, finding that the court could avoid the unconstitutional aspects of the prior statutory definition by severing the offending language that the legislature

later removed. In any event, of course, there is no argument that Theeler's conduct did not fall within the scope of the statute. Baker quoted from an earlier ruling of the court, stating that "if an invalid part of a statute is severable from the rest, the portion which is constitutional may stand while that which is unconstitutional is stricken out and rejected. In this case, Baker pointed out, the statute actually has a severability clause, as did a 1995 bill that partially amended the statute's definition of "partners." "With or without severability clauses in each amendment since the statute's enactment," the judge wrote, "we conclude that the unconstitutional provision is unnecessary for 'the integrity of the law.' It is undisputed that the purpose of Sec. 45-5-206, MCA, is to protect victims of domestic violence and to punish and rehabilitate abusers. Severing the phrase 'with a person of the opposite sex' . . . , as the Legislature did in 2013 – 'will not frustrate the purpose or disrupt the integrity of the law.' Further, severing the unconstitutional provision so as to construe the statute 'in a manner that avoids constitutional interpretation' leaves the 'remainder of the statute . . . complete in itself and capable of being executed in accordance with the apparent legislative intent.' The statute still would protect victims of domestic violence and provide for the punishment and rehabilitation of abusers." The court insisted that "as a heterosexual male, Theeler received every constitutional protection he was due when prosecuted for sexually assaulting his female partner." Thus, the lower courts correctly rejected his motion to dismiss, and the conviction is affirmed. Specially concurring, Justice Laurie McKinnon used an alternative analysis of the severability process to reach essentially the same conclusion, emphasizing that the court should be figuring out what the legislature was likely to do if the underinclusiveness of the statute was brought to its attention. Her conclusion is that "the remedy for the underinclusiveness of the statute is to expand coverage to those formerly excluded by striking the portion of the statute which defines 'partners' as 'those of the opposite sex.' Because the portion of the statute under which Theeler has been convicted has not been struck down, his conviction should be affirmed." Nice try, Chief Appellate Defender Chad Wright and Assistant Appellate Defender Alexander H. Pyle, who represented Donald Theeler on the appeal, but no cigar. . .

NEW JERSEY – U.S. District Judge Kevin McNulty rejected an argument by a convicted defendant in a drug distribution case that because of a possible transgender element in the case the judge should have posed a particular question suggested by the defense to the prospective jurors during voir dire. *United States v. Tiangco*, 2016 WL 7104841 (D.N.J., Dec. 5, 2016). In a post-conviction motion, the defendant argued that the court's refusal to ask her proposed voir dire question requires acquittal or a new trial. The proposed question was: "Do you have any opinions or beliefs about Bruce/Caitlyn Jenner?" Wrote Judge McNulty, "I did not ask the 'Jenner' question, but I did address counsel's transgender concerns by orally asking each individual potential juror the following question: 'One or more of the individuals in this case identify with a gender other than that with which he or she was born. Would this affect your ability to be fair and impartial?" After reviewing 3rd Circuit precedents on voir dire requirements and concerns about juror bias, he continued, "The concerns expressed in Ms. Tiangco's case . . . were diffuse and general. Counsel never claimed that Ms. Tiangco is herself transgender. There were stray references to a 'girlfriend,' but again no indication whatsoever that that person is transgender. One government witness, co-conspirator Benjamin Navarro, was born biologically male but identifies as female, and prefers to be known as Kristie. Navarro was in a relationship with Freehauf, knew Ms. Tiangco, and participated in the methamphetamine distribution conspiracy. But again, there was no specific indication that anything about the jurors' attitudes toward Navarro might affect their judgment as to Ms. Tiangco's guilt. Concerns about jurors' attitudes toward transgender persons would therefore seem to apply to Ms. Tiangco only obliquely, if at all. Nevertheless, I entertained the notion that there might be some potential for bias, however unpredictable. I therefore did not refuse to address the *subject matter* of transgender persons; I simply declined to adopt the *particular question* suggested by the defense. . . Defense counsel seems to regard the proposed question about Caitlyn Jenner as the royal road to the jurors' subconscious (or conscious) attitudes. I was not persuaded. I judged that this was not the sole, or even the best, means of uncovering relevant bias. I did, however, grant defense counsel's application to include a question about transgender status." Judge McNulty decided that substituting his own question was within the scope of his discretion, and that it was adequately designed to uncover any relevant prejudice of jurors that might be the basis of a challenge for cause or a peremptory strike. Thus, he concluded, "There is no error or likelihood of prejudice requiring a new trial, and certainly no basis for a judgment of acquittal."

PRISONER LITIGATION NOTES

ILLINOIS – Transgender pro se inmate Dameon ("Devine Desire") Cole has another case in *Law Notes* this month. She lost to summary judgment on her medical claims in *Cole v. Coe*, 2016 U.S. Dist. LEXIS 159453 (S.D. Ill., November 17, 2016), reported in *Law Notes* (December 2016 at pages 532-3).

Now, in *Cole v. Tredway*, 2016 U.S. Dist. LEXIS 169178, 2016 WL 7118946 (S. D. Ill., December 7, 2016), she again loses to summary judgment on protection from harm claims. Chief United States District Judge Michael J. Reagan found the relatively low level harassment Dameon endured over three years at Lawrence Correctional Center was insufficient to present a jury question of deliberative indifference to her safety under *Farmer v. Brennan*, 511 U.S. 825, 832-3 (1994). Her key problem of proof was that there was no evidence that she was actually assaulted and the only sexual activity was concededly consensual. Other inmates harassed her by "winking, licking their lips, grabbing their genitals and propositioning her for sex," to which guards responded by laughter – even calling her a "stool pigeon" when she filed a grievance. One cellmate, with whom Dameon had a prior verbal altercation and who had threatened her, was placed in her cell by an officer who said "I guess one of you are going to learn how to fuck or fight" and walked away laughing. This was sufficient evidence of deliberate indifference to survive initial screening in *Cole v. Johnson*, 2015 WL 4037522 (S.D. Ill., July 1, 2015), reported in *Law Notes* (Summer 2015 at page 324-5); but it failed on summary judgment because nothing happened, and the putative aggressor was removed from Dameon's cell by officials shortly thereafter. Judge Reagan discusses liability for placement of an HIV+ inmate in Dameon's cell, ostensibly to facilitate sex; but Dameon loses here, too. The sex was consensual and Dameon herself did not know that the inmate was HIV+ until two weeks later – there was no evidence that the officer knew the HIV status at the time of the cell assignment. Incidentally, Dameon was charged with violating prison rules for having sex, but there is no discussion of the rather obvious entrapment issues, since the Court assumes for purposes of the motion that the officer placed the inmate with Dameon to facilitate sex. Dameon may have lost some sympathy with the Court by refusing an HIV test after the incident and threatening to have "sexual activity" with every inmate and staff member "willing to participate." There is considerable discussion generally of cell assignments for transgender inmates at Lawrence Correctional Center, which has no protective custody unit. Ultimately, Judge Reagan finds that Dameon's concerns were never "specific" enough to present the issue for a jury, even though Dameon says that other inmates were refusing to lock with her and were surrounding her with "hard-ons," demanding sex. Judge Reagan found that the behavior was "verbal" and not actionable – *see DeWalt v. Carter*, 224 F.3d 607, 612 (7th Cir. 2000) – and failed the post-Farmer Seventh Circuit test that requires "risks so great that they are almost certain to materialize if nothing is done." *Brown v. Budz*, 398 F.3d 904, 911 (7th Cir. 2005). *Brown* also discusses "risks attributable to detainees with known propensities of violence toward a particular individual or class of individuals; to highly probable attacks; and to particular detainees who pose a heightened risk of assault to the plaintiff" or heightened risks based on the characteristics of the plaintiff. *Id*., citing *Weiss v. Cooley*, 230 F.3d 1027, 1032 (7th Cir. 2000) – but Judge Reagan dismisses this language, writing that Dameon had only a "vague, general fear of harm." He said that an assault is not "necessarily" required, but there must be more than "propositions," citing *Fletcher v. Phelps*, 639 F. App'x 85 (3d Cir. 2015); and *Reis v. Augustine*, 2014 WL 6611584 (N.D. Fla. 2014) – where "lack of specificity" was "fatal." Judge Reagan relied heavily on the recent Seventh Circuit case of *Ramos v. Hamblin*, 840 F.3d 442 (7th Cir. 2016), reported in *Law Notes* (November 2016 at page 491), where Judge Richard Posner granted summary judgment against an inmate in Wisconsin on a protection from harm claim where the plaintiff was actually assaulted but there was no evidence that officials perceived him as gay or in particular danger. Judge Posner found in *Ramos* that "no evidence suggested that Ramos was particularly vulnerable to sexual assault." To state the holding is to illustrate the distinction, but Judge Reagan attempts at length (and futilely, in this writer's opinion) to apply *Ramos* to this case. *William J. Rold*

MICHIGAN – Pro se inmate Franklin Clayton is incarcerated for having penetrative sex with another person without informing the partner that he knew he was HIV+. While in prison, Clayton continued to have sex without informing his partners, resulting in his administrative segregation under MICH. COMP. LAWS § 791.267(3) and implementing directives. In *Clayton v. Michigan Department of Corrections*, 2016 WL 7173356 (W.D. Mich., December 9, 2016), Clayton sued over a dozen defendants, claiming that his segregation violated his civil rights, as well as the provisions of the Americans with Disabilities and Rehabilitation Acts ["ADA" and "RA", respectively]. United States District Judge Janet T. Neff, screening the complaint under 28 U.S.C. §§ 1915(e)(2), 1915A and 42 U.S.C. § 1997e(c), dismisses the suit against eight defendants, mostly lower level officials, on various grounds, including immunity, lack of personal involvement, and conclusory allegations. She permits the case to proceed to service against: the State of Michigan, the Michigan DOC Director and Deputy Director, and the Chief and Regional Medical Officers. Clayton describes in detail the restrictions imposed by segregation (and their medical and psychological consequences), and he maintains he is no longer a medical risk to other inmates because "there is no risk of transmission of HIV from his sexual activity." The opinion has a good discussion of

official and personal liability under the ADA and RA, the exceptions to immunity for prospective injunctive relief under *Ex Parte Young*, 209 U.S. 123, 159-60 (1908), and Congress' power to abrogate sovereign immunity under the Fourteenth Amendment as to the States. Judge Neff finds: "There is little doubt that a prisoner who tests positive for HIV and engages in penetrative sexual behavior poses a direct threat to the health and safety of others." Here, Clayton claims that he is being discriminated against "based on the disability of being seropositive for HIV," when he is "functionally cured." While Judge Neff finds the allegation of being "cured" to be "suspect," it is an issue for summary judgment or trial, not screening – noting the ADA's exception for danger to others under 42 U.S.C. § 12182(b)(3), and the RA's similar exception under 42 U.S.C. § 12113(b). Judge Neff rules that Clayton cannot maintain a § 1983 action against the Michigan Department of Corrections, but she reserves decision on whether the state agency has sovereign immunity under the ADA and RA "at this stage of the proceedings," citing *United States v. Georgia*, 546 U.S. 151, 159 (2006); *Mingus v. Butler*, 591 F.3d 474, 482 (6th Cir. 2010); and *Nihiser v. Ohio EPA*, 269 F.3d 626, 628 (6th Cir. 2001) – because, under the ADA and RA, Congress may have abrogated sovereign immunity in a case concerning government action that "actually violates the Fourteenth Amendment." *William J. Rold*

NEVADA – U.S. Magistrate Miranda M. Du recommended dismissal of all claims brought by Corey J. Strzyzewski, an openly gay HIV-positive inmate who asserted he was improperly kept in administrative segregation without due process and in violate of equal protection rights. *Strzyzewski v. Deal*, 2016 WL 7423407 (D. Nev., Nov. 16, 2016). The judge found that Strzyzewski's problem began he was alleged to have engaged in "sexual stimulating behavior" that might cause his HIV to be transmitted to other inmates. When he was due to be released from disciplinary segregation for this conduct, he claims he should have received a due process hearing to determine whether he should be retained in administrative segregation. Prison authorities took the position that in light of his status and admitted past misconduct, he was being segregated for his own safety and the safety of other prisoners. He was representing himself *pro se* in this case and made many of the usual procedural errors made by *pro se* prisoner plaintiffs, making some of his claims time-barred, failing to identify appropriate individual defendants, and so forth. The crux of the matter is found in the following quotation from the Magistrate Judge's recommendation: "Plaintiff, an HIV-positive individual, pled guilty to a charge of engaging in sexually stimulated activities and pursuant to AR 610, was placed in administrative segregation. Plaintiff fails to present any evidence in the record for which a jury could conclude that he was treated differently than other, similar situated inmates. Plaintiff also fails to present any evidence that defendants intentionally discriminated against him on the basis of his sexual orientation or HIV status. Additionally, defendants have shown that there is a legitimate penological reason to place HIV-positive inmates, who engage in high risk behavior, in administrative segregation."

NEW YORK – United States District Judge Mae A. D'Agostino granted *pro se* inmate Ramzidden Trowell limited permission to proceed on claims of sexual assault by officers in two incidents at Upstate Correctional Facility in *Trowell v. Upstate Correctional Facility*, 2016 WL 7156559 (N.D.N.Y., December 7, 2016). On the first screening, last July (apparently unreported), Judge D'Agostino allowed Trowell to proceed against a Sergeant Sagamore for excessive force in February of 2016. She dismissed other claims, with leave to amend, involving deliberate indifference to medical care, retaliation, harassment, and failure to protect – because they were too vague as to time, place, event, and even identity of defendants. Now, Judge D'Agostino grants the plaintiff leave to amend to supplement the complaint by alleging an event in August 2016, in which an officer (Fleury) allegedly finger-raped Trowell while calling him a "bitch," in the course of a use of force to extract Trowell from his cell. (The opinion does not identify the sexual orientation of Trowell or the officers.) There is extended discussion of Second Circuit standards for amending complaints; and while Judge D'Agostino finds infirmities in some of the claims in the supplemental pleading similar to the deficiencies in the first complaint, she allows Trowell to proceed against Fleury and directs the pleadings to be consolidated as an Amended Complaint. Judge D'Agostino applies the more liberal standard (a single incident of sexual contact may suffice if sufficiently serious) enunciated by the Second Circuit in *Crawford v. Cuomo*, 796 F.3d 252, 256-57 (2d Cir. 2015). She directs service on Fleury and answers to be filed by both Fleury and Sagamore. It appears, without Judge D'Agostino actually saying so, that the other claims dismissed in July with leave to amend may be dismissed now with prejudice, since the judge says that the Amended Complaint is controlling and that claims other than those against the two officers are "futile." She denied appointment of counsel, with leave to renew the application, if complications arise during discovery. *William J. Rold*

OHIO – *Pro se* plaintiff Alvin Simmons is a federal pre-trial detainee, whose allegations of civil rights violations were dismissed under 28 U.S.C.

PRISONER LITIGATION

§1915(e) by U.S. District Judge Benita Y. Pearson in *Simmons v. N.E.O.C.C. Medical Department*, 2016 U.S. Dist. LEXIS 165150, 2016 WL 6995292 (N. D. Ohio, November 30, 2016). In "very brief" pleadings, Simmons alleged that medical officials revealed his HIV status, assaulted him (for which he provides "no details"), and discriminated in general against African-American and gay inmates. He was given two chances to amend to state a claim, but on the third pleading Judge Pearson dismissed without further leave to amend and certified that an appeal would be frivolous. Judge Pearson joins the array of courts holding that the Health Insurance Portability and Accountability Act (HIPAA) provides no private cause of action. Generalized allegations of victimization on the basis of race and sexual orientation are insufficient under the Eighth Amendment. There is no separate analysis of Equal Protection on these insufficient facts. *William J. Rold*

TENNESSEE – A pro se plaintiff fails to respond to a motion for summary judgment at his peril. Here, inmate Steven L. Hill alleged that he was targeted, harassed, mistreated, removed from a substance abuse program, subjected to unreasonable searches, and retaliated against at the Davidson County Detention Facility because he is gay. In a Report and Recommendation ["R & R"], U.S. Magistrate Judge Joe B. Brown recommended summary judgment and dismissal with prejudice on all claims in *Hill v. Kinnaman*, 2016 U.S. Dist. LEXIS 173684, 2016 WL 7241283 (M.D. Tenn. Dec. 15, 2016). Two defendants remained after preliminary screening, and Hill did not respond to their motion for summary judgment. *See Hill v. Kinnaman*, 2015 U.S. Dist. LEXIS 164919 (M.D. Tenn., December 09, 2015), reported in *Law Notes* (January 2016 at pages 27-8). (Apparently the jail is managed, at least as to them, by the Corrections Corporation of American; and defendants had private counsel.) The defendants argued that they had a rational basis other than Hill's sexual orientation to search Hill's cell, that the harassment was low level and originated from other inmates who were not state actors, that Hill was removed from the substance abuse program for good cause and only temporarily, and that Hill completed the program. Although Hill did not respond to the motion after court warning, Judge Brown nevertheless perused the record (criticizing defense counsel for combining argument with their "statement of uncontested facts"), found that Hill could not rely on his unsworn complaint in summary judgment, and said that no reasonable jury could return a verdict in his favor on this record – citing, generally, *Ondo v. City of Cleveland*, 795 F.3d 597 (6th Cir. 2015). Finding no other basis for a claim of animus or ill will, the R & R recommended dismissal and a certification that an appeal could not be taken in good faith. *William J. Rold*

TEXAS – Earlier this year, we covered the saga of Texas prisoner Joshua D. Zollicoffer, a/k/a Passion Star, who was allegedly "repeatedly raped, forced into non-consensual sexual relationships, and assaulted when she resisted demands" while incarcerated in seven different prisons. See "Federal Judge Defers Qualified Immunity Ruling and Orders Systemic Discovery on Policies and Failures Underlying High Rate of Gay and Transgender Inmate Assaults in Texas," reporting *Zollicoffer v. Livingston*, 4:14-cv-03037 (S.D. Tex., March 14, 2016), in *Law Notes* (April 2016, at pages 144-5). Star sued sixteen defendants, but the reported opinion focused only on the State Prison Director. At the time, U.S. District Judge Alfred H. Bennett found: "Plaintiff has sufficiently alleged a violation of [her] Eighth Amendment rights. There is no question that Plaintiff was incarcerated under conditions posing a substantial risk of serious harm . . . . They are enough to offend even the sternest of dispositions." Judge Bennett noted that the Department of Justice inquired about Texas' "alarming statistics" (specifically noting the "vulnerability of gay and transgender prisoners") and that the state's own Inspector General had documented the allegations. Judge Bennett allowed wide systemic discovery focusing on policies "failing to protect gay and transgender inmates from abuse." Judge Bennett also allowed discovery about whether policies that seemed adequate on their face were not implemented in fact – and whether Texas prison officials condoned "a culture of degradation for LGBT people." Now, the *Texas Tribune* (December 17, 2016) reports that Star may be close to a settlement that includes her parole after serving 14 years of a 20-year sentence – long after her co-defendant had been released for the same crime. Only in later years (and after suing) has Star been confined in "safekeeping" for her protection. Texas officials were not forthcoming about the terms of any settlement, but it is clear that Star will seek damages for her ordeal even after released. Demoya Gordon, a Transgender Rights Project attorney at Lambda Legal, which represents Star, stated: "It was only after all of those things happened that TDCJ finally agreed to move her into what we call safekeeping . . . . Unfortunately, it took a large, national organization like Lambda Legal to file an official lawsuit in federal court for them to actually take notice and start to take Passion's pleas for safety seriously." "When people like Passion get sentenced to prison to serve a term, they're not sentenced to be raped and assaulted with impunity," Gordon said. "This is a case that we're also using to raise the profile and raise awareness about the pervasiveness of this issue." *William J. Rold*

LEGISLATIVE

LEGISLATIVE & ADMINISTRATIVE

U.S. CONGRESS – Among items on the agenda of the Republican majority when the Congress convenes in January is consideration of the First Amendment Defense Act, a measure introduced by Republicans in the outgoing Congress as H.R. 2802. It is purportedly intended to prevent discrimination against people, businesses and other organizations that discriminate on the basis of sexual orientation or gender identity because of their religious beliefs. Under the federal Religious Freedom Restoration Act, passed in the 1990s in response to a Supreme Court ruling that the First Amendment itself does not provide to individuals a religious exemption from complying with neutral federal and state laws, the federal government must have a compelling interest and using the least restrictive means necessary to achieve that interest in applying policies to religious objectors. The proposed statute might preempt state and local laws to the extent they would be found to burden discriminators' religious freedom rights. Its actual application and scope are speculative at this time, however. During the election campaign, Donald Trump indicated support in concept for such a measure. However, although Republicans controlled both Houses in the outgoing Congress, the measure never came to a floor vote in either House, so its prospects remain uncertain.

U.S. DEPARTMENT OF LABOR – Rushing to act before the Obama Administration ends, the Labor Department has published a final rule expanding nondiscrimination and affirmative action requirements in apprenticeship programs that are registered with the Department or state apprenticeship agencies. Staggered implementation of the new rules is to being on January 18, 2017. The final rule includes sexual orientation and gender identity as prohibited grounds of discrimination in such programs, as an interpretation of federal statutory bans on sex discrimination. The non-discrimination rules will affect program sponsors' recordkeeping, selection, retaliation and complaint procedures effective January 18. The next implementation date, January 17, will bring onstream implementation of the non-discrimination requirements. Further steps become effective on January 18, 2019. Compliance will be evaluated beginning with the first compliance review of any particular program after January 18, 2017. Because this is a formal published regulation, it cannot be immediately rescinded by the new administration.

COLORADO – The City and County of Denver amended its building code to require that all new and existing single-stall restrooms provide signs designating them as gender-neutral, according to *Mena Report*, 2016 WLNR 38977806 (Dec. 21, 2016).

FLORIDA – On December 13, city commissioners in Lake Worth, Florida, unanimously voted to prohibit anyone in the city from using conversion therapy on a minor. A public hearing scheduled for January 10 will be followed by a final vote on the measure. West Palm Beach recently passed a similar law, joining such municipalities as Miami Beach, Cincinnati, Pittsburgh, and Seattle in banning the practice, which has been outlawed on the state level by California, New Jersey, Vermont, Oregon, Illinois and the District of Columbia through legislation, and New York through an executive regulatory action. (The New York Assembly has approved legislation more than once, but it has not come to a vote in the State Senate.) *Palm Beach Post*, Dec. 18.

INDIANA – The West Lafayette City Council voted 7-2 to add sexual orientation, gender identity and expression, and veteran status to the city's human rights ordinance, giving the Human Relations Commission various enforcement options. The measure, which passed a second reading on December 5, covers employment, public accommodations, housing, and education. Resolutions address these forms of discrimination were passed in 1993 (sexual orientation) and 2010 (gender identity and expression, and veterans status), but the new action steps up the legislative status to an ordinance, which is why two readings were required before enactment. *Journal and Courier*, Dec. 6.

NEW JERSEY – The Hackensack Board of Education voted on December 13 to approve on first reading a proposed policy to protect the rights of transgender students in the city's schools. The policy was characterized in a report on *northjersey.com* on December 13 as a "comprehensive plan that includes rules for bathroom use for transgender students, pronouns to use when referring to transgender students, and definitions of terms such as 'gender nonconforming' and 'gender expression.'" It would also protect the privacy rights of students who do not want the school to tell their parents about their gender identity as expressed at school. If the policy is approved, Hackensack will be the eleventh school district in the state to have adopted a policy that does not automatically contact parents about a student's gender identity at school. Most of the policies provide that the school will not make such contact without the student's consent.

PENNSYLVANIA – The Pittsburgh City Council unanimously voted to approve a ban on mental health

professionals practicing conversion therapy on minors, and Mayor Bill Peduto promptly announced he would sign the measure into law after the December 13 vote. *pittsburgh.cbslocal.com*, Dec. 14. * * * *The Sentinel* (Dec. 9) reported that after six months of "sometimes heated discussion" the Carlisle Borough Council approved by 5-2 vote a proposed Human Relations Ordinance encompassing sexual orientation and gender identity and expression, becoming the 37th municipality in the state to pass such an ordinance. Indeed, it is surprising that Pennsylvania is one of the few states in the northeast that has not added sexual orientation to its state civil rights law, but an obstreperous Republican legislative committee chairman has continued to block such an enactment, despite widespread public opinion in support of outlawing discrimination against sexual minorities and the belief that if a measure came to the floor, it was likely to pass the legislature and be signed by the state's Democratic governor. That public opinion has expressed itself through county and municipal legislation, resulting in a large portion of the state's urban and suburban population living under antidiscrimination rules. The Carlisle ordinance establishes a volunteer Human Relations Commission, which will be constituted in March, and covers discrimination in employment, housing and commercial property, and any public accommodation where such discrimination is not already prohibited by federal or state law. Religious organizations are exempt, but individuals are not exempted based on their religious views, which generated some controversy during the adoption process.

WEST VIRGINIA – Wheeling has become the state's eleventh city to adopt a ban on discrimination in employment and housing because of sexual orientation or gender identity. The measure was passed unanimously by the City Council on December 20. The measure does not address public accommodations, thus avoiding some of the controversy about transgender bathroom access. Religious institutions are exempt from compliance with these provisions. Private clubs are exempt as to their membership policies, but not exempt as to their employment policies. The ordinance applies only to companies with 12 or more employees. The city's Human Rights Commission is authorized to issue cease-and-desist orders in response to complaints. *National Law Review*, 2016 WLNR 39073498 (Dec. 22).

WISCONSIN – The board that oversees worker health benefits for state employees reversed a decision from July and voted to provide coverage for gender reassignment surgery beginning January 1. However, the state Department of Justice, at Governor Scott Walker's request, has asked the board to reconsider. The board's action responded to new federal regulations under the Affordable Care Act going into effect January 1, banning gender identity discrimination in health insurance coverage, but the Department of Justice characterized the regulation as unlawful, and on December 31, the U.S. District Court for the Northern District of Texas issued a nationwide preliminary injunction banning enforcement of the regulation. The state insurance board voted on December 30 that it would rescind the coverage if four contingencies occurred: a court ruling invaliding the new federal rule, a determination that the policy did not comply with state law, renegotiation of insurance contracts that maintain or reduce premium costs for the state, and a final DOJ opinion that says dropping the benefits would not violate the board's fiduciary duty in administering the state health benefits plan. *University Wire*, Dec. 31. Frankly, we found this news report somewhat confusing.

CHEROKEE NATION – The Attorney General of the Cherokee Nation, Todd Hembree, issued an opinion on December 9 that the tribe, which has about 300,000 members, mostly living in Oklahoma, will recognize same-sex marriages. Hembree echoed the Supreme Court's reasoning in *Obergefell*, while acknowledging that the tribe as a sovereignty was not bound to follow that ruling. Hembree was responding to concerns after his predecessor as Attorney General, Dianne Hammons, issued an opinion that a license issued to two women by a tribal officer was invalid. The tribe's Tax Commission then asked for an opinion about whether the tribe would recognize same-sex marriages performed pursuant to an Oklahoma marriage license, after the federal courts struck down the state's ban on same-sex marriage. Under Hembree's opinion, conscientious objections to issuing marriage licenses or benefits are prohibited, but ministers and citizens are not required to participate in same-sex marriage ceremonies. *Tulsa World*, Dec. 9.

LAW & SOCIETY NOTES

TRANSGENDER POPULATION FIGURES – The Williams Institute at UCLA School of Law reports that the UCLA Center for Health Policy Research has released findings through the California Health Interview Survey concluding that in 2015, about 64,000 adults in California ages 18 to 70 (about 0.25% of the population) were estimated to be transgender or gender non-conforming, and about 133,000 California youth ages 12 to 17 (about 4.5% of the youth population) were

estimated to express their gender in a "non-conforming" way. (Press Release dated December 15, 2016)

CHELSEA MANNING – A status report filed in the federal district court in Washington, D.C., indicated that despite her legal name change and gender dysphoria diagnosis, the Army continues to list Private Chelsea Manning as "male" in its personnel database despite her request to change that to "female" consistent with her gender identity. Manning, formerly known as Bradley Manning during active military service, was sentenced in 2013 to 35 years in prison on charges of espionage for leaking classified documents to Wikileaks. She subsequently asserted her female gender identity and was diagnosed with gender dysphoria. She has been suing the Pentagon for appropriate medical treatment while in prison, complaining about the refusal of military prison authorities to allow her to follow female grooming standards. Her military medical provider denied the request for her to be classified as female, but the Justice Department declined to comment when questioned by a reporter from Reuters as to the reason for the denial. Manning has applied to the White House to have her sentenced commuted to time served, but as of the end of the year there was no response. Manning acknowledges having twice attempted suicide out of despair about her treatment in prison. The ACLU and various LGBT rights groups have sent a letter to the White House supporting Manning's application, with an ACLU representative, Ian Thompson, observing to the press, "Ms. Manning is the longest-serving whistleblower in the history of the United States. Granting her clemency petition will give Ms. Manning a first chance to live a real, meaningful life as the person she was born to be." However, thus far the Obama Administration has taken a hard line on persons with security clearances who have provided classified documents to Wikileaks, making it unlikely that clemency will be forthcoming. *Washington Times*, December 8.

INDIANA – Indiana University employees who enjoy domestic partnership health benefits for their same-sex partners were informed that they will lose the coverage if they don't marry their partners, the *South Bend Tribune* reported. When they applied for the partner benefits, they had to sign an affidavit saying that they would marry if the opportunity was available. Now the University is standing on that policy, and it is estimated that about 20 employees will lose benefits if they don't hurry up and marry before the end of the year. At the height of the program, about 250 employees had enrolled same-sex partners for benefits, but the number participating in the program dropped sharply after the U.S. Supreme Court denied a petition to review the 7th Circuit's decision striking down Indiana's ban on same-sex marriage in October 2014, with most of the enrolled employees subsequently marrying their partners. The school's board of trustees voted to discontinue the domestic partner benefits program in 2015, shortly after the Supreme Court's *Obergefell* decision.

NEW JERSEY – Boy Scout officials in New Jersey set off a storm of protest when they contacted Kristie Maldonado, the mother of a transgender boy, Joe Maldonado, age 8, informing her that Joe could not continue to be a member of his Cub Scout troop, because the BSA considers him to be female. Joe had been participating in the troop without any problems, but the parents of some of the other boys in the troop complained to BSA officials. He is treated as a boy at his elementary school, and grooms and dresses as a boy. The story made national headlines, generated petitions and protests, and brought offers from other troops to allow Joe to participate (including from a Scout troop in the U.K.). The national BSA has no formal written policy about transgender boys, but the local leadership insisted that a person would be considered the sex indicated on their birth certificate. In light of the adverse precedent of *Boy Scouts of America v. Dale* from the U.S. Supreme Court in a case involving a gay assistant scoutmaster, upholding the right of the Scouts to exclude gays from membership, commentators suggested that a lawsuit on behalf of Joe would not be successful and, in any event, his mother said she was not inclined to sue, but hopes that Joe's story will raise awareness about the organization's retrogressive policy. Responding to publicity about Joe's expulsion, the Girl Scouts of America noted that transgender girls are welcome to participate in the Girl Scouts, just as lesbian girls were also always welcome to participate.

NEW YORK – It was reported that the New York City Health Department has issued its first "intersex birth certificate" to Sara Kelly Keenan, age 55, who was identified female on her birth certificate and was unaware of her intersex status for most of her life, according to press reports. Her genetic make-up is male, but she was born with female genitalia and "mixed internal reproductive organs." According to an online report by *I4U News*, 2016 WLNR 39934404 (Dec. 31), her parents and doctors had decided to keep her intersex status a secret. At age 16 she began hormone replacement therapy, and was told that she was a girl who was unable to make female hormones, thus the need for therapy. After she became aware of the true reason for the therapy, she

underwent testing which confirmed that she is truly intersex. The report states: "Keenan has embraced her intersex identity and with the landmark of her birth certificate she wants to pave the way for the intersex community." According to the news report, this is the first time any jurisdiction in the U.S. has issued an "intersex birth certificate." NBC News broadcast a report on these developments on December 29. That report quoted Lambda Legal attorney Paul Castille as commending the City for "issuing an accurate birth certificate" for Keenan, commenting, "In the United States, birth certificates often provide access to a wide range of public services and critical identity documents, such as state IDs and passports. Having birth certificates with gender designations other than male or female provides an enormous sense of validation for a number of non-binary and intersex people." We previously reported on a lawsuit by an individual who rejects the gender binary, seeking a passport identifying the individual's gender as intersex. *Zzyym v. Kerry*, 2016 WL 7324157, 2016 U.S. Dist. LEXIS 162659 (D. Colo., Nov. 22, 2016) (refusing to dismiss lawsuit against State Department for refusing to process a passport application from a person who will not identify as either male or female).

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) – The EEOC, responsible for enforcing federal employment discrimination laws, is governed by a statute that provides that no more than 3 of its 5 commissioners may come from the same political party. Thus, President Barack Obama nominated Constance Barker, an incumbent commissioner who is a Republican, for a new term, as there are three Democrats currently serving as commissioners. Although the relevant Senate Committee approved the nomination and sent it to the floor for a vote, the Senate has failed to confirm Barker's appointment for a term that would run through July 1, 2021, so President-elect Donald Trump will have the opportunity to fill the vacancy, as well as to designate a new chair of the Commission, after he takes office. However, the three Democrats on the Commission – Chair Jenny Yang and Commissioners Chai Feldblum and Charlotte Burrows – will continue to make up the majority until Ms. Yang's term expires on July 1. The fourth commissioner, a Republican, is Victoria Lipnic. After Trump's election, there was speculation that Lipnic might be appointed Secretary of Labor, but Trump went in another direction. It is possible that Trump might designate Lipnic to replace Yang as Chair, and he does not have to wait for Yang's term on the Commission to end in order to do that. Control of the Commission is vitally important to the ongoing development of LGBT employment discrimination law, since the Democratic majority has issued landmark decisions by 3-2 votes holding that sexual orientation and gender identity discrimination violate the prohibition of discrimination "because of sex" in Title VII of the Civil Rights Act of 1964, and their position has been taken up and followed by other federal agencies with responsibility for administering sex discrimination laws and regulations in such spheres of activity as housing, education, and health care. These moves have enjoyed a mixed reception from the federal courts, with the Supreme Court poised to rule during 2017 on a case that presents the question whether the ban on discrimination "because of sex" in educational institutions encompasses gender identity discrimination claims. If the Supreme Court were to rule affirmatively on Gavin Grimm's claim against the Gloucester County School District on the merits, that could lock in a controlling definition of the phrase "because of sex" that might block a new Republican EEOC majority from reversing the gender identity discrimination case. Depending on the reasoning of the Supreme Court, it might also block a reversal of the agency's sexual orientation ruling, which has not as of the end of 2016 been endorsed by any federal circuit court of appeals, although cases are pending on the issue in several circuits. In related news, David Baldwin, the gay air traffic controller whose discrimination claim against the Transportation Department was the subject of the EEOC's 2015 sexual orientation ruling, has settled his federal district court lawsuit against the department, so that case will not be a vehicle for a potential court approval of the EEOC's interpretation of the statute. *BloombergBNA* reported on the settlement on December 21. Baldwin accepted a settlement offer from the Transportation Department on December 19, subject to approval by the U.S. District Court for the Southern District of Florida. He will receive a settlement payment of $10,001.00. The settlement will cover all of Baldwin's legal costs and fees. The government had never filed a motion to dismiss in the case, given the Obama Administration's decision to treat sexual orientation claims as cognizable under Title VII, but the offer of judgment proffered by the U.S. Attorney's Office for the Southern District stated, as is usual, that the offer was not to be construed as an admission that defendants are liable or that plaintiff suffered any damages. The case was pending before District Judge Kathleen Williams, under the title *Baldwin v. Fox*, Case No. 15-23825-civ-Williams.

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UNITED NATIONS – The United Nations General Assembly rejected an attempt led by some African nations

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to reverse or delay a prior decision by the Human Rights Council to employ an Independent Expert on Sexual Orientation and Gender Identity, Mr. Vitit Muntarbhorn. A vote on December 19, seeking to delay Muntarbhorn's work to give objecting nations more time to build opposition, was defeated by a vote of 77-86 with 16 abstentions. The purported reason for the delay was to determine the "legal basis" for the expert's mandate. The African nations argued that they wanted a delay because "there is no international agreement on the definition of the concept of 'sexual orientation and gender identity.'" Opposing the attempted reversal, U.S. Ambassador Samantha Power called this "patently false," saying that violence and discrimination based on sexual orientation and gender identity had been "well established" and referred to in U.N. statements and resolutions emanating from both the General Assembly and the Security Council. *Associated Press*, Dec. 19.

AUSTRALIA – Opposite results in votes on transgender rights laws in two Australian states. The South Australian upper house approved a measure on December 6 under which transgender people can change the sex on their birth certificate without having surgery or getting a court order, but hours later the legislature in Victoria voted down a similar measure. Most Australian states require evidence of surgical alteration in order to issue a revised birth certificate. The South Australian bill passed on a vote of 10-7, overturning existing requirements to submit a court application supported by proof of sex reassignment surgery. Under the new law, a statement from a doctor or psychologist stating that they have "undertaken a sufficient amount of appropriate clinical treatment in relation to the person's sex or gender identity" will be enough for an adult to get a new birth certificate. Transgender people under 18 will still need a court order. The bill also repeals a requirement that married people get divorced as a prerequisite to making the change. The Australian Capital Territory legislated to eliminate the surgery requirement in 2014, and in 2011 a High Court decision in Western Australia eliminated the surgical requirement there, according to a report on the developments by *BuzzFeed* on December 6. South Australia's Parliament has also recently approved new legislation which will let gay couples adopt children and provide access to IVF treatment for lesbian couples seeking to have children. South Australia was the last state to end its ban on gay adoptions. *Advertiser*, Dec. 8.

CANADA – The nation's prison system is revising its policies concerning transgender inmates to place offenders in facilities based on their gender identity. A spokesperson for Public Safety Minister Ralph Goodale confirmed reports that the Correctional Service Canada will amend its guidelines both on housing accommodations for inmates and gender reassignment surgery early in 2017. The spokesperson, Scott Bardsley, told CBC News, "Out government believes that everyone can live according to their gender identity and express their gender as they choose and be protected from discrimination. CSC is committed to ensuring that inmates who identify as trans have the same protection, dignity and treatment as other inmates." *Canadian Government News*, Dec. 29.

CHAD – Chad has adopted a new penal code that reduces homosexual conduct from a crime to an offense, with a commensurate reduction in penalties. Upon conviction of the crime, perpetrators were sentenced from 15-20 years in prison and subject to a heavy fine. As a criminal offense, it will be processed as a "correctional hearing," a minor offense, according to a December 13 report by *Agence de Presse Africaine*.

CHINA – *Global Times* (Dec. 22) reported that a court in Guangzhou heard the province's first lawsuit addressing HIV-related employment discrimination on December 21. The 27-year-old plaintiff, Ah Ming (a pseudonym), claims he was suspended from work in December 2015 and had filed a complaint with a labor dispute arbitration committee, which dismissed his claim, asserting that HIV positive people should be quarantined until they are proven not to be infectious. The Baiyun District court heard the case in a private session. Ah Ming's counsel presented to the court representations by various state agencies that quarantine is not deemed necessary in such cases.

GUATEMALA – Legislation has been introduced by representatives from several political parties seeking to allow same-sex marriages. The chief proponent, legislator Sandra Moran, head of the Convergence Block in the national Congress, argued that Guatemala should modernize its law to legitimize the rights of all minorities. "We know that people who decide to form families of this type face an adverse environment where they can be obligated to live together in secret, or face rejection by their relatives, or even the threat of violence and discrimination, so we want to give them legal support," she said. *panamapost.com*, Dec. 23.

GUERNSEY (U.K.) – On December 14 the Queen's Privy Council approved Guernsey's legalization of same-sex marriages, which was approved by the island's legislature in September in a 33-5 vote. Guernsey is a British Crown dependency with a population of about

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63,000, according to an on-line report by Internet journalist Rex Wockner.

ISRAEL – *Yedioth Ahronoth* (Dec. 9) reported that Attorney General Avichai Mandelblit has informed the High Court of Justice (the nation's highest court) on December 8 that he had decided to "make the process for acquiring Israeli citizenship the same for LGBT foreign couples as straight foreign couples." This responded to a petition submitted to the court by lawyer Iris Sheinfeld. Under current procedures, it takes much longer for a same-sex couple to get permanent residency status for a foreign same-sex partner, and unlike opposite-sex partners, they are not given full citizenship status and rights and may have to give up their foreign citizenship. Sheinfeld expressed satisfaction with the announced changes, stating: "This is serious news for the gay community. I welcome these significant steps that have been taken today for the equal rights of same-sex couples and straight couples."

JAPAN – A City official in Sapporo said that the city, capital of the province of Hokkaido, plans to draw up guidelines with an eye to launching the certification of same-sex couples by the end of March 2018. Several other Japanese municipalities have introduced similar arrangements to give formal recognition to same-sex couples. The mayor received a request in June from a civic group supporting LGBT people, seeking establishment of a system to recognize their partnerships. Sapporo hopes to obtain the 2026 Winter Olympics, and noted that the Olympic Charter now bans sexual orientation discrimination, so this policy change is seen as a step towards enhancing the city's bid to host the world games. *Japan Times*, Dec. 22. * * * *Japan News* (Dec. 13) reports that the Health, Labor and Welfare Ministry has asked all businesses to adopt measures to prevent sexual harassment against LGBT people. The article also reports that an "increasing number of companies, mainly major firms, have been making attempts to eliminate workplace discrimination against sexual minorities." It notes a major trading company, Rakuten, Inc., that has set up "gender-neutral restroom facilities, which can be used by everybody regardless of their gender, on all floors when it moved to a new head office building in August." The company also allowed people who transition to change their names on company business cards, evidently a major step in Japan. In February 2016, Sony Corporation extended its welfare benefits program to same-sex partners of employees. Many other examples of new corporate policies were cited in the article. However, the nation has yet to legislate expressly on the subject of sexual orientation or gender identity discrimination.

KENYA – The High Court in Nairobi ruled on December 7 that an HIV data collection directive ordered by President Uhuru Kenyatta last year in order to identify and treat children living with HIV/AIDS violates fundamental privacy rights protected by the nation's constitution. The High Court ruled that stakeholders should find a way to ensure that collected data was stored in a manner which prevents linking the person and their status, according to a report by *Legal Monitor Worldwide*, 2016 WLNR 37635138 (Dec. 9).

MALTA – On December 5, the Parliament voted to make Malta the first nation in the world to ban conversion therapy, adopting a law that makes it a crime for any medical professional to prescribe a so-called "gay cure" or engage in any practice seeking to change a person's sexual orientation or gender identity. The new ban includes fines and jail time for offenders. The amendment to Malta's Gender Identity, Gender Expression and Sex Characteristics Act also allows persons beginning with age 16 to request a change in gender on their official identity documents. *dpa International*, Dec. 6. Malta, an island nation in the Mediterranean Ocean, has about 450,000 inhabitants, making it one of the world's smallest countries by population.

NORTHERN IRELAND – After an amendment to the Policing and Crime Bill passed in Westminster, "Turing's Law" will be extended to Northern Ireland, providing that men convicted there for being in gay consensual relationships can clear their names. Northern Ireland did not decriminalize homosexual conduct until 1982, long after Britain had done so in 1967. *Belfast Telegraph Online*, Dec. 28. "Turing's Law" is named in honor and memory of Alan Turing, a gay genius widely credited with having played a major role in helping the Allies win World War II by his participation in a team that broke the German secret code for transmitting military messages by radio. Turing was convicted of homosexual conduct after the way, branded a criminal, subjected to chemical castration, and was subsequently found dead in his flat under circumstances that some have labeled as suicide while others claim it was accidental poisoning. His story has been the subject of a major biography, a widely-performed play, and a recent movie.

PAKISTAN – Waqar Ali, a transgender man, filed a petition with the Lahore High Court, seeking to ensure that transgender people will be included in an upcoming national census. In response, Chief Justice Syed Mansoor Ali Shah on December 19 asked the government to respond to the petition by January 9, 2017. During a hearing

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on December 19, counsel for the government informed the court that steps were being taken to include transgender people in the upcoming population census, according to *BBC International Reports* (Dec. 20), and that transgender people were free to use the option of either male or female on their national identity cards. The representative asked for time to get instructions from the Pakistan Statistics Bureau in order to provide a more detailed response to the court. Ali's petition requests the court to direct the federal government to legislate for the welfare of the transgender community, reports the BBC, according to its international obligations, having ratified international conventions on civil and political rights.

PARAGUAY – Transgender activists Yren Rotela and Mariana Sepulvada have initiated a legal action to use officially the names by which their friends and social circle know them, reported *BBC International Reports* on December 20. They are relying on a constitutional guarantee of individual rights to "free expression, creativity and the formation of their own identity and image," noting that the civil code allows for a change of identity and international agreements signed by Paraguay may also support their claim. Prior cases seeking legal name changes for this purpose have been unsuccessful.

SOUTH KOREA – On December 6, a South Korean appeals court rejected an appeal from the Seoul Western District Court, which had rejected a petition to legally recognize a same-sex couple's marriage. Kim Jho Gwang-soo and Kim Sung-hwan, both identified as "male filmmakers," conducted a marriage ceremony in September 2013, but the district office decline to register the marriage, claiming that it failed to satisfy the definition of "husband and wife in civic law." Kim-Sung-hwan told the press that he would appeal to the nation's top court. *Yonhap News Agency of Korea*, Dec. 6.

TAIWAN (REPUBLIC OF CHINA) – The Parliament voted on December 19 to pass the first draft of a marriage equality bill, moving the country forward towards becoming the first Asian jurisdiction to legalize same-sex marriage, according to a report on *yahoo.com*. A legislative committee has approved the necessary amendment to the civil law, although opponents have forcefully argued that the policy question should be decided by a national referendum. The chief proponent of the bill, Yu Mei-nu of the Democratic Progressive Party, speculated that the process of final enactment might take around six months. Support for marriage equality has grown with the open endorsement of President Tsai Ing-wen, who recently became a telephone buddy of U.S. President-elect Donald J. Trump, to the consternation of officials of the People's Republic of China, which claims Taiwan as a province that is temporarily self-governing. Proponents and opponents of the measure held dueling rallies leading up to the vote on December 19.

UNITED KINGDOM – The *Daily Telegraph* reported on December 19 that an official of the Leicestershire County Council had violated the rights of a transgender youth by informing his adoptive parents of his new first name and transgender status without authorization, and was ordered by the Family Division of the High Court in London to pay damages to the youth. According to the news report, "In September 2014, PD, then 15, told his parents, who had adopted him as a girl at the age of six, that he wanted to change his identity to male." This caused deterioration in their relationship, and two years later PD decided he wanted nothing more to do with his adoptive parents and moved out on his own, cutting off all communication with them. He went to a gender identity clinic in London to be diagnosed with gender dysphoria and begin his transition. Obtaining a name change created an official record, and a council official familiar with the family informed the adoptive parents of PD's new name without his authorization. He brought his case to the Family Division of the High Court in London, citing the privacy protection in Article 8 of the European Convention of Human Rights, which the court found had been violate in this case, awarding him 5,000 pounds in damages, which will be paid by the Council.

UNITED KINGDOM – The *Sunday Telegraph* (Jan. 1, 2017) reported that Lady Anna Gorden, daughter of the Marquess and Marchioness of Aberdeen and Tamair, will likely become the first member of the British aristocracy to have a same-sex wedding. Lady Anna Gordon made waves by announcing on social media that she had become engaged to Sarah McChesney, and the engagement has been announced on the Court and Social page of the *Daily Telegraph*. Earlier, Lord Ivar Mountbatten, a cousin of Queen Elizabeth, had announced that he had happily settled down with a same-sex partner, James Coyle, but as yet there were no plans to form a civil partnership or get married. The legislation legalizing same-sex marriage passed by the Parliament a few years ago anticipated one of the by-products that might come out of same-sex weddings, providing that a future King or Prince of Wales who married a man would not pass on the title of Queen or Princess of Wales to their same-sex spouse, and men with aristocratic titles who married same-sex partners would not by making their spouse a "Duchess, Countess or Lady." A little tongue-in-cheek there by the *Telegraph*?

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CATHOLIC CHURCH – Nothing ever really changes, right? On December 7, the Vatican published a document titled "The Gift of the Priestly Vocation," risibly suggesting that "persons with homosexual tendencies" cannot be admitted to seminaries or the priesthood, although it is widely known that many Catholic priests are gay. The document was drafted by the Vatican's Congregation for Clergy, and approved for publication by Pope Francis ("Who am I to judge?"). *Huffington Post*, December 8. More hypocrisy from the Roman Catholic Church.

PROFESSIONAL NOTES

NEW YORK – New York Court of Appeals Chief Judge Janet DiFiore and Chief Administrative Judge Lawrence K. Marks announced on December 14 the appointment of an LGBT Commission, charged with highlighting and addressing issues of concern to LGBT members within the justice system and legal profession. Co-chairs of the Commission are out lesbians **HONORABLE MARCY KAHN**, Associate Justice of the Appellate Division, First Department, and **HONORABLE ELIZABETH GARRY**, Associate Justice of the Appellate Division, Third Department. The commission's Executive Director will be **MARC LEVINE**. The goal of the Commission is to "promote equal participation in and access to the courts and legal profession by all persons regardless of sexual orientation, gender identity or gender expression," according to a press release issued by the NY State Unified Court System. The Commission is made up of 21 judges and attorneys in addition to the co-chairs, including law firm partners and staff members from public interest organizations and the court system, drawn from all regions of the state.

GLBTQ LEGAL ADVOCATES & DEFENDERS (GLAD) announced December 28 that at its December board meeting the board voted in Richard J. Yurko as its new President, Joyce Kauffman as Vice President, Darian Butcher as Clerk, and David Hayter as Treasurer. Dianne Phillips, who served as board chair for the past five years, will remain on the board.

ACLU OF SOUTHERN CALIFORNIA – The American Civil Liberties Union of Southern California announced on December 27 an opening for a full-time LGBTQ Rights Staff Attorney to join the organization's LGBTQ, Gender & Reproductive Justice Project, based in Los Angeles. The deadline for submitting applications via email or surface mail is January 23, 2017. Resume, cover letter, and writing sample should be sent to jobs@aclusocal.org or HR Department – LGBTQ Rights Staff Attorney, ACLU of Southern California, 1313 W. 8th Street, Los Angeles, CA 90017. ACLU SoCal is an equal opportunity employer and does not unlawfully discriminate on the basis of any status or condition protected by applicable federal or state law. Full details about the position can be found on the organization's website: www.aclu.org/careers/lgbtq-rights-staff-attorney-aclu-southern-california.

NEW YORK CITY BAR'S COMMITTEE ON LESBIAN, GAY, BISEXUAL AND TRANSGENDER RIGHTS has submitted comments to the NY State Department of Health on published proposed rulemaking to amend 18 N.Y.C.R.R. Sec. 505.2(1) concerning Medicaid coverage for transgender-related care and services. The report, approved for submission by the Bar Association, commends the agency for its proposal to expand coverage, but criticizes lack of clarity regarding coverage for transgender youth and certain gender reassignment procedures, a continuing flashpoint between the state agency and transgender rights advocates. The Report recommends that "the Regulation should be revised simply to state that any and all treatments for gender dysphoria that are consistent with contemporary standards of care must be covered," and noted that an October 25, 2016, order issued by the U.S. District Court (S.D.N.Y.) in *Cruz v. Zucker* may requires various modifications to the proposed Regulation. The Committee is chaired by Anna Pohl.

JUSTICE DONALD CORBIN – We note the passing on December 12, 2016, of retired Arkansas Supreme Court Justice Donald Corbin, who served 24 years on the court before his retirement at the end of 2014. Corbin's judicial service was notable for his outspoken support for the equal protection, due process, and privacy rights of lesbian and gay citizens of the state. He joined the court's unanimous decision in 2002 striking down the state's sodomy law (even though he had voted for a version of the law in 1977 as a state legislator), wrote the 2006 decision striking down an administrative ban on same-sex couples serving as foster parents, and joined a ruling in 2011, stating that a similar ban adopted by voters in an initiative was unconstitutional. He was also involved in the ongoing litigation over marriage equality in Arkansas, and pushed for the Supreme Court to issue a ruling during 2014 upholding a lower court decision striking the state's ban, but was frustrated internally and retired from the court before it could act. Subsequently, after the U.S. Supreme Court ruled in *Obergefell*, the state supreme court dismissed the state's appeal of the trial court decision as moot. After retiring, Corbin gave an interview to the local press describing the behind-the-scenes machinations that delayed a final merits ruling from the state supreme court. *Arkansas Daily Weblog*, Dec. 13.

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EDITOR'S NOTES

This proud, monthly publication is edited and chiefly written by Prof. Arthur Leonard of New York Law School, with a staff of volunteer writers consisting of lawyers, law school graduates, current law students, and legal workers.

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