L G B T
LAW NOTES
May 2017

"G.G.'S CASE IS ABOUT MUCH MORE THAN BATHROOMS"

Senior Circuit Judge Andre Davis Pens Moving Tribute to Gavin Grimm and Attaches It to Routine Order

EXECUTIVE SUMMARY

L G B T LAW NOTES

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4th Circuit Judges Hail Gavin Grimm as a Civil Rights Leader

A pair of federal appeals court judges have saluted Gavin Grimm, a transgender high school senior, as a civil rights leader in the struggle to establish equal rights for transgender people under the law. On April 7, the Richmond-based 4th Circuit Court of Appeals granted a motion by the Gloucester County (Virginia) School Board to vacate a preliminary injunction issued last summer by the U.S. District Court, which had ordered the school district to allow Grimm, a transgender boy, to use the boys' restrooms at the high school during his senior year. *G.G. v. Gloucester County School Board*, 2017 WL 1291219, 2017 U.S. App. LEXIS 6034.

While the court granted the school district's unopposed motion to vacate the Order, a member of the panel, Senior Circuit Judge Andre M. Davis, was moved to write a short opinion reflecting on the case. Circuit Judge Henry F. Floyd directed that Davis's opinion be published together with the 4th Circuit's order, and Judge Paul V. Niemeyer, who had dissented from the 4th Circuit's decision, agreed to the publication.

Davis's eloquent, brief opinion deserves to be read in full. Throughout the opinion, Grimm is referred to by his initials, as the case was filed on his behalf by his mother and stalwart champion in his struggle for equal rights, Deirdre Grimm.

explanation would help the powerful adults in his community come to understand what his adolescent peers already did. G.G. clearly and eloquently attested that he was not a predator, but a boy, despite the fact that he did not conform to some people's idea about who is a boy.

Regrettably, a majority of the School Board was unpersuaded. And so we come to this moment. High school graduation looms and, by this court's order vacating the preliminary injunction, G.G.'s banishment from the boys' restroom becomes an enduring feature of his high school experience. Would that courtesies extended to others had been extended to G.G.

Today, G.G. adds his name to the list of plaintiffs whose struggle for justice has been delayed and rebuffed; as Dr. King reminded us, however, "the arc of the moral universe is long, but it bends toward justice." G.G.'s journey is delayed but not finished.

That Order was quickly stayed by the U.S. Supreme Court, which then agreed to hear the school board's appeal of the Order last fall. However, after the Trump Administration withdrew the Obama Administration's interpretation of Title IX of the Education Amendments of 1972, as embodied in a guidance letter, to which the 4th Circuit had deferred in ordering the district court to issue the Order, the Supreme Court cancelled the scheduled oral argument and returned the case to the 4th Circuit. Although the Order is now vacated, presumably the 4th Circuit still retains jurisdiction to decide whether the district court was correct in its decision to dismiss Gavin Grimm's sex discrimination claim under Title IX in the absence of an administrative interpretation to which to defer, since it was Grimm's appeal of the dismissal that brought the case to the 4th Circuit in the first place.

DAVIS, Senior Circuit Judge, concurring:

I concur in the order granting the unopposed motion to vacate the district court's preliminary injunction and add these observations.

G.G., then a fifteen-year-old transgender boy, addressed the Gloucester County School Board on November 11, 2014, to explain why he was not a danger to other students. He explained that he had used the boys' bathroom in public places throughout Gloucester County and had never had a confrontation. He explained that he is a person worthy of dignity and privacy. He explained why it is humiliating to be segregated from the general population. He knew, intuitively, what the law has in recent decades acknowledged: the perpetuation of stereotypes is one of many forms of invidious discrimination. And so he hoped that his heartfelt

Our country has a long and ignominious history of discriminating against our most vulnerable and powerless. We have an equally long history, however, of brave individuals—Dred Scott, Fred Korematsu, Linda Brown, Mildred and Richard Loving, Edie Windsor, and Jim Obergefell, to name just a few—who refused to accept quietly the injustices that were perpetuated against them. It is unsurprising, of course, that the burden of confronting and remedying injustice falls on the shoulders of the oppressed. These individuals looked to the federal courts to vindicate their claims to human dignity, but as the names listed above make clear, the judiciary's response has been decidedly mixed. Today, G.G. adds his name to the list of plaintiffs whose struggle for justice has been delayed and rebuffed; as Dr. King reminded us, however, "the

arc of the moral universe is long, but it bends toward justice." G.G.'s journey is delayed but not finished.

G.G.'s case is about much more than bathrooms. It's about a boy asking his school to treat him just like any other boy. It's about protecting the rights of transgender people in public spaces and not forcing them to exist on the margins. It's about governmental validation of the existence and experiences of transgender people, as well as the simple recognition of their humanity. His case is part of a larger movement that is redefining and broadening the scope of civil and human rights so that they extend to a vulnerable group that has traditionally been unrecognized, unrepresented, and unprotected.

G.G.'s plight has shown us the inequities that arise when the government organizes society by outdated constructs like biological sex and gender. Fortunately, the law eventually catches up to the lived facts of people; indeed, the record shows that the Commonwealth of Virginia has now recorded a birth certificate for G.G. that designates his sex as male.

G.G.'s lawsuit also has demonstrated that some entities will not protect the rights of others unless compelled to do so. Today, hatred, intolerance, and discrimination persist—and are sometimes even promoted—but by challenging unjust policies rooted in invidious discrimination, G.G. takes his place among other modern-day human rights leaders who strive to ensure that, one day, equality will prevail, and that the core dignity of every one of our brothers and sisters is respected by lawmakers and others who wield power over their lives.

G.G. is and will be famous, and justifiably so. But he is not "famous" in the hollowed-out Hollywood sense of the term. He is famous for the reasons celebrated by the renowned Palestinian-American poet Naomi Shehab Nye, in her extraordinary poem, *Famous*. Despite his youth and the formidable power of those arrayed against him at every stage of these proceedings, "[he] never forgot what [he] could do."

Judge Floyd has authorized me to state that he joins in the views expressed herein. ■

Roy Moore Loses Reinstatement Appeal before "Alabama Supreme Court"

The Alabama Supreme Court rejected Roy Moore's appeal of his suspension as Chief Justice of Alabama on April 19. *Moore v. Alabama Judicial Inquiry Commission*, 2017 WL 1403696, 2017 Ala. LEXIS 36.

The Alabama Supreme Court normally consists of seven justices elected by the people of the state, but when Roy Moore, who was suspended as chief justice by order of the state's Court of the Judiciary on September 30, 2016, sought to exercise his right to appeal that ruling to the state's Supreme Court, all of the other justices recused themselves. What to do? The Supreme Court invoked a special procedure to authorize the Acting Chief Justice (who was appointed to occupy Moore's seat for the duration of his elective term) to "participate" with then-Governor Bentley (who has since resigned because of a sex scandal) to create a substitute supreme court to consider Moore's appeal. They assembled a list of all the retired judges in the state who were deemed "capable of service," then conducted a lottery to compile a list of fifty potential judges, with the first seven names drawn to make up this special substitute version of the court, unless one or more recused themselves or were disqualified for some other reason, in which case they would go back to the list of 50 until they had a full bench.

Moore was suspended because of his activities in opposition to marriage equality. After U.S. District Judge Callie Granade ruled on January 23, 2015 that the Alabama Marriage Amendment and the Alabama Marriage Protection Act, both of which prohibited the formation or recognition of same-sex marriages, were unconstitutional, Moore sprang into action. He undertook various efforts to block implementation of Judge Granade's order by denouncing it as illegitimate, then encouraging and later directing the state's probate judges to refrain from issuing marriage licenses to same-sex couples. As chief justice, Moore both presided over the Supreme Court and acted as the administrative head of the state court system, in which capacity he could issue directives to lower court judges.

As the marriage equality issue rose through the courts and culminated in the U.S. Supreme Court's June 26, 2015 *Obergefell v. Hodges* ruling, finding a federal constitutional right for same-sex couples to marry, Moore remained outspokenly opposed, making every effort both publicly and behind the scenes to stave off the evil day when same-sex marriage might be fully accepted in Alabama. Although he recused himself from some of the Supreme Court's actions after having issued his initial public denunciations of Granade's rulings, he ultimately decided to participate in the court's decision in 2016 to dismiss all pending proceedings and allow the probate judges to do their duty. But Moore wrote separately from the rest of the court, first to justify his decision not to recuse himself despite his prior actions and public statements, and then to inveigh against the federal constitutional ruling, reiterating his view

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that Alabama was entitled as a sovereign state to reject federal interference with its marriage laws.

This led to allegations that he was violating several provisions of the ethical code for judges, and charges were filed against him before the Court of the Judiciary, which found a string of ethical violations and suspended him from office.

In this appeal, Moore challenged the jurisdiction of the Court of the Judiciary to make its decision and contended that he had not violated any of the judicial ethical rules. He also contended that his suspension, which would run for over two years until the end of his elective term, was not warranted and was unduly long: far longer than any past disciplinary suspension of any sitting judge.

The specially-constituted substitute Supreme Court disagreed with Moore on every point, announcing on April 19 its determination, unanimously, that "the charges were proven by clear and convincing evidence and there is no indication that the sanction imposed was plainly and palpably wrong, manifestly unjust, or without supporting evidence," so the court "shall not disturb the sanction imposed."

This might not be the end for Moore as a "public servant," however. Earlier in his career he had been ejected from the state supreme court for defying a federal court order to remove a Ten Commandments Monument he had installed in the lobby of the Supreme Court building. He bided his time and eventually came back and won election to a new term as Chief Justice. On April 26, he announced that he would enter the contest for the U.S. Senate seat that was vacated by Jeff Sessions when he became Trump's Attorney General. Former Governor Bentley had appointed the state's attorney general, Luther Strange, to fill the seat pending a special election, and Strange has already announced he will be a candidate for the Republican nomination. The deadline for candidates to qualify for the primary is May 17 and the party primaries will be held on August 15. If no candidate wins an outright majority for the Republican nomination, a run-off will be held September 26, and the general election is December 12. ■

2nd Circuit Panels Follow *Christiansen* Precedent in Title VII Sexual Orientation Cases

On March 27, a three-judge panel of the New York-based 2nd Circuit Court of Appeals released a ruling in *Christiansen v. Omnicom Group*, 2017 WL 1130183, holding that prior 2nd Circuit decisions blocked any reconsideration by the panel of the question whether sexual orientation discrimination claims can be litigated under Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination because of sex. In an unusual move, two of the judges on the panel concurred in an opinion virtually accepting the argument that the circuit should reconsider and change its position on this question if presented with a petition for rehearing before the full bench of the circuit. The 2nd Circuit has eleven active judges, of whom seven were appointed by Presidents Clinton or Obama, the rest by Republican presidents, holding out hope that an *en banc* review could lead to a favorable circuit precedent. Although the panel ruled against Matthew Christiansen's appeal on the sexual orientation question, it sent the case back to the district court to consider his claim of gender-stereotyping, which the Circuit may allow under the rubric of sex discrimination.

Since then, two different three-judge panels of the 2nd Circuit have issued decisions in other cases presenting the same question: whether sexual orientation discrimination claims are covered by Title VII. In both cases, the panels found themselves bound by *Christiansen* and the prior precedents to reject a sexual orientation discrimination claim.

On April 18, a panel ruled in *Zarda v. Altitude Express*, 2017 WL 1378932, 2017 U.S. App. LEXIS 6578, *per curiam*, that it was bound by circuit precedent to uphold the trial court's dismissal of a sexual orientation discrimination claim. The case involved a gay male skydiver and instructor, since deceased, who was in no way gender-nonconforming–other than his failure to conform with the stereotype that men should be sexually attracted only to women, which the 2nd Circuit does not now recognize as the kind of stereotype that can give rise to a sex discrimination claim.

On April 25, a different panel ruled in *Daniel v. T&M Protection Resources*, 2017 WL 1476598, 2017 U.S. App. LEXIS 7218, a hostile environment case, also *per curiam*, that the district court correctly allowed Otis Daniel to maintain his sex discrimination claim, because the court found that the verbal harassment to which Daniel was subjected by his male supervisor could support a gender stereotyping claim. His supervisor "frequently called him 'homo' and told him to 'Man up, be a man." The court pointedly observed that the case could not be litigated as a sexual orientation discrimination case because of prior 2nd Circuit rulings, including *Zarda* and *Christiansen*.

Attorneys for Christiansen and for Zarda's estate have both indicated that they are filing petitions for *en banc* rehearing.

Attorneys for Christiansen (Susan Chana Lask) and for Zarda's estate executors (Gregory Antollino) have both indicated that they are filing petitions for *en banc* rehearing before the full 2nd Circuit.

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Manhattan Court Finds Former Same-Sex Partner of Adoptive Mother Lacks Standing to Contest Custody of the Child

Acting Manhattan State Supreme Court Justice Frank P. Nervo ruled on April 11 that the former same-sex partner of a woman who adopted a child from Africa after the women's relationship had ended could not maintain a lawsuit seeking custody and visitation with the child based on the relationship that she developed with the child after the adoption took place. *K. v. C.*, 2017 WL 1356080, 2017 NY Misc LEXIS 1624 (N.Y. Sup. Ct., N.Y. Co.). In one of the first applications of the New York Court of Appeals' historic August 2016 ruling in *Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1, Justice Nervo found that plaintiff Kelly Gunn had failed to show by "clear and convincing evidence" that she and her former partner, Circe Hamilton, had agreed to adopt and raise the child together, which would have brought the case within the conceptual sphere, if not the precise holding, of the Court of Appeals' recent precedent. Gunn has announced that she will appeal the ruling to the Appellate Division, First Department in Manhattan, and seek an extension of the twenty-day stay that Justice Nervo put on his ruling.

Justice Nervo's application of the recent precedent was complicated by the limitations of that prior ruling. In that case, which was a consolidation of two separate cases, both cases involved donor insemination situations where the former partners had planned for and carried out the birth of a child within the context of their relationship, with an explicit mutual agreement that they would both be parents of the child, followed by years of living together with the child before the women separated. This new case posed different facts.

In its *Brooke S.B.* ruling, written by the late Judge Sheila Abdus-Salaam, the Court of Appeals had cautiously abandoned its prior bright line test, under which a biologically-unrelated same-sex co-parent was treated as a legal stranger without standing to seek custody or visitation. In *Brooke S.B.*, the court overruled the 25-year-old precedent, and made an exception for situations where a parental relationship was created by mutual consent within the context of donor insemination. "Because we necessarily decide these cases based on the facts presented to us," wrote Judge Abdus-Salaam in that case, "it would be premature for us to consider adopting a test for situations in which a couple did not enter into a pre-conception agreement. Accordingly, we do not now decide whether, in a case where a biological or adoptive parent consented to the creation of a parent-like relationship between his or her partner and child after conception, the partner can establish standing to seek visitation and custody."

Justice Nervo's opinion referred to the parties by first initials, but press reporting after his opinion was released included their names.

Gunn and Hamilton "were in a relationship from 2007 to 2009, entering into a cohabitation agreement on May 18, 2007," wrote the judge. "It is undisputed that during their relationship, they entered into a plan to adopt and raise a child together. It is also undisputed that the parties' relationship deteriorated over time and they entered into a separation agreement on May 28, 2010."

About ten months later, Hamilton learned that a child was available for adoption in Ethiopia and began to take the steps to complete the adoption. Gunn claims that despite their separation, she facilitated the adoption through a substantial monetary payment as part of their separation agreement, which made it possible for Hamilton to "establish a home sufficient to pass inspection by the adoption agency." She also arranged a business trip to be able to travel with Hamilton and the child, Abush, on the London-to-New York part of Hamilton's trip home with the child after obtaining custody of him in Ethiopia. Gunn also presented evidence of her continuing involvement with the child after the return to New York, although Gunn conceded that "her involvement with the child was limited because [Hamilton] would disapprove."

On the other hand, Hamilton argued that the couples' plan to adopt a child and raise the child together "dissolved contemporaneously with the dissolution of the parties' relationship." She argued that Gunn's involvement after Hamilton adopted the child was "only a supportive role as a close friend" of Hamilton and the child. She contended that Gunn was "merely a godmother," not a parent. She also argued that she did not "encourage, facilitate or condone a parental relationship" between Gunn and the boy, who is now seven years old.

Thus, this case did not precisely map the factual contours approved by the Court of Appeals in *Brooke S.B.* In attempting to adapt that ruling and apply it to these facts, Justice Nervo interpreted the earlier case to extend to an adoption situation, but only if the plaintiff could show, by clear and convincing evidence, that the parties had planned to adopt the child and raise it together and carried out their plan within the context of their continuing relationship. While these parties had such a plan prior to their separation, he found, in order to meet this test, the plan had to have continued through the adoption process and the raising of the child, which he held did not occur in this case.

The timing of Gunn's lawsuit is interesting. Although Hamilton adopted Abush in 2011, Gunn did not file her lawsuit until September 1, 2016, two days after the Court of Appeals decided *Brooke S.B.* Prior to that decision, of course, her suit would have been blocked by the precedent that the Court of Appeals overruled, *Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991). In an April 20 article about the case, the *New York Times* reported that Gunn went to court "to prevent her former partner . . . from moving to her native London" with the child. Gunn sought immediate relief when filing her complaint, which first went to Justice Matthew F. Cooper, who issued

an interim order restraining Hamilton from relocating Abush to London while the case was pending. The matter was then assigned to Justice Nervo, who scheduled a hearing to begin just a week later, on September 8. The hearing continued sporadically until February 16, 2017. Hamilton had responded to the complaint on September 6 with a motion to dismiss the case. Gunn finished presenting her witnesses on November 23. After evaluating Gunn's evidence, Justice Nervo denied Hamilton's motion to dismiss, finding that Gunn's evidence, as yet uncontradicted, had established a *prima facie* case, a basis for concluding that she had a potential claim to parental standing.

However, after hearing Hamilton's evidence, which ended on February 16, Justice Nervo concluded the factual and legal issues against Gunn, granted Hamilton's motion to dismiss, denied Gunn's motion and vacated the interim orders that had been issued by Justice Cooper. He also dissolved interim orders that had enabled Gunn to continue seeing the child while the case was ongoing. However, recognizing that Gunn would likely appeal and could have grounds to argue that the Court of Appeals' precedent should be given a broader reading, Nervo stayed his order for twenty days. A prompt appeal and petition to the Appellate Division to preserve the interim relief might preserve the status quo while an appeal is considered.

Justice Nervo's opinion includes a lengthy summary of the testimony presented by both parties, which led the judge to conclude that Gunn had fallen short of showing by clear and convincing evidence that she had a parental relationship with the child based on a mutual agreement with Hamilton. "Upon the presentation of the evidence of both parties over 36 days of testimony, constituting a hearing transcript of 4,738 pages, 215 exhibits on behalf of petitioner and 126 exhibits on behalf of respondent, the court finds the petitioner has on numerous occasions stated that she did not want to be a parent and gave no indication to either respondent or third parties that she either wanted this role or acted as a parent," wrote Nervo. "Therefore, she has failed to establish by clear and convincing evidence that she has standing as a parent under Domestic Relations Law Section 70, as established *In the Matter of Brooke S.B. v. Elizabeth A.C.C.*"

The court never addressed the best interest of the child, usually a key finding in a custody dispute, because in order to put that issue into play, a plaintiff has first to establish her status as a parent or, under New York cases, show extraordinary circumstances in order to invoke the court's authority to require a biological or adoptive parent to engage in a contest about the best interest of her child. Part of Gunn's argument on appeal will likely be that *Brooke S.B.* has implicitly overruled the extraordinary circumstances requirement in cases involving same-sex partners who had jointly planned to raise a child together, even if the case does not involve donor insemination or a continuous relationship of the women prior to the adoption.

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Reading through Justice Nervo's summary of the evidence, which is unlikely to be upset on appeal, as appellate courts generally refrain from second-guessing the factual findings of trial judges in custody and visitation cases unless there is an appearance of substantial bias against a party or failure to account for significant evidence in the hearing record, it sounds like he concluded that although Gunn had formed a relationship with Abush and there were some indications that it was deeper than a mere acquaintanceship or babysitter kind of relationship. On the other hand, there was significant evidence that Gunn had expressed reservations during her relationship with Hamilton about the adoption plans and had never directly communicated to Hamilton after the adoption that she desired to take on the responsibility of being a co-parent of the child. Since the Court of Appeals emphasized in its decision that standing would arise from a mutual agreement between the child's biological or adoptive parent and her same-sex partner, and there was no sign of such an agreement at or after the time of this adoption, the case could not be made to fit precisely into the Court of Appeals precedent.

On the other hand, it may be open to the Appellate Division to take a different view, especially since the Court of Appeals disclaimed making a ruling on factual situations different from those in the cases it was deciding. Clearly, the Court of Appeals rejected the bright-line test of the old *Alison D. v. Virginia M.* case. Whether it will countenance a broader exception to the standing rules than it carved out in *Brooke S.B.* is uncertain.

Gunn's attorney, Nancy Chemtob, told the *New York Times*, "I believe that this decision doesn't follow *Brooke*." The *Times* reported that "Bonnie Rabin, one of Ms. Hamilton's lawyers, said the ruling should allay concerns that a trusted caretaker could suddenly claim parental rights under the state's expanded definition of parentage. 'That would be scary to parents,' she said." ■

2nd Circuit Rejects Gay Brazilian Man's Refugee Claims, Despite Evidence About Anti-Gay Violence in Brazil

Opening up a gulf in reasoning with the 9th Circuit, which has insisted on a distinction between the official policies of a government and the facts on the ground in evaluating whether gay people would suffer persecution or worse in a particular country, a panel of the U.S. Court of Appeals for the 2nd Circuit affirmed a ruling by an Immigration Judge (IJ) and the Board of Immigration Appeals (BIA) that a gay man from Brazil could not win refugee status in the United States, despite the documented high rate of murders of gay men in that country and the asserted inability of the government to do anything about it. *Dias v. Sessions*, 2017 WL 1437117, 2017 U.S. App. LEXIS 7088 (2nd Cir., April 24, 2017) (not published in F.3d).

Because the appeal was decided under the 2nd Circuit's special summary proceeding method to deal with the huge caseload of refugee appeals generated in the New York metropolitan region, the *per curiam* opinion emanating from a panel consisting of Circuit Judges Reena Raggi, Peter W. Hall, and Denny Chin is light on facts. The Petitioner, a native and citizen of Brazil, apparently came to the attention of the Department of Homeland Security as a result of a criminal conviction, but the court does not state any details about that, or the circumstances under which he came to be in the United States and subject to removal. Petitioner applied for asylum, withholding of removal, and/or protection under the Convention against Torture (CAT), all of which were denied by an Immigration Judge on May 7, 2014, in a decision that was affirmed by the Board of Immigration Appeals (BIA) on September 9, 2015. In addition to finding that the Petitioner failed to meet the burden of showing he would likely be subjected to persecution or torture if removed to Brazil, the IJ found that he could relocate within Brazil to a safer place than that from which he came. The BIA did not affirm on the relocation finding, which was unnecessary in light of the finding on the merits.

"Although [Petitioner] did not articulate it as such," wrote the court, "his claim is that private parties have a pattern or practice of persecuting gay men in Brazil, which the government is unable to stop. [He] predicts that people in Brazil will discover that he is gay either from the Internet article about his crime, from his family, or from a future relationship with a man. He asserts that homophobic violence is rampant in Brazil, citing a State Department report that killings based on sexual orientation rose from 2011 to 2012, and a Chicago Tribune article on a 1995 study that found 59% of gay Brazilians had suffered some type of homophobic violence. He cites a study finding that a gay person's risk of being killed there is 785 percent greater than in the United States and several high-profile cases of homophobic murders. He acknowledges that Brazil has gay marriage, active gay rights groups, and certain cities with anti-discrimination laws, but argues that this evidences shows that Brazil is willing but unable to stop the violence."

The BIA, in disagreeing with these arguments, "acknowledged the evidence of violence and discrimination against gay Brazilians." But the agency put more weight on the "official" developments – gay rights groups, gay marriage, annual gay pride parade, and city ordinances banning anti-gay discrimination – to find that the Petitioner had "failed to show the Brazilian government would be unwilling or unable to control those responsible for the violence and discrimination."

The court commented: "Although the IJ and BIA decisions are sparse on reasoning, substantial evidence supports that finding." The court emphasized that the Chicago Tribune article on which Petitioner relied was more than twenty years old, and that the State Department report, while citing "338 killings based on sexual orientation, . . . acknowledged the Brazilian government's efforts to fight discrimination and promote gay rights."

The standard for review of a BIA determination is not a *de novo* reconsideration, but rather a determination whether the agency should have been "compelled" by the evidence in the record to rule in favor of the Petitioner. Under this standard, the 2nd Circuit panel found that the BIA was not "compelled" to grant asylum or withholding of removal to the Petitioner.

Turning to the CAT claim, the court found that the agency "reasonably concluded that his predicted chain of events was speculative. Even if it is likely that [he] will have a romantic relationship with a man, the record did not compel the agency to find it more likely than not that [he] will be tortured by, or with the acquiescence of, Brazilian authorities."

Petitioner is represented by Robert C. Ross of West Haven, CT.

The 2nd Circuit panel's approach deviates from that recently taken by the 9th Circuit in appeals by gay men from Mexico, another country in which the movement for marriage equality has made major gains, some municipalities now ban sexual orientation discrimination, and formerly anti-gay criminal laws have been reformed, but anti-gay violence at the hands of criminal gangs, police officers, and family members of gay people remains a major concern. In *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051 (9th Cir. 2017), recently reiterated in *Hernandez v. Sessions*, 2017 WL 1404699 (9th Cir., April 20, 2017 – see below), the court "made clear" that its earlier precedents on refugee claims by gay Mexicans "falsely equated legislative and executive enactments prohibiting persecution with on-the-ground progress" and insisted that the U.S. immigration authorities must look beyond such "official" positions to consider the situation that gay people actually face in countries where there is pervasive anti-gay hostility about which the governments can do little. The 9th Circuit has been particularly emphatic in protecting transgender refugee applicants. In cases where local police officials are part of the problem, the 9th Circuit has chided immigration authorities for failing to recognize such harassment as being attributable to the government. The Supreme Court has yet to decide any case involving a claim for refugee status in the United States by a gay or transgender applicant. ■

Washington Supreme Court Rejects Religious Upbringing as a Pretext in Custody Disputes

Custody disputes are especially messy when three kids are involved—just watch *Mrs. Doubtfire* to see for yourself! Even so, the movie showed us how good things might still come out of a bitter divorce. In the case of *In re Marriage of Black*, the Washington Supreme Court unanimously ruled that trial courts are prohibited from referencing a parent's sexual orientation in a custody dispute, even though there are other grounds for denying custody to a homosexual parent. *In re Marriage of Black*, 2017 WL 1292014, 2017 Wash. LEXIS 434 (Apr. 6, 2017). Thus, the court finally addressed a loophole created by the Washington Court of Appeals, which allowed anti-gay court officials to use a child's religious upbringing as a pretext for denying custody to a homosexual parent. *See In re Marriage of Wicklund*, 84 Wn. App. 763, 932 P.2d 652 (1996). Writing for the entire bench, Chief Justice Mary E. Fairhurst expressed the court's doubt that the trial court provided Rachelle Black with a fair proceeding, as the record indicated that the trial court was heavily influenced by the guardian ad litem's (GAL) improper bias against Rachelle's sexual orientation. Thus, the court reversed and remanded the trial court's decision to award Charles Black primary residential custody and sole decision-making authority regarding the children's education and religious upbringing. Additionally, the court reversed and remanded the trial court's denial of spousal maintenance to Rachelle.

Rachelle and Charles married in 1994 and had three sons together. After their first son was born, Rachelle agreed to be a stay-at-home mother while Charles became the primary wage earner. The couple enrolled their children in private Christian schools, and attended a conservative Christian church that viewed homosexuality as a sin. This family dynamic went unchanged until December 2011, when Rachelle told Charles she believed she might be gay. After Charles told their friends and family of Rachelle's sexual orientation (without her permission), Rachelle began sleeping in a basement room. She also began a romantic relationship with a woman, and spent more time away from home. Rachelle filed for dissolution in May 2013. She and Charles began custody proceedings in August 2014.

The trial court heavily relied on the reports and recommendations prepared by Kelly Theroit Leblanc, the GAL appointed to the Blacks' case. Leblanc believed the children would be uncomfortable with Rachelle's homosexuality due to their religious upbringing. Thus, Leblanc recommended that it would be in the children's best interest to award Charles primary residential custody and sole decision-making authority regarding the children's education and religious upbringing. Should any doubts remain about Leblanc's anti-gay bias, she also recommended broad prohibitions on Rachelle's ability to interact with the children, including: no discussing religion, homosexuality, or any other "alternative lifestyle concepts"; not bringing the children to movies and events; not giving them symbolic clothing or jewelry; and not engaging in any conduct reasonably related to homosexuality. Subsequently, the Washington Court of Appeals reversed the prohibitions on Rachelle's conduct pursuant to its prior decision in *Wicklund*; however, it upheld the residential provisions of the parenting plan and the denial of spousal maintenance, both of which were now on appeal.

Under Washington state law, trial courts are permitted to consider a number of statutory factors when developing a parenting plan in a custody dispute. However, they are specifically prohibited from considering a parent's sexual orientation unless there is an express showing that the parent's sexual orientation poses harm to the children. See *In re Marriage of Cabalquinto*, 100 Wn.2d 325, 699 P.2d 886 (1983). Interestingly, *Cabalquinto* was also reviewed *en banc* and unanimously decided by the Washington Supreme Court. Though there were other tenable grounds for the custody order in *Cabalquinto*, the court completely reversed and remanded it because the trial court improperly referenced a party's sexual orientation. The court expressly recognized that even though sexual orientation may have not been a determining factor, such an unnecessary reference typically indicated the contrary. *Wicklund* deviated from *Cabalquinto* in this regard. There, the Washington Court of Appeals reviewed a custody order similar to the one issued to the Blacks—one parent was awarded primary residential custody, while the other was prohibited from "practicing homosexuality" in front of their children, who were raised as Jehovah's Witnesses. Instead of reversing and remanding both parts of the trial court's order, the appellate court only reversed the prohibition on the father's conduct. The appellate court completely missed the rationale expressed in *Cabalquinto*, and upheld the residential provision because it could be supported by factors other than the parent's sexual orientation.

The court reasserted *Cabalquinto*'s requirement to remand a trial court's custody order when sexual orientation is inappropriately referenced.

Realizing the error made in *Wicklund*, the court here reasserted *Cabalquinto*'s requirement to remand a trial court's custody order when sexual orientation is inappropriately referenced. Chief Justice Fairhurst wrote

extensively about the discrimination the LGBT community faces, and how a court may be tempted to penalize a parent for her sexual preferences, rather than base a custody decision on the best interests of her child. Thus, the court rejected Charles's assertion that the appellate court's decision should be upheld because Rachelle's sexual orientation was merely used to provide context for their separation, rather than as a determinative factor.

Furthermore, the court concluded that the bias against Rachelle's sexual orientation was more determinative to the trial court's custody order than Charles suggested. Chief Justice Fairhurst quoted a number of problematic statements made by Leblanc, including the latter's repeated references to Rachelle's sexual orientation as a "lifestyle choice," her belief that the children may be bullied because of their mother's sexual orientation, and her recommendation to prohibit Rachelle's ability to discuss religion with the children while not imposing the same restriction on Charles. The Chief Justice even went on to say that Leblanc's view of Charles as the more stable parent stemmed from a belief that Rachelle caused the separation by choosing to terminate the marriage, live with her partner, and disrupt her relationship with her children! It is no wonder that the court decided to remand the Blacks' custody dispute to a different judge, although two judges disagreed, in part, with remanding to a different trial judge, pointing out that it was the GAL, not the trial judge, who appeared biased, and that the trial judge had made clear that Rachelle's sexual orientation was "irrelevant" to his decision. On the other hand, the two judges agreed that "a disinterested observer" might conclude that "impartiality on remand" was unlikely, so they reluctantly concurred in sending the case to another judge. – *Timothy Ramos (NYLS '19)*

[Rachelle Black was represented by Amanda J. Beane, Kelly F. Moser, Julie Wilson-McNerny, all of Perkins Coie LLP, and David J. Ward, of Legal Voice. The court received seven amicus briefs in support of Rachelle Black's appeal, including from the ACLU, Seattle University Law School faculty, the Pacifica Law Group LLP.]

Nebraska Supreme Court Rules in Favor of Gay Foster Parents

On April 2, 2017, the Nebraska Supreme Court sided with three same-sex couples and struck down regulations restricting gay and lesbian couples from being considered and selected as foster or adoptive parents. *Stewart v. Heineman*, 296 Neb. 262, 2017 Neb. LEXIS 49, 2017 WL 1293658. At issue was a 1995 administrative memorandum (Memo 1-95) propounded by the state's Division of Children and Family Services (previously known as the Department of Social Services) which provided in pertinent part: ". . . it is the policy of the Department of Social Services that children will not be placed in the homes of persons who identify themselves as homosexuals. This policy also applies to the area of foster home licensure in that, effective immediately, no foster home license shall be issued to persons who identify themselves as homosexuals."

One plaintiff-couple, Greg Stewart and Stillman Stewart, sought a foster home license in 2012, but were told by a DHHS representative that they were barred under DHHS policy. A second plaintiff-couple, Todd Vesely and Joel Busch, began the process of becoming foster parents in 2008 but, in 2010, the then-director of the Division of Children and Family Services told them that DHHS policy barred licensing unrelated adults living together. None of the plaintiffs had actually been denied a license or placement, a fact relied upon by the defendants throughout the case to claim plaintiffs lacked standing.

The plaintiffs filed suit in 2013 alleging equal protection and due process violations under the Nebraska and federal Constitutions and violations of 42 U.S.C. § 1983 of the Civil Rights Act. Specifically, they asserted that sexual orientation constituted a suspect class and that prospective foster and adoptive parents were being subjected to differential treatment for which there was neither a compelling interest nor even a rational basis. The plaintiffs requested: (1) a declaration that Memo 1-95 is unconstitutional, void, and unenforceable; (2) an order enjoining defendants from enforcing the same; and, (3) an order requiring defendants to evaluate applications of all prospective foster and adoptive parents consistently.

After the court denied defendants' motion to dismiss for lack of standing and failure to state a claim, both parties moved for summary judgment in January of 2015. Plaintiffs submitted into evidence affidavits, letters from DHHS, internal emails, as well as transcripts of depositions of several DHHS employees in support of their motion.

One DHHS employee wrote to Vesely and Busch that "DHHS policy 'allows for an exception'" that could allow a child to be placed with one, but not both of them as "'second parent adoptions'" were impermissible by a second person unmarried to the first and, at the time, the couple could not marry. Additional deposition testimony and letters submitted revealed what was termed the "Pristow Procedure," so-named after the Director of the Division of Children and family Services for DHHS. Memo 1-95 was still in force and effect when plaintiffs applied or inquired about licensing but, according to DHHS employees, the policy had been "modified by practice" by Director Thomas Pristow, who verbally instructed certain employees that homosexual applicants could be considered for foster or adoptive placements. Under the Pristow Procedure, however, homosexual and heterosexual applicants were treated differently.

Under the Pristow Procedure, when a heterosexual couple applied for foster or adoptive placements, a caseworker would either recommend or not recommend placement to their supervisor and, if recommended, placement was effective if supervisor agreed. By contrast, if a caseworker recommended placement in the home of a homosexual couple, then the placement could only take effect after five levels of review and approval: the caseworker, the caseworker's supervisor, the administrator, the service area administrator and Pristow himself.

Pristow offered conflicting testimony as to the rationale for the different standards. On the one hand he claimed that there was no reason that unmarried persons living together or homosexuals should be treated differently from heterosexual, married couples in the licensing or placement of children in foster or adoptive homes. On the other hand, he testified that Nebraska's anti-gay laws somehow factored into his decision-making, stating, "'[T]his is a conservative state, and I'm cognizant of that, and I want to make sure that . . . my process . . . reflects what the best interest of that child is.'"

Plaintiffs also offered evidence that new and old employees alike experienced confusion over exactly what DHHS policy was. Some were given verbal instructions regarding the "Pristow Procedure" while, at the same time, Memo 1-95 remained posted on the DHHS website as official policy.

At the summary judgment hearing, plaintiffs argued DHHS discriminated on the basis of sexual orientation via the five-tier Pristow Procedure noting, among other things, that convicted felons were subjected to fewer tiers of review than homosexual applicants.

The defendants argued that there was no longer a case and controversy because Memo 1-95 was no longer the policy or practice of DHHS. Here, defendants conceded Memo 1-95 had not been rescinded, although it was no longer posted on the Department's website, but they argued that formal rescission was unnecessary given the Pristow Procedure. As to the Pristow Procedure, defendants claimed equal protection does not necessitate absolute equality and the determinative factor in deciding placement in homosexual or heterosexual homes was the same, i.e. the best interests of the children. According to defendants, the five-tier review for homosexual applicants existed to prevent bias against gay and lesbian couples.

The motion court ruled for plaintiffs and defendants appealed. The defendants did not contest the underlying merits of the motion court's determination. Rather they claimed error as to (1) receipt of hearsay evidence, (2) granting summary judgment given genuine issues of fact as to the justiciability of the case, (3) plaintiffs' standing; (4) deciding a case that was, according to them, "moot" and, (5) awarding plaintiffs' attorney fees.

The court found no merit to defendants' assignment of error and upheld the motion court's judgment in all respects, in an opinion by Justice John F. Wright.

As to justiciability and standing, the court considered the true issue for decision to be whether the case was ripe for decision. The court then had to decide the question of the fitness of the issues for judicial decision and the hardship to the parties of withholding a decision. The court stated that the publication of Memo 1-95 on DHHS' official website was legally indistinguishable from a sign reading "Whites Only" on the door to an office hiring individuals for employment. Relying on a number of U.S. Supreme Court cases, the court found that the issue raised by the plaintiffs was neither hypothetical nor speculative, as defendants claimed. Here the court wrote: "The U.S. Supreme Court has rejected the argument made by defendants that persons claiming denial of equal treatment must demonstrate an ultimate inability to obtain a benefit to meet the justiciable threshold." The court pointed to a body of case law supporting standing where "stigmatic injury" stemming from discriminatory treatment is claimed.

The court went on: "[t]here was a barrier to equal treatment and serious non-economic injuries that plaintiffs would be imminently subjected to upon application to become parents." Whether ultimately accepted or rejected, plaintiffs "would suffer stigmatic harm stemming from systemic unequal treatment." The plaintiffs did not first have to apply and be denied licensure or placement and "forward-looking relief" was appropriate so as "to avoid suffering the discrimination inherent in memo 1-95 and the Pristow Procedure". The court rejected defendants' claim that the Pristow Procedure existed to protect gay and lesbian applicants, noting that if this were the case DHHS would review appeals from rejections rather than mandating review of approvals of gay and lesbian applicants.

As to mootness, the court found that the plaintiffs had sufficiently shown that they would be benefited if the relief they sought was granted. First, the court noted that the policy expressed in Memo 1-95 remained in force at the time the plaintiffs filed their lawsuit. The Pristow Procedure was itself impermissibly discriminatory and, even had it been proper, this would not have changed the fact that Memo 1-95 was never formally rescinded and Pristow intentionally avoided formal rescission, allegedly to avoid provoking a reaction from the homophobic state legislature. Indeed, DHHS employees were only told about the Pristow Procedure if and when homosexuals applied for licensure or placement. And, while DHHS removed Memo 1-95 from its website before a judgment had been handed down, the court stated that "it is well recognized that 'a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued.'" There was also, of course, no evidence that the department had actually ended its unlawful conduct, merely its assertion that it was no longer applying an unequal procedure.

The court did not address defendants' hearsay arguments on the basis that articles the defendants claimed were hearsay played no role in the court's determination of justiciability. The court also affirmed the lower court's attorney fee award.

[The plaintiffs-appellees were represented by Amy A. Miller and Leslie Cooper of the ACLU and Garrard R. Beeney and W. Rudolph "Rudy" Kleysteuber of Sullivan & Cromwell, LLP, as cooperating attorneys. Amicus briefs were filed on behalf of the Nebraska Appleseed Center for Law in the Public Interest and the Child Welfare League of America, both in support of the plaintiffs.] – *Matthew Goodwin*

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

Federal Court Awards Summary Judgment to "Unique" Family on Federal and State Housing Discrimination Claims

U.S. District Judge Raymond P. Moore ruled in *Smith v. Avanti,* 2017 WL 1284723, 2017 U.S. Dist. LEXIS 5477 (D. Colo. Apr. 5, 2017), in favor of a same-sex couple, one of whom is transgender, in a housing sex discrimination case brought under the federal Fair Housing Act (FHA) and Colorado's Anti-Discrimination Act. The plaintiffs, two women who have been married for more than five years and have two minor children, alleged that a landlord turned down their application to rent two residential properties because of their sex or gender identity, sexual orientation, and familial status. While the landlord initially seemed willing to rent to the couple, upon meeting them in person, she refused to rent to them because of their "uniqueness," and because she feared doing so would jeopardize her position in the community.

This is the first ruling to extend FHA protections based on sexual orientation or gender identity.

According to plaintiffs' 19-page complaint, Tonya and Rachel Smith (the Smiths) are a married lesbian couple. Rachel is a transgender woman, and since 2014 has taken steps to affirm her female gender identity. Together, they have two young sons, who, at the time of the complaint, were 5-years-old and 15-months-old. In or around April 2015, the Smith's landlord at the time informed them that they needed to move out of their home because the property was going to be sold.

On April 24, 2015, Tonya found a Craiglist.com advertisement for a two-bedroom townhouse in Gold Hill, Colorado, that met all of their needs, including amenities, budget, and proximity to nature and a "Waldorf-style" education for their sons. In an email to the advertiser, Deepika Avanti, Tonya expressed their family's sincere interest in renting the townhouse, referring to it as what seemed like their "dream home." In describing her family in that same email, Tonya mentioned that Rachel was transgender. Avanti responded, requesting a photo of the family and scheduled a meeting with the Smiths at the townhouse that same evening.

The Smiths viewed the townhouse, and, at Avanti's request, also viewed a more expensive three-bedroom home. During their visit, they also met with the couple and their toddler who lived next door to the two-bedroom townhouse. That night, Avanti emailed Tonya and said that she would not rent either residence to the couple. She explained that the couple next door expressed concern over the Smiths' young children and potential noise, and that after having spoken with her husband, they decided in a "small town" like Gold Hill they needed to maintain their "low profile."

The next morning on April 25, 2015, Tonya emailed Avanti, asking what she meant in regard to keeping a "low profile." Avanti responded: "Your unique relationship would become the town focus, in small towns everyone talks and gossips, all of us would be the most popular subject of town, in this way I could not be a low profile." Ultimately, Avantit would not rent to the Smiths because of their "uniqueness." They were not able to find another suitable home before they were forced to move and had to move in with Rachel's mother. Eventually, on July 1, 2015, they moved into an apartment in Aurora, Colorado, that was substantially less accommodating of their needs, including the fact that Rachel's commute to work took one hour (rather than 20 minutes) and the type and quality of education available for their sons was not as appealing as in Gold Hill.

Therefore, the Smiths brought suit in the U.S. District Court for the District of Colorado against the landlord. Their attorneys, from Lambda Legal and Holland & Hart's Denver office, successfully argued that the "uniqueness" of the Smith's relationship, of which defendant referred, is the fact that they "defy heterosexually-defined gender roles," and Avanti's subsequent refusal to rent to them constituted impermissible housing discrimination. Specifically, the Smiths asserted claims for sex discrimination and discrimination on the basis of familial status in violation of the FHA, as well as claims for sex discrimination, sexual orientation discrimination, and discrimination on the basis of familial status in violation of Colorado's Anti-Discrimination Act.

Judge Moore granted summary judgment to the Smiths on all five claims. Significantly, the court held that the Smiths were entitled to summary judgment on their FHA sex discrimination claim for two distinct reasons: First, because the FHA prohibits discrimination "for failure to conform to stereotype norms concerning to or with whom a woman should be attracted, should marry, and/or should have children;" and second, because the FHA prohibits discrimination against transgender individuals because of their gender-nonconformity. As the FHA does not explicitly include sexual orientation or gender identity as enumerated protections, and because the Tenth Circuit has not gone as far as other circuits in recognizing that Title VII's analogous protections necessarily extend to sexual orientation or transgender status, this result astonished many commentators who followed this case intently and hailed it as an important ruling on gender identity discrimination claims under the FHA. – *Michael Leone Lynch*

Michael Leone Lynch is a law clerk for Justice Paul Feinman of the Appellate Division of the Supreme Court of the State of New York, First Department.

Autistic Student Subjected to Homophobic Bullying May Proceed on Title IX and Equal Protection Claims

In an early application of the 7th Circuit's ruling in *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (Apr. 4, 2017), U.S. District Judge James D. Peterson of the Western District of Wisconsin (which is in the 7th Circuit) ruled that an autistic man who used to be a student in the Eau Claire Area School District can maintain his action under Title IX and the Equal Protection Clause on a claim that he was subjected to harassment based on sex-stereotyping and a perception by other students that he was gay, and that school authorities who were informed of the harassment did not take any reasonable steps to address the situation. *Bowe v. Eau Claire Area School District*, 2017 WL 1458822, 2017 U.S. Dist. LEXIS 61496 (D. Wis., April 24, 2017).

Connor Bowe also asserted claims under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1974, as well as Title VI of the Civil Rights Act. Wrote Judge Peterson, summarizing the complaint, "Bowe's schoolmates bullied him for many years. They called him names, such as 'gay,' 'queer,' 'fag,' 'pussy,' 'stupid,' and 'butt boy.' They shoved him and threw things at him. 'At some point prior to' February 2011, when Bowe was about to turn 14, [Principal Tim O'Reilly] and non-party Kevin Stevens, another District official, told some of Bowe's classmates that Bowe suffered from autism. Bowe's parents did not consent to the disclosure of Bowe's disability. The bullying continued, and in fact grew more serious. Between February 2011 and February 2014, Bowe's classmates called him 'stupid,' 'fat,' 'weak,' 'fag,' 'pussy,' 'shit stain,' and 'bubble butt.' They accused him of having 'mental deficiencies' and told him to 'go fucking die.' They threw things at him, threatened to hurt him, 'physically assaulted him,' threw eggs at his house, and left a bag of feces at his house. Bowe and his parents complained to [Principal David] Oldenberg, O'Reilly, and other District officials about the bullying multiple times a year each year from 2010 to 2015, but no District official took any action to end the bullying. Because of the bullying, Bowe's grades fell significantly and he was prevented from fully participating in some of his classes." We have reproduced the court's summary in full so that readers can appreciate the severity of abuse Bowe claims to have suffered.

Bowe filed his complaint on November 14, 2016. The defendants moved to dismiss. They argued, as to the ADA and Rehabilitation Act claims, that Bowe had not alleged "facts sufficient to show that he was harassed based on his disability or that the harassment was sufficiently severe or pervasive," according to Judge Peterson's description of the motion. Who are they kidding? They tried to argue that because just a few of the items of verbal harassment might be linked to Bowe's autism, he could not state a claim under the disability discrimination laws. Peterson rejected that argument. "When some incidents of harassment are alleged to be based on the plaintiff's protected status, the court may consider allegations of other, more generalized harassment when determining whether the alleged harassment was severe enough to state a peer-harassment claim. One may reasonably infer from Bowe's allegations that the totality of the harassment he endured was so severe that it changed the conditions of his education and created an abusive education environment."

"One may reasonably infer from Bowe's allegations that the totality of the harassment he endured was so severe that it changed the conditions of his education and created an abusive education environment."

As to the Title IX sex discrimination claim, Peterson rejected the defendants' argument that "Bowe has not plausibly alleged that he was harassed on the basis of sex." To the contrary, he wrote, "As both parties recognize, allegations that a plaintiff was 'harassed because of a failure to adhere to specific sexual stereotypes' are sufficient to satisfy this element," citing *Hively*. He noted a district court decision from Indiana that found that it was reasonable to infer harassment because of "failure to adhere to traditional male stereotypes" when a victim was called "gay" and "faggot" by bullies. While conceding the defendants' contention that some courts have described as a "subtle" issue under Title IX the inference to be drawn when "young children" use "gendered words" to bully other children, Peterson pointed out that the cases defendants were relying on "show that the use of such words by middle- and high-school students may constitute sexual harassment." Here, he wrote, "the consistent pattern of gender stereotype slurs alleged by Bowe makes it easy to infer that his classmates harassed him because of his failure to adhere to traditional gender stereotypes."

In addition to his statutory claims, Bowe sought to hold two District officials liable for an equal protection violation under the 14th Amendment, asserting a "class-of-one" equal protection claim. Defendants argued that he had failed to allege that he was treated differently from others similarly situated. (What? Are they claiming that all students who complained of harassment were similarly blown off or ignored by school administrators?) Peterson rejected this argument, relying

on *Miller v. City of Monona*, 784 F.3d 1113 (7th Cir. 2015), for the proposition that "'plaintiffs alleging class-of-one equal protection claims do not need to identify specific examples of similarly situated person in their complaints,' at least when the complaint does not otherwise reveal a rational basis for the difference in treatment." Here, wrote Peterson, "Bowe alleges that O'Reilly and Oldenberg knew about the ongoing harassment but took no action to stop it. Taking these allegations as true, there is no rational basis for their treatment of Bowe. So Bowe's equal protection claims will survive defendants' motion to dismiss."

The defendants also argued that because Bowe could have asserted claims under the Individuals with Disabilities Education Act (IDEA), he was required to file his charges with the Department of Education and exhaust administrative remedies before filing suit, but Peterson was unpersuaded, finding that Bowe's claims arose independently under the various discrimination laws he cited, and did not require administrative exhaustion. At this point, the now 20-year-old Bowe is seeking a remedy for past actions, not suing under IDEA for an order to the school district to ensure that he receive the "free appropriate public education" promised under IDEA.

However, Peterson noted that Bowe "made no argument in support" of his direct ADA and Rehabilitation Act claims (and a racial discrimination claim under Title VI) in responding to the motion to dismiss, and so those claims were waived and would be dismissed in response to the district's motion. Peterson also denied Bowe's request to allow him to file an amended complaint to make up for any pleading deficiencies, finding that the original complaint, which withstood the motion to dismiss under Title IX and the Equal Protection Clause, was adequate to support his claims for the relief he is seeking. Thus, Peterson denied the defendants' motion to dismiss the Title IX and Equal Protection claims, on which the case can proceed.

Bowe is represented by Paul A. Kinne, of Gingras, Cates & Luebke, S.C., Madison, WI. ■

7th Circuit Affirms Refusal to Reopen Asylum Case for Petitioner Claiming to be Homosexual

A panel for the U.S. Court of Appeals for the Seventh Circuit has ruled in *Barragan-Ojeda v. Sessions*, 2017 WL 1244892 (7th Cir. April 5, 2017), that the Petitioner's assertion that he was homosexual and feared persecution if returned to Mexico did not satisfy the regulatory evidentiary requirements to warrant remanding his case for further consideration, and found that the prior ruling by an Immigration Judge (IJ) violated none of his due process rights.

Petitioner had been placed into removal proceedings immediately upon entering the United States without inspection. He was granted a continuance to find an attorney and present a case, and eventually sought asylum, *pro se*. He claimed past persecution to his family and that he also was persecuted at work because he was considered effeminate, but denied he was gay. The IJ denied his applications. After appealing the case having retained counsel, Petitioner then claimed that he was homosexual, and feared persecution in Mexico because of his sexual orientation. The Board of Immigration Appeals (BIA) found that Petitioner's request should have been formatted as a motion to remand the case for further consideration of new evidence, and ruled that under the appropriate legal framework, Petitioner's request was not sufficient for remand because it did not establish that he was submitting previously-unavailable evidence.

On appeal to the Seventh Circuit where Petitioner claimed that both the BIA erred in failing to remand his case for further consideration but that also, for the first time, that the IJ made procedural due process errors, Judge Kenneth F. Ripple wrote for a panel that Petitioner's claims did not meet the applicable legal standards.

First, Judge Ripple found that while the Board may not in certain instances rule on claims of constitutional violations, Petitioner's failure to raise the alleged issues on appeal with the BIA meant that he could no longer make them to the court. Judge Ripple ruled that the alleged errors could have procedurally been resolved by the BIA, that failing to raise them at the BIA level constituted a failure to exhaust administrative remedies, and that therefore the issue could not be considered on review by the court.

The attorney's allegations could not by themselves support a motion to remand the case for further consideration.

With respect to the request for asylum as a gay man, Judge Ripple noted that it was Petitioner's attorney's arguments, and not Petitioner's sworn statement in support of his request, which alleged many of the material facts warranting remand. Further, without any record evidence and without Petitioner's sworn statement alleging the reasons why he denied his sexual orientation before the IJ and the reasons why he failed to seek asylum initially as a gay man, the attorney's allegations could not by themselves support a motion to remand the case for further consideration. Accordingly, the Board's refusal to remand the case to the Immigration Judge was upheld.

The opinion identifies Carlos Alberto Quichiz of JRQ & Associates LLC, Chicago, as counsel for Petitioner. – *Bryan Johnson-Xenitelis*

California Appellate Court Extends *Batson* Jury Selection Principles to Sexual Orientation

A three-judge panel of the California Third District Court of Appeal followed the Ninth Circuit's lead and similarly concluded that, like race and gender, "excluding prospective jurors solely on the basis of sexual orientation runs afoul of . . . constitutional principles." *People v. Douglas*, 2017 Cal. App. LEXIS 330, 2017 WL 1325849 (Cal. Ct. App. Apr. 11, 2017). In a unanimous opinion by Justice Harry E. Hull, Jr., the court also determined that a mixed-motive analysis is appropriate where a prosecutor states both neutral and non-neutral reasons for excusing gay jurors.

A dramatic fact pattern underlies this case. In October 2011, after a closeted man failed to pay all that he owed for the services of a male escort, the escort's boyfriend, Brady Dee Douglas, tried to collect and a high-speed car chase ensued. After Douglas shot at him, the man swerved his car into Douglas's car and then escaped unharmed.

A jury later convicted Douglas of attempted second degree robbery, assault with a semiautomatic firearm, shooting at an occupied motor vehicle, drawing or exhibiting a firearm against a person in a motor vehicle, and carrying a loaded firearm with intent to commit a felony. Judge Paul K. Richardson of the Yolo County Superior Court sentenced Douglas to an aggregate term of six years in state prison.

For purposes of this appeal, though, what unfolded during the jury selection is most relevant. Based on answers given during voir dire, it was clear that two potential jurors, D.J. and S.L., were openly gay. The prosecution used their peremptory strikes to excuse both of them. Defense counsel then made a motion pursuant to *People v. Wheeler*, 22 Cal.3d 258 (1978), a precursor California Supreme Court decision to the landmark U.S. Supreme Court ruling in *Batson v. Kentucky*, 476 U.S. 79 (1986). *Wheeler* and *Batson* held that, under both the state and federal Constitutions, one cannot use peremptory challenges to remove prospective jurors based solely on their race.

Despite a lack of precedent, out of an abundance of caution, Judge Richardson accepted a *Wheeler* motion from defense counsel arguing that the prosecutor had systematically excused all of the openly gay men. In response, the prosecutor explained that he excused D.J. based on his close personal relationship with a Yolo County public defender who had described the prosecutor's office as the "dark side" and excused S.L. based on his short answers to his questions and a more favorable demeanor to defense counsel. He added, in reference to both openly gay men, a concern that they might be biased against his principal witness, a closeted man who lied to police about patronizing a gay escort. Judge Richardson then denied the motion, but did not mention the general concern about openly gay men in his explanation for denying the motion. The jury that was empaneled later convicted Douglas of all counts except a pimping charge.

On appeal, defendant contended that he was denied his constitutional rights to a fair trial, equal protection, and a fair and impartial jury when the prosecutor impermissibly excused two openly gay jurors based solely on their sexual orientation and the trial court denied his *Batson/Wheeler* motion. After noting the Ninth Circuit's 2014 decision in *SmithKline Beecham Corp. v. Abbott Labs*, 740 F.3d 471, *rehearing en banc denied*, 759 F.3d 990 (9th Cir. 2014), that equal protection prohibits peremptory strikes based on sexual orientation under *Batson*, and a similar 2000 decision by a sister California appellate court, Justice Hull easily reached the same conclusion without much analysis.

Much more scrutiny is devoted to determining "whether the trial court erred in concluding that the proffered reasons were nondiscriminatory." Hull agreed that "[t]he third reason—the assumption that openly gay men may harbor a bias or hostility towards a closeted gay witness—is troubling." He suggested, however, that Douglas may not have "fully characterized the nature of the prosecutor's challenge" because "the record, we believe, can also be read to indicate a concern not about sexual orientation, but rather a concern about an underlying attitude or belief regarding truthfulness." It would be permissible if the prosecutor had merely intended to "ferret out any biases for or against gay persons" as opposed to "trying to oust all gay people from serving on the jury."

Resolving this distinction on the record on appeal was impossible, though, because "the trial court never actually considered the prosecutor's sexual orientation-related ground." Hull, then, is forced to "err on the side of constitutional caution by finding that the prosecutor's third reason was sexual orientation-based as defendant argues."

To aid the trial court on remand, Hull surveys the potential approaches for analyzing a *Batson/Wheeler* challenge when a party gives both permissible and impermissible reasons for exercising a strike, including the "per se" or "tainted" approach, the mixed-motive or dual motivation approach, and the substantial motivating factor approach. Hull and his colleagues ultimately endorsed the mixed-motive approach. Under a mixed-motive analysis, "after the defendant makes a prima facie showing of discrimination, the state may raise the affirmative defense that the strike would have been exercised on the basis of the [] neutral reasons and in the absence of the discriminatory motive."

The case will now go back to the trial court to "conduct a hearing at which the court shall determine whether the prosecutor's sexual orientation-based reasons for his challenge to D.J. and S.L., while a factor, were not determinative and that there were neutral and nondiscriminatory reasons supporting the challenges." – *Matthew Skinner*

Matthew Skinner is the Executive Director of The LGBT Bar Association of Greater New York (LeGaL).

New Jersey Appellate Division Defines Standard for Hostile Environment Claim by Transgender Detainee Against Police Officers

The New Jersey Appellate Division rejected a municipality's contention that the standard for determining a hostile environment for employment discrimination purposes should be the same as the standard for determining a hostile environment claim in the context of public accommodations, particularly when the accommodation at issue is the county jail and the alleged harassers are police officers dealing with a transgender arrestee. *Holmes v. Jersey City Police Department*, 2017 WL 1507189 (April 27, 2017).

Plaintiff Shakeem Malik Holmes, who identifies as a transgender man, was arrested for shoplifting and transported to a police station, where he contends that he was subjected to hostile treatment because of his gender identity. He was placed into a "female-only jail cell" and was "categorized as female for security purposes within the jail facilities," but that was not the basis for this hostile treatment claim asserted under New Jersey's Law Against Discrimination (LAD). The LAD identifies gender identity as a prohibited ground for discrimination in places of public accommodation, and the court notes that the defendant was not contesting the assertion that the jail was a place of public accommodation subject to the statute.

Holmes' claim rests on his allegation that "police officers made demeaning, insulting and threatening comments about his transgender status," wrote Judge Susan L. Reisner for the Appellate Division. "Specifically, he alleges that several officers referred to plaintiff as 'it,' referred to plaintiff's situation as 'bullshit,' and stated 'so that's a fucking girl?' He also asserts that one of the officers threatened to put his fist down plaintiff's throat 'like a fucking man.'"

The trial judge, relying on *Heitzman v. Monmouth County*, 321 N.J. Super. 133 (App. Div. 1999), concluded that rude and insensitive comments "did not rise to the level of severe or pervasive LAD violations" and granted summary judgement to the defendants.

The "severe or pervasive" standard is normally applied to determine whether verbal harassment can create a hostile workplace environment for purposes of an employment discrimination case. But this case concerns treatment in a jail, not workplace harassment.

The LAD identifies gender identity as a prohibited ground for discrimination in places of public accommodation.

"In this case," wrote Reisner, "the inquiry is whether plaintiff's allegations, if true, could support a hostile environment claim under the LAD. We find that they could, and that plaintiff is therefore entitled to present his claim to a jury. In reaching that conclusion, we consider that plaintiff, as an arrestee temporarily incarcerated in the police station, was in a uniquely vulnerable position; that the individuals making the hostile comments were police officers, who wield tremendous power over arrestees; and that the comments included a physical threat. Under all the circumstances, a jury could find that the conduct was sufficiently severe that a reasonable transgender person in plaintiff's position would find the environment to be hostile, threatening and demeaning."

The court pointed out that the *Heitzman* case on which the trial judge in Hudson County relied, which apparently required a higher evidentiary standard for hostile environment workplace claims based on religion than for those based on race, "was overruled, in pertinent part, by *Cutler v. Dorn*, 196 N.J. 419 (2008), where the Court 'unequivocally rejected the higher proof standard.'"

And further, she pointed out, the Appellate Division has recognized that "the prohibition of discrimination in relation to public accommodation is functionally distinct from the ban on employment discrimination" and that "in the context of public accommodation discrimination, hostile comments that might not suffice to create a hostile environment in a work context may nonetheless violate the LAD."

The court also distinguished a case involving a student being harassed by fellow students, observing that in Holmes' case the harassment came from police officers, analogous to teachers, not from fellow inmates, who would be analogous in some sense to other students. "Here, the comments were not made by school children, or by plaintiff's peers. They were made by police officers, in a position of authority over plaintiff, who was their prisoner. In those circumstances, the impact of threatening and harassing conduct may be magnified, even if it only occurs on one day. Moreover, while a certain amount of strong language may be expected in the confines of a police department, defendant has not suggested that its personnel have any operational need to threaten, demean or humiliate prisoners on the basis of their gender affiliation or membership in any other protected class. In fact, such conduct may encourage other prisoners to attack the harassment victim, thus undermining the orderly operation of the police lock-up as well as the safety of the transgender prisoner."

Thus, summary judgment in favor of the defendants should have been denied, and the case was remanded for trial on Holmes' hostile environment claim. Holmes is represented by Deborah L. Mains of Costello & Mains. ■

Over $600,000 Awarded to Victorious Lawyers in Texas Marriage Equality Case

In an appeal that has been pending before a panel of the 5th Circuit Court of Appeals for more than a year, the court decided to reject an attempt by Texas Governor Greg Abbott, Attorney General Ken Paxton, and Commissioner John Hellerstedt of the Department of State Health Services to win a reduction of the large attorneys' fees and costs awarded by U.S. District Judge Orlando Garcia to the victorious attorneys who represented the plaintiffs in the Texas marriage equality case, *DeLeon v. Perry*, which is now titled *DeLeon v. Abbott*, 2017 WL 1406499, 2017 U.S. App. LEXIS 6638 (5th Cir., April 18, 2017).

Two same-sex couples filed suit in 2013 against then-governor Rick Perry and other state officials seeking the right to marry and to win recognition of same-sex marriages performed out of state. In February 2014, Judge Garcia ruled in favor of the plaintiffs, but the decision was stayed as the state appealed to the 5th Circuit. That court put off oral arguments until shortly before the Supreme Court announced that it would consider appeals in marriage cases from the 6th Circuit. Then the 5th Circuit delayed ruling until after the Supreme Court announced its *Obergefell* decision, which made the 5th Circuit appeal purely academic. That court quickly affirmed Judge Garcia's decision, making the plaintiffs "prevailing parties" who were entitled to seek an award of attorneys' fees and costs.

Judge Garcia awarded fees of $585,470.30 and costs of $20,202.90, more than $600,000 in all. In December 2015, the new line-up of official state defendants filed their appeal. The 5th Circuit panel issued a brief *per curiam* opinion upholding Garcia's award, emphasizing that the trial judge has "broad discretion" to award fees and costs if the judge "provides a concise but clear explanation for its reasons for the fee award." In this case, the court found that this standard had been met, but one member of the court, Circuit Judge Jennifer Walker Elrod, issued a dissent on three points.

She objected first to awarding fees for time spent opposing a motion by an anti-gay group to intervene as a co-defendant so that they could make arguments that the state was unlikely to make in defending the statute. Although the plaintiff's lawyers were successful in beating back the intervention effort, Judge Elrod thought the state should not be required to pay them fees for doing so, since the state had not supported the intervention effort and was not the "losing party" on that issue.

She also objected to awarding fees for time that the attorneys spent "interacting with the media." Plaintiffs' lawyers in controversial public interest cases frequently spend time cultivating the media to win favorable coverage of the litigation and help build public support for the resulting court decision. That was a key part of the litigation strategy in the marriage equality cases, and arguably the successful media cultivation helped to move public opinion so that the ultimate Supreme Court decision and its implementation did not arouse widespread opposition. But Elrod argued that awarding fees for that time was "improper." "Plaintiffs have offered no explanation for how the media-related tasks included in the fee award were directly and intimately related to their successful representation, or were aimed at achieving their litigation goals," she wrote. As such, the state should not have to pay for them.

Finally, she objected to awarding fees for much of the time spent by the plaintiffs' attorneys in recruiting and assisting various amicus curiae (so-called "friends of the court') to file briefs supporting the plaintiffs in the case. She would have denied fees for such time on the theory, articulated by the 11th Circuit in a prior case, that because "amici are not entitled to attorneys' fees as a 'prevailing party,' it would not allow this result to be changed 'by the simple expedient of having counsel for a party do some or all of the amicus work.'"" She would, however, agree to order the state to pay for time that plaintiffs' attorneys spent reviewing the amicus briefs after they were filed, because the issues and arguments raised by amici might come into play during the trial or appeals of the case. But she rejected the view that soliciting amicus parties and helping the amici to prepare their briefs was part of the work of representing the plaintiffs. This seems the least plausible of her objections, since lawyers consider the presentation of forceful amicus briefs, carefully coordinated to avoid inconsistent arguments and assure coverage of all potential points of argument, to be an integral part of their strategy to educate the court and provide significant supplementation to the evidentiary record. The courts of appeals and the Supreme Court have cited amicus briefs in their opinions in favor of marriage equality, showing that they are not merely peripheral window dressing in the effort to achieve the plaintiffs' litigation goals.

Circuit Judge Jennifer Walker Elrod issued a dissent on three points.

Judge Elrod stated her objections in terms of concepts rather than dollar amounts, not suggesting how much she would have reduced the fee award, and the *per curiam* opinion does not respond to any of her arguments. The state could seek Supreme Court review, and Elrod's partial dissent implicitly encouraged this by contending that some of the points she raised involved departures from 5th Circuit precedent or created splits between the 5th Circuit and other Circuit courts on the basis for awarding fees to prevailing parties. The Supreme Court is rarely interested in cases about attorneys' fees, but a circuit split in a high profile case might catch its attention. ■

Pennsylvania Superior Court Recognizes Pre-2005 Same-Sex Common Law Marriage

Pennsylvania abolished common-law marriage by statute effective January 24, 2005, but provided that the statute should not be "deemed or taken to render any common-law marriage otherwise lawful and contracted on or before January 1, 2005, invalid." After the U.S. Supreme Court's *Obergefell v. Hodges* decision in 2015, holding that same-sex couples have a constitutional right to marry, implicitly affirming *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014), a trial court decision that was not appealed by the state, numerous trial judges in Pennsylvania have issued declaratory judgments recognizing common law marriage of same-sex couples that were contracted prior to January 1, 2005.

The Pennsylvania Superior Court provided the first appellate ruling in the state granting retroactive recognition to a same-sex common law marriage.

The outlier was a July 8, 2016 order by Judge John D. McBride of the Beaver County Court of Common Pleas in *In re Estate of Stephen Carter*, in which Judge McBridge refused to affirm an alleged common law marriage contracted in 1996 or 1997 by Carter and his surviving spouse, Michael Hunter, in Philadelphia. On April 17, a unanimous three-judge panel of the Pennsylvania Superior Court provided the first appellate ruling in the state granting retroactive recognition to a same-sex common law marriage, reversing the Beaver County court in response to Hunter's appeal, 2017 PA Super 104.

Writing for the court, Judge H. Geoffrey Moulton, Jr., found that McBride erred on both of the grounds of decision. The first was that because same-sex couples did not have the right to marry in Pennsylvania until the *Whitewood* decision in 2014, the two men could not have contracted a common law marriage prior to January 1, 2005. The second was based on McBride's finding that Hunter had at best established that the men intended to marry when it became legal to do so in Pennsylvania, which he deemed insufficient to establish a common law marriage, despite the evidence that the men exchanged rings, regarded themselves as spouses, lived together, and were regarded as spouses by members of their families.

Judge Moulton found that the trial court's first ground had misconceived the effect of *Whitewood* and the U.S. Supreme Court's subsequent rulings in *U.S. v. Windsor* and *Obergefell v. Hodges*. "Together," he wrote, "*Windsor*, *Whitehead*, and *Obergefell* teach that same-sex couples have precisely the same capacity to enter marriage contracts as do opposite-sex couples, and a court today may not rely on the now-invalidated provisions of the Marriage Law to deny that constitutional reality. Consequently, because opposite-sex couples in Pennsylvania are permitted to establish, through a declaratory judgment action, the existence of a common law marriage prior to January 1, 2005, same-sex couples must have that same right. To deprive Hunter of the opportunity to establish his rights as Carter's common law spouse, simply because he and Carter are a same-sex couple, would violate both the Equal Protection and Due Process Clauses of the Fourteenth Amendment."

Turning to the trial court's second ground, Judge Moulton conceded that even prior to its legislative abolition, common law marriage had been difficult to prove, because of the insistence by Pennsylvania courts that the proponent of recognizing the marriage prove by a preponderance of the evidence that the purported spouses had expressed to each other a present intention to be married. He quoted from the most recent Pennsylvania Supreme Court ruling, *Staudenmayer v. Staudenmayer*, 714 A. 2d 1016 (Pa. 1998), where the court stated: "A common law marriage can only be created by an exchange of words in the present tense, spoken with the specific purpose that the legal relationship of husband and wife is created by that." However, continued the Supreme Court, "Because common law marriage cases arose most frequently because of claims for a putative surviving spouse's share of an estate, however, we developed a rebuttable presumption in favor of a common law marriage where there is an absence of testimony regarding the exchange of *verba in praesenti*. When applicable, the party claiming a common law marriage who proves: (1) constant cohabitation; and (2) a reputation of marriage 'which is not partial or divided but is broad and general,' raises the rebuttable presumption of marriage."

In this case, both ways of proving a common law marriage could be found based on the testimony presented to Judge McBride. Hunter recounted how he proposed marriage to Carter on Christmas Day 1996, giving him a diamond ring, asking if Carter would marry him, and Carter answering yes. Two months later, on February 18, 1997, Carter gave Hunter a ring in return which was engraved with that date, and the men henceforth celebrated February 18 as their anniversary for the next 16 years, until Carter died tragically from injuries sustained in a motorcycle accident in April 2013, "less than two months before the United States Supreme Court's landmark decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), which struck down the provision of the federal Defense of Marriage Act

("DOMA") defining 'marriage' as only between one man and one woman," Judge Moulton commented.

After the men exchanged rings, they bought a house together with a joint mortgage, made mutual wills and other legal documents establishing their relationship, supported each other, held joint bank and investment accounts, and subsequently moved to the Pittsburgh area where they again jointly purchased a house. There was testimony from Carter's nieces that they referred to Hunter as "Uncle Mike." It was easy based on the testimonial record for the Superior Court to conclude that McBride erred in basing his decision on one bit of evidence considered out of context, that Carter and Hunter had consciously decided not to go out of state to marry when it became possible for same-sex couples to marry elsewhere, since an out-of-state same-sex marriage would not be recognized in Pennsylvania at that time and they specifically planned to have a ceremonial wedding in their home state of Pennsylvania when that became possible.

This did not, in the view of the Superior Court, undermine the conclusion that they considered themselves married as of February 18, 1997, had continuously cohabited, and had held themselves out to the world as married from that date forward. "In sum," wrote Moulton, "the evidence clearly established that Hunter and Carter, like countless loving couples before them, expressed 'an agreement to enter into the legal relationship of marriage at the present time.' Therefore, we conclude that Hunter proved, by clear and convincing evidence, that he and Carter had entered into a common law marriage on February 18, 1997." Where McBride went wrong was in failing to distinguish between ceremonial marriage and common law marriage. The evidence on which he relied related to ceremonial marriage, and did not undermine the evidence of a common law marriage.

The court returned the case to the Beaver County Court of Common Pleas "for the entry of an order declaring the existence of a common law marriage between Hunter and Carter as of February 18, 1997." ■

Nebraska Inmates Seek to Marry; Federal Judge Appoints Counsel

Senior U.S. District Judge Richard G. Kopf has permitted two Nebraska inmates who wish to marry to proceed past screening in this civil rights case and has appointed attorney Michael D. Gooch of Omaha to represent them in *Wilson v. Geerdes*, 2017 U.S. Dist. LEXIS 49133 (D. Nebr., Mar. 31, 2017). Co-plaintiffs Harold Bryan Wilson and Riley Nicole Schadle were both classified as males and incarcerated at the same institution when the lawsuit commenced, according to the Complaint in PACER. They were disciplined for such "prohibited" behavior as "sitting too close" and "putting one's arm around the other," according to the Complaint. Subsequently, Wilson was transferred to another prison, in order to "thwart" the relationship with Schadle, a transgender woman who remained at the same institution. Nevertheless, Wilson obtained a marriage license from county officials, but prison authorities refused to notarize it, saying that the inmates would not be permitted to marry or even to have contact with one another, according to an Amended Complaint in PACER, filed after Wilson was transferred.

Judge Kopf wrote: "Given the allegations and the state of the law on the right to marry, and to facilitate one operative pleading from Plaintiffs as well as any subsequent joint filings, the court concludes that counsel should be appointed," citing *Davis v. Scott*, 94 F.3d 444, 447 (8th Cir. 1996). According to PACER, the couple seek an injunction only, not damages.

Judge Kopf authorized a modest retainer ($2,000), plus "reasonable expenses when representing Plaintiffs," with a refund to the "Federal Practice Fund" if plaintiffs prevail and costs and attorneys' fees are awarded.

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CIVIL LITIGATION

SUPREME COURT – Once again, the Supreme Court has refused to get involved with the question of whether state laws banning health care practitioners from providing so-called "conversion therapy" to minors violate the Constitution. On May 1, the Court denied a petition for certiorari in *Welch v. Brown*, 834 F.3d 1041 (9th Cir. 2016), cert. denied, 2017 WL 58598. In that case, the 9th Circuit ruled that California's law did not violate the 1st Amendment rights of mental health professionals. The plaintiff practitioners, including members of clergy, claimed that it abridged their freedom of speech, and violated the 1st Amendment's religion clauses. The free speech argument had been dispatched in a previous 9th Circuit ruling, 740 F.3d 1208, as to which the Supreme Court had previously denied review. In this ruling, the 9th Circuit rejected the contention that the law violated the Free Exercise and Establishment Clauses and constitutionally protected privacy rights, or improperly intruded into the privacy of the clergy-congregant relationship. The courts have repeatedly rejected the claim that by banning a form of therapy under its power to regulate the practice of health care, the state is imposing an unconstitutional content-based regulation of speech. The 9th Circuit's 2016 decision rejecting these claims was denied rehearing and rehearing en banc in an order issued on October 3, 2016, by the circuit court.

U.S. COURT OF APPEALS, 3RD CIRCUIT – One of the problems with refugee law is that each individual plaintiff has to start from scratch proving how dangerous things are in their home country. It doesn't matter that numerous courts have concluded, for example, that the intense homophobia of the population and the law enforcement officials in Jamaica is so fierce that lesbian, gay and bisexual people from Jamaica should be allowed to stay in the U.S. as refugees, even if their conduct in this country hasn't been exemplary. In *Hewitt v. Attorney General*, 2017 U.S. App. LEXIS 6443, 2017 WL 1379425 (3rd Cir., April 14, 2017), for example, Anthony Hewitt, a Jamaican who had achieved lawful permanent resident status in the U.S. since 1973, was convicted on a marijuana charge in New Jersey in 2010 that got him a 16-year sentence and the attention of the Department of Homeland Security, which sought to deport him. While not contesting that he was deportable, Hewitt presented evidence that he had sexual relationships with men, identified as bisexual, and was terrified about how he would be treated if deported to Jamaica in light of the "violent homophobia that persists in certain parts of the population." He actually testified that "he remembered one incident where a gay man was tied to a light post and beaten to death by the crowd." According to the 3rd Circuit's *per curiam* opinion, "The Immigration Judge denied relief and ordered Hewitt's removal to Jamaica. The IJ reviewed Hewitt's history of relationships with men and impliedly accepted as credible his testimony that he is bisexual, but determined that Hewitt failed in his burden of proof to show that he would be tortured in Jamaica on account of his sexual affinity for men." Because of his criminal record in New Jersey, Hewitt could only win refugee status in the U.S. under the Convention against Torture. The Board of Immigration Appeals affirmed the IJ's decision, explaining that "notwithstanding that there is mistreatment of gays and bisexuals in Jamaica, Hewitt had never been threatened or harmed in Jamaica and no one beyond his immediate family knows he is bisexual." The 3rd Circuit said that "the agency did not commit legal error in concluding that he failed to show it was more likely than not that he would be tortured in Jamaica on account of his bisexuality." Among other things, Hewitt had submitted evidence from his daughter, a letter in which she "expressed loving concern for him and stated that Jamaican culture 'does not accept homosexuality in any aspect . . . . I have so much anxiety seeing videos of the riots and crowds going after the 'public homosexual' and the torture and death being reported." Said the court, "This letter from a family member tends to show only that homophobia persists in Jamaica, which the IJ accepted as true." Not enough, said the court, lacking evidence of a threat personal to Hewitt.

U.S. COURT OF APPEALS, 4TH CIRCUIT – The court rejected due process claims asserted by Lt. Col. Christopher T. Downey, who claims his constitutional rights were violated when he was found guilty by his commanding officer in a nonjudicial punishment proceeding of violating the Uniform Code of Military Justice when he interceded during a military ball to assault a photographer who was taking a photograph of some lesbian officers dancing together, and then told the officers to "watch their behavior and what they were doing was unacceptable and placed them in a compromising situation." This incident took place in April 2012, well after the Defense Department had implemented the repeal of the "Don't Ask, Don't Tell" policy. Downey was relieved of his command position over this incident, his commanding officer having lost confidence in his judgment. He sought in this proceeding to have his record cleared of this violation, which focused on finding him guilty of assault. *Downey v. U.S. Department of the Army*, 2017 WL 1372601, 2017 U.S. App. LEXIS 6357 (4th Cir., April 13, 2017). Ironically, a named defendant is the openly-gay former Secretary of the Army, Erik Fanning, whose named was substituted for that of his predecessor, John M. McHugh, whose decision to reject the request to correct the service record was being challenged. The 4th Circuit

found no procedural irregularities that would amount to a due process violation, affirming a decision by District Judge Leonie M. Brinkema in this unpublished decision.

U.S. COURT OF APPEALS, 9TH CIRCUIT – The dispute between the 9th Circuit and the Board of Immigration Appeals about whether gay refugees from Mexico can seek asylum or other forms of refugee protection in the United States continues to play out in *Hernandez v. Sessions*, 2017 WL 1404699, 2017 U.S. App. LEXIS 6894 (9th Cir., April 20, 2017). Hernandez sought review of the BIA's finding that he does not have a well-founded fear of future persecution if he is removed to Mexico. The BIA, citing a 2011 9th Circuit ruling (which was recently overruled in part *en banc*), which relied on the State Department's country report on Mexico from 2010, which, said the BIA, "indicates that Mexican society increasingly accepts homosexual behavior, that Mexico's supreme court ruled that all states are required to recognize homosexual marriages, that the law prohibits discrimination on the basis of sexual orientation, and that women and men were given equal access to diagnostic services and treatment for HIV." Relying on that 2011 ruling, *Castro-Martinez v. Holder*, 674 F.3d 1073, is no longer adequate in light of its partial overruling by *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051 (9th Cir. 2017). The 9th Circuit panel wrote that "since the BIA's decision, we have made clear that *Castro-Martinez* 'falsely equated legislative and executive enactments prohibiting persecution with on-the-ground progress." The court granted Hernandez's petition "so that the BIA can, in the first instance, apply this court's newly enunciated law to determine whether Hernandez is likely to face persecution." This ruling will certainly be frustrating for named defendant Attorney General Jefferson Beauregard Sessions, III, whose mandate from the president is to deport as many aliens as possible, apparently regardless of the merits of their claims to judge by some recent news reports. Hernandez is represented by Lesley Irizarry-Hougan, L.I.H. Law, P.S., Seattle, WA, and Kristin Kyrka, Law Offices of Marie Higuera, Seattle, WA.

ARIZONA – In a ruling relying on obsolete precedents and ignoring recent case law, U.S. District Judge John J. Tuchi ruled that a gay, HIV-positive man cannot assert a 42 U.S.C. Section 1985(3) claim against a home health care company and some of its employees because, in Judge Tuchi's words, "In the Ninth Circuit, sexual orientation does not give rise to a protected class under Sec. 1985(3)." *Gomez v. Celebrity Home Health & Hospice Incorporated*, 2017 U.S. Dist. LEXIS 52960, 2017 WL 1282803 (D. Ariz., April 6, 2017). Gomez, *pro se*, claims that "his civil rights were violated when Defendants, an entity and several of its employees who provided home health care to him, used his personal and health information to run background checks on him and refused to let him view his medical records." He alleged that he is being "persecuted because I am gay" and "discriminated against because of my HIV+ status which they released to a large number of people who did not previously know my HIV status," thus causing him "extreme medical, emotional and mental distress." He was seeking $400 million in damages and a "gag order" sealing his medical and "personally identifiable information," relying on HIPAA. He also wanted an order that individual defendants surrender their passports to prevent them from "fleeing the country." Gomez based his claims on various constitutional provisions as well as HIPAA and 42 USC 1985(3), and a breach of contract under state law. The court's recounting of procedural maneuvering shows how somebody who has not suffered through a course in federal civil procedure can easily be tripped up in trying to represent themselves in a federal civil suit, and how somebody who is not conversant with federal jurisdictional and constitutional law is probably not well suited to draft a complaint that can withstand a motion to dismiss of any degree of complexity. On the other hand, the court's dismissal of his 42 USC 1985(3) claim on the ground stated above can be challenged. If the plaintiff claims discrimination based on membership in a 14th Amendment protected class, he can assert a claim against private parties under 42 USC 1985(3) – sometimes referred to as the Ku Klux Klan Act – which was passed during the Reconstruction Period to provide a federal cause of action for people who were victims of a conspiracy to deprive them of their federally protected civil rights. The Supreme Court has generally limited the scope of this statute to cases involving categories that receive heightened scrutiny. In the 9th Circuit, sexual orientation discrimination claims get heightened scrutiny under *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471 (9th Cir.), *rehearing en banc denied*, 759 F.3d 990 (9th Cir. 2014), and *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014), cases that relied on the circuit's interpretation of *U.S. v. Windsor*, 133 S. Ct. 2675 (2013). We were so disturbed upon reading Judge Tuchi's decision that we sent a letter to him advising him of these 9th Circuit precedents that went unmentioned in his opinion, in which he relied instead on decades-old cases that are arguably no longer good law in that circuit.

CALIFORNIA – The *San Francisco Chronicle* (April 29) reported that a lawsuit brought by the ACLU on behalf of Josef Robinson, a transgender employee of Dignity Health who was denied insurance coverage for sex reassignment

surgery and related medical treatment, had been settled for $25,000. The suit claimed a violation of Title VII's ban on sex discrimination in terms and conditions of employment. U.S. District Judge Yvonne Gonzalez Rogers, who had indicated at a September hearing that she was likely to allow the case to go to trial, approved the settlement on April 28. Now an independent company, Dignity Health was originally started by the Catholic Church. Robinson had been scheduled for gender reassignment surgery to take place in March 2016, but the procedure was cancelled due to the express exclusion of such procedures under Dignity's insurance benefits for employees. Dignity maintained during a September 2016 hearing before Judge Rogers that the policy was "gender neutral" because it applied equally to men and women. Her response was, "This is a sex-based issue. It couldn't be more sex-based." However, the judge put the case on hold pending action by the Supreme Court on the *G.G.* case, so she never formally ruled on Dignity's motion to dismiss.

CALIFORNIA – A public television corporation in San Francisco has filed a motion in the U.S. District Court for the Northern District of California, seeking to lift the seal on the videotape of the Proposition 8 trial held back in 2010 so that it can be available for public viewing and broadcast. *Motion to Unseal Videotaped Trial Records* filed by KQED, Inc., on April 28, 2017, in *Perry v. Brown*, Case No. 09-cv-2292. U.S. District Judge Vaughn Walker had ordered that the trial be videotaped and broadcast live outside the courtroom, but the intervenors, proponents of Proposition 8 who were defending the anti-marriage equality constitutional amendment, objected and, when neither Walker nor the 9th Circuit would bow to their objection, sought and obtained an order from the Supreme Court shutting down the broadcast. However, Judge Walker decided to have the trial videotaped anyway, telling the parties that it would be for his own use in reviewing the testimony as he came to a decision in the case, and would be placed under seal and not open to public view for the "foreseeable future." Of course, the transcript of the trial was made public by the plaintiffs, and provided the basis for reenactments on distributed on youtube.com and for subsequent dramatic treatment in theater and broadcast. Nonetheless, subsequent attempts to get the seal lifted have been unavailing. This new motion filed by attorneys Thomas R. Burke and Jason Harrow of Davis Wright Tremaine LLP, on behalf of the Bay Area's leading public radio and television outlets, argues that the privacy concerns raised by the intervenors back in 2000 were no longer salient and there was no good reason to deny public access, in light of precedent upholding the public's right of access to judicial proceedings. Prior to filing this motion, counsel had contacted Charles Cooper, the attorney who represented the Intervenors at trial, seeking their agreement to unsealing, but Cooper responded that his clients maintained their objections. The motion points out that with its ruling in 2015 that same-sex couples have a constitutional right to marry and the development of public opinion since that time, and the mere passage of time, the concerns expressed in 2000 by Intervenors had faded in significance. Indeed, despite the sealing of the videotape, several of the expert witnesses they hoped to present bowed out, and one of the two remaining ones publicly recanted some of his testimony after the case was decided. If this motion is granted, it seems likely that new documentaries about the case presenting actual testimony and oral argument from the trial will follow.

CONNECTICUT – In *Jones v. Department of Children and Families*, 2017 WL 1150251, 2017 Conn. App. LEXIS 114 (Appellate Ct. of CT, April 4, 2017), a three-judge panel of the court unanimously affirmed a ruling by Superior Court Judge Scholl (Hartford District) that Michael Jones, an African-American gay man, was not discharged from his position as a social worker because of his sexual orientation. Connecticut's Fair Employment Practices Act outlaws discrimination because of sexual orientation, so the issues in this case relate to proof under the statute, there being no question that the statute applies to the plaintiff's claim. The case is complicated by evidence that at least one of Jones's direct supervisors may have been biased against him due to his sexual orientation, although the evidence is somewhat equivocal, relying on hearsay about statements this supervisor made which she denied on the witness stand, and the trial court resolved it against him. (Furthermore, that supervisor did not make the decision to terminate the plaintiff.) The case is also complicated by the fact that Jones had filed a grievance about anti-gay bias that was pending at the time the Human Resources Department decided to terminate him, and an internal investigation subsequently substantiated some of his bias claims after the termination took place. Ultimately, however, the Appellate Court found that Jones had failed to prove that the discharge had anything to do with the grievance, finding there was evidence in the record supporting the trial court's conclusion that Jones was discharged because of objective deficiencies in his work. Thus, his retaliation claim was rejected. The opinion is lengthy and detailed, taking on Jones' contention that the trial court misallocated burdens of proof on his alleged dual-motive theory and had improperly dealt with his "cat's-paw" theory of liability, contending that although the ultimate decision-maker in the Human Resources Department was not biased against him, the decision-maker relied on evaluations of his work by supervisors who were biased. The

sheer complexity of the range of issues raised by Jones on appeal make it likely that he will attempt further review in the state supreme court. Jones is represented by James V. Sabatini.

FLORIDA – U.S. District Judge Kenneth A. Marra granted a motion by the employer to dismiss some of the counts in a discrimination suit filed by a gay man who was discharged by Charles Schwab Bank, but with permission to replead if the plaintiff could, in good faith, allege facts sufficient to support his claims. *Miller v. Charles Schwab Bank*, 2017 U.S. Dist. LEXIS 58257 (S.D. Fla., April 14, 2017). Stephen Miller, an openly gay Jewish man, was hired by Schwab as a regional bank manager in Chicago. In the summer of 2013, he began reporting to a new supervisor, Kenton Thompson, whom he notified that he would like to apply for a national sales manager position, which the men agreed to discuss in a face-to-face meeting. During their dinner meeting, Thompson inquired about Miller's family, and Mille told him about his 25-year same-sex relationship. Miller alleges that Thompson's demeanor "soured" and the meal ended abruptly without a discussion of the sales manager position. Things went downhill for Miller after this meeting, despite his sterling sales record. This included attempts to get rid of him by eliminating his position and the appointment of a different person as national sales manager, Christian Rodriguez, who arranged for a "faith-based team building exercise at a Christian faith food bank" for the regional banking managers, an event that ended with a Christian prayer that made Miller feel excluded and marginalized. When Rodriguez visited the Florida office where Miller worked in April of 2014, he "manifested outright hostility" to Miller during a three-hour meeting, after which Rodriguez became critical of Miller's work and, "at one point, verbally attacked him by telling him to 'man it up'" and then sending him a "performance improvement plan," and telling him that the "man it up" conversation had been his semi-annual appraisal. (Previously, Miller had always been notified in advance of performance reviews, which had been conducted "professionally.") Miller complained to the human resources department, which notified Rodriguez, who "called Plaintiff in a rage insisting that Plaintiff 'own his PIP' and 'take responsibility.'" Miller claimed that thereafter Rodriguez excluded him from invitations to sports events extended to all other male regional banking managers and that Thompson stated, "in front of other employees and while looking at Plaintiff, 'If anyone has a problem with Rodriguez, they need to find another job because Rodriguez isn't going anywhere.'" HR decided that "no discrimination occurred" and attempted to schedule a meeting between Rodriguez and Miller, but Miller put them off as he studied for an examination. He then received a verbal warning and a revised PIP "due to taking 'unauthorized leave to study for the exam." He requested a job transfer, but Rodriguez responded negatively, and subsequently told him that his job was being eliminated. Rodriguez then denied Miller's request to transfer to other posted jobs, told him to have no contact with clients or other employees for 90 days, "removed him from all communications and assigned him to a windowless office." He then received a "much smaller bonus than normal, despite being ranked as number one nationwide for sales of pledged asset lines, and number six of thirteen for sales of mortgages." He was given a negative annual review despite these accomplishments, and then discharged as of June 2, 2015. He filed a five-count complaint under Title VII, Florida Section 760 and the Palm Beach County Equal Employment Ordinance. (The local ordinance is the only one of those statutes that expressly forbids sexual orientation discrimination.) His complaint alleged discrimination because of sex (sex stereotyping), sexual orientation, and religion. He alleged hostile environment discrimination and retaliation for his filing of the internal grievance. In this opinion, Judge Marra ruled on defendant's motion to dismiss the religious discrimination, hostile environment, and retaliation claims, and claims under the Palm Beach ordinance. He found that the complaint failed to allege facts sufficient to support all the elements of these three claims (for example, failing to provide specific factual allegations to link particular retaliatory conduct to his filing of the internal grievance, and falling short on the specifics necessary to show "severe or pervasive" harassment), but in light of the overall factual allegations, the claims were dismissed without prejudice to allow Miller to replead those claims if he could assert facts in good faith sufficient to meet all the elements. As to the Palm Beach ordinance, Judge Marra found it inappropriate to deal with the defendant's allegation that Miller had failed to exhaust administrative remedies, since Miller had alleged in his complaint that he had done so, setting up a dispute about material facts that should not be resolved on a motion to dismiss. Miller is represented by Anthony Vincent Falzon of Simon, Schindler & Sandberg LLP, Miami.

KANSAS – Too late, it seems, regardless of the merits . . . Gerald Michael Riscoe filed suit *pro se* on January 4, 2016, against the U.S. Government under the Federal Tort Claims Act (FTCA), alleging that the Food and Drug Administration negligently approved the notorious drug DES that would, according to his claim, "cause sexual identity reversal, or what was formerly known as 'true hermaphroditism,' in offspring." According to attachments to his complaint, he sent an email to the Centers for Disease Control in 2000, "suggesting that DES could be

responsible for gender dysphoria in children whose mothers took DES while pregnant. Plaintiff stated, 'My hypothesis is that large doses of DES during a woman's pregnancy with her son feminized the brain.'" As characterized by U.S. District Judge Carlos Murguia in *Riscoe v. United States of America*, 2017 WL 1408219 (D. Kan., April 20, 2017), "plaintiff claims that the FDA acted negligently in regulatory matters related to DES, a drug that plaintiff's mother took during her pregnancy in 1952 (among other times). Plaintiff claims that the FDA's actions led to extremely negative side effects for both his mother and him. The court will not repeat the details of these side effects here, as they are not central to the court's decision, and plaintiff has expressed a desire to maintain his privacy." Ok, readers, speculate away . . . At any rate, the court held that the claim was not justiciable and was time-barred. Judge Murguia found that the FDA's performance of its duties under federal law is "regulatory activity of a type not cognizable under the Federal Tort Claims Act," so there was no subject matter jurisdiction over Riscoe's claim. Furthermore, "he faces another hurdle: plaintiff's injury occurred sixty-five years ago." Tort claims against federal agencies must be presented within two years after the claim accrues. "Based on plaintiff's representations" in the email attached to his complaint, "at the very latest, the statute of limitations expired on plaintiff's claim in 2002," if his claim accrued when he "discovered" his theory that DES caused his injury. But he did not file this lawsuit until fourteen years later. Furthermore, to the extent he was seeking to assert claims on behalf of "his mother, his deceased father, and his stillborn sibling," he lacked standing to do so as a *pro se* litigant.

KENTUCKY – A transgender man who claims he was fired after asking his joint employers for leave to get a hysterectomy to correct a severe medical problem suffered dismissal of some of his claims against one of the employers for failure to exhaust administrative remedies, but will get to proceed against both employers under the Family and Medical Leave Act, pursuant to Senior U.S. District Judge Charles R. Simpson's ruling on the separate motions for judgment on the pleadings by the two corporate defendants in *Bradford v. Prosoft, LLC & Humana, Inc*., 2017 WL 1458201, 2017 U.S. Dist. LEXIS 61591 (W.D. Ky., April 24, 2017). Pax Bradford, a transgender man, was hired by Prosoft in January 2015 and, "immediately thereafter, was 'contracted for employment with Humana'" as a studio production artist. When he was hired Bradford presented as a man and was perceived as such by these two companies. He began experiencing "significant abdominal pain" in April 2015, and was diagnosed by his physician with two serious health conditions, dysmenorrhea and endometriosis, for which the physician recommended a hysterectomy as part of the treatment. After receiving this diagnosis, Bradford informed his direct supervisor at Humana that he needed a hysterectomy, thereby incidentally disclosing for the first time that he is transgender. He asked for two weeks of medical leave and permission to work from home while recovering from the surgery. The supervisor told Bradford he would speak to Humana's creative agency director about the leave request. Around May 12, 2016, Bradford claims he informed both Prosoft and Humana that his surgery was scheduled for May 23, 2016, and reiterated his request to Humana's Human Resources Department for paperwork regarding leave under the Family and Medical Leave Act (FMLA). He provided a physician's note verifying his scheduled surgery and documentation of his requests for leave and an accommodation to work at home while recuperating. He met with Humana's creative agency director two weeks before the scheduled surgery, repeating his leave requests, but the director inform him that Humana "would not accommodate his requests for medical leave and that he would be terminated for leaving for his scheduled surgery." Although he was scheduled to work through Friday, May 20, at Humana, a Prosoft payroll representative called him on May 19 to tell him that the creative agency director at Humana had terminated his employment effectively immediately. In his complaint, Bradford alleges that Humana has granted accommodations similar to his work-at-home leave requests to other employees. In his complaint, Bradford alleged that Humana and Prosoft failed to accommodate his disability and then discharged him, and they were aware of his being a transgender person with a disability (specifically, the medical conditions of which he had been diagnosed the prior April) when they undertook these actions. The court found that Bradford had worked long enough to be eligible for FMLA leave and had a viable claim against both companies, viewed at this point (over Prosoft's objection) as joint employers, under that statute. The court also rejected defendants' assertion that Bradford did not have a disability under the ADA on grounds that his medical condition was "transient," pointing out that he had suffered from these two medical conditions for more than six months. (Under the 2008 ADA amendments, a serious condition lasting more than six months is not deemed to be "transient" and thus can be considered an "impairment" for purposes of the ADA.) However, the court found that Bradford had failed to exhaust administrative remedies under the Americans with Disabilities Act and Title VII, at least as far as Prosoft was concerned, having filed suit before receiving a right to sue letter from the EEOC. (Bradford claimed to have filed a charge with the EEOC in June 2016, but he also filed this lawsuit in June 2016,

well before he could have requested a right to sue letter from the agency.) However, the court did not dismiss his ADA and Title VII claims against Humana, which unaccountably failed to raise administrative exhaustion in its separate motion to dismiss, to which it had attached a copy of Bradford's EEOC charge! A major issue to be resolved in this case is whether both defendants are "employers" of Bradford and, if not, which one should be treated as his employer for purposes of his various claims. Not discussed in the opinion is whether either employer challenges Bradford's assertion that Title VII would cover his claim of gender identity discrimination. Bradford is represented by Amanda R. Walker and Bradley S. Zoppoth, The Zoppoth Law Firm, Louisville, KY.

MARYLAND – U.S. District Judge Richard D. Bennett exercised discretion to refuse to dismiss an employment discrimination complaint under Title VII and the Maryland Human Relations Act filed by a transgender African-American woman, despite the failure of timely service on the defendant. *Lee v. Hagerstown Goodwill Industries, Inc*., 2017 U.S. Dist. LEXIS 57273, 2017 WL 1364755 (D. Md., April 14, 2017). Lee alleges that she was hired into a job training program by HGI from Aug. 20, 2014, through January 16, 2015, but her attempts to gain either temporary or permanent employment with Goodwill were rebuffed and she was "continually harassed by HGI employees based on her gender identity." She filed a timely charge with the EEOC and received a right to sue letter on February 5, 2016, filing her complaint on May 5, 2016. A summons was issued on May 26, but not timely served on defendant. Instead, on February 9, 2017, "defendant's resident agent, Kirk C. Downey, Esq., spoke with plaintiff's counsel and agreed to accept service on behalf of HGI," and the summons was then served on Downey on February 21, 2017. Nonetheless, HGI moved to dismiss the complaint for failure of service, relying on 4th Circuit precedent as the only circuit that "does not permit a district court to grant the plaintiff a discretionary extension of time to effect service of process." Judge Richard Bennett decided that the relevant precedent, now over twenty years old and out of step with the other circuits, need not be followed, especially noting that the Supreme Court had actually granted a cert petition in another case to review this issue, but that appeal was dismissed when the plaintiff failed to file a timely brief. "This Court fully agrees with the proposition that 'federal courts are here to resolve cases on the merits, to avoid procedural defaults whenever possible, and to issue the sanction of dismissal only in extreme cases of plaintiff misconduct," wrote Bennett, quoting from a prior unpublished district court decision, *Harris v. S. Charlotte Pre-Owned Auto Warehouse, LLC*, 2015 WL 1893839 (W.D.N.C., April 25, 2015). "With this proposition firmly in mind, and notwithstanding the fact that plaintiff has not shown good cause for its failure to timely serve defendant, this Court, in its discretion, declines to dismiss plaintiff's Complaint under Rule 12(b)(5). Defendant's resident agent agreed to accept service on defendant's behalf, and defendant can demonstrate no prejudice it will suffer based on this Court's exercise of its discretion." Lee's counsel listed on the opinion is Nina Basu, Basu Law Firm LLC, Elkridge MD. One suspects Lee obtained counsel after filing *pro se* and not realizing the need to follow up and have the complaint actually served on the defendant.

MONTANA – A group calling itself Privacy Matters has dropped its lawsuit against the Virginia School District and the U.S. Department of Education challenging the requirement that public schools receiving federal financial assistance allow transgender students to use restroom and locker room facilities consistent with their gender identity. The notice of dismissal was filed in federal court on April 13, without any explanation why the suit was being abandoned, but it seems likely that the Trump Administration's withdrawal of the Obama Administration's formal interpretation of Title IX on this issue had something to do with abandoning the litigation. *Duluth News-Tribune*, April 14.

NEW JERSEY – The *Hackensack Record* (April 18) reported a settlement of a hostile environment and discrimination lawsuit filed by Mathew Stanislao challenging his termination as an officer by the Glen Rock Police Department in October 2014. Announcing the settlement on April 12, Mayor Bruce Packer said that Stanislao will be reinstated as a patrol officer with back pay "on or before May 5, 2017." A payment of $750,000 will be made to Stanislao and his attorneys, of which $600,000 will come from the city's liability insurer and the remainder from the city's general budget. Stanislao agreed to dismissal of his lawsuit as part of the settlement. He had claimed that fellow officers subjected him to anti-gay verbal harassment, that he was never recognized for his meritorious service and was blocked from promotions. Stanislao is represented by Charles Sciarra and Matthew Curran of Sciarra & Catrambone.

NEW JERSEY – Superior Court Judge Dennis O'Brien granted a preliminary injunction on April 5 against Jersey Shore Arts Center in Ocean Grove, which was seeking to evict QSpot LGBT Community Center from its rental space in the Center. The court also granted a TRO so that QSpot can hold its LGBT Film & Digital Media

Festival as scheduled in the existing location on Main Street. QSpot has a discrimination lawsuit on file against the Jersey Shore Arts Center, claiming that the eviction is motivated by anti-LGBT bias in violation of New Jersey's Law Against Discrimination. The Arts Center told QSpot in May 2016 that its lease would not be renewed because it did not provide arts and education programming required of tenants in the Center, a claim which QSpot contests. *Newark Star-Ledger*, April 9. The community of Ocean Grove has been the scene of discrimination litigation in the past relating to sexual orientation claims.

NEW YORK – A married gay male couple applied to purchase a co-operative apartment in Manhattan. The managing agent for the building suggested that they submit a letter describing the "longevity" and "solidity" of their relationship, stating that they are married. They saw this as discriminatory (presumably based on their assumption that such a suggestion would not be made to a heterosexual couples) and filed a claim against the management company under the state and city human rights laws, which prohibit sexual orientation and marital status discrimination in housing transactions. New York County Supreme Court Justice Geoffrey D. Wright granted summary judgment to the defendants, who, it was said, "sought to facilitate, not prevent, the plaintiff's purchase of the apartment." If the defendants' suggestion to the plaintiffs could be construed as an "inquiry into their sexual orientation or marital status (of which defendants already were aware, but the cooperative board might not have been), when read in context with the relevant emails, they do not express any 'limitation, specification or discrimination' on the basis of the couple's sexual orientation, as opposed to financial concerns similar to any couple seeking to buy an apartment building," wrote the Appellate Division, First Department, rejecting an appeal of Justice Wright's decision. *Verzatt v. Halstead Property LLC*, 2017 N.Y. App. Div. LEXIS 3162, 2017 WL 1499575, 2017 NY Slip Op 03260 (1st Dept., April 27, 2017). "While the statements might be construed as a 'limitation, specification or discrimination' on the basis of marital status, as plaintiffs acknowledged, they would not have been denied the apartment on the basis of their marital status had they disclosed their status to the board, since they were married. Thus, they were not 'aggrieved by an unlawful discriminatory practice' as required under the State and City Human Rights Laws," wrote the court. Interesting. The State Division of Human Rights advises the public that employers, landlords and businesses should refrain from inquiring about forbidden grounds of discrimination, such as race, religion, national origin, and so forth, to avoid raising concerns about discrimination. But in this case, the court sees no problem with a managing agent suggesting to a same-sex couple seeking to buy an apartment that they affirmatively demonstrate to the co-op board that they are a married couple, presumably because a co-op board confronting an application from a same-sex couple, might assume that they are unmarried and have concerns about permitting the sale of an apartment to an unmarried couple? But since the state and local laws forbid discrimination based on marital status, wouldn't turning down a couple because they were unmarried, whether same-sex or different-sex, pose a problem under the law? The brief opinion as reported on Westlaw and Lexis indicates that there are defendants other than the management company but does not identify them, and this appeal relates only to two causes of action, without identifying the others. Plaintiffs-appellants are represented by Ryan C. Downer of Relman, Dane & Colfax PLLC.

NEW YORK – New York City has settled a federal lawsuit by the government on behalf of Raymond Parker, whose application for a position as a 911 dispatcher with the New York Police Department (NYPD) was turned down after he disclosed that he was HIV-positive. The NYPD took the position that an HIV-positive person can't handle a high-stress situation and considered him to be medically disqualified. He filed a charge with the Equal Employment Opportunity Commission (EEOC) under the Americans with Disabilities Act. The Stipulation and Dismissal in *United States v. City of New York*, No. 17 Civ. 0346 (RA) (S.D.N.Y., filed April 10, 2017) was signed on April 7 by Assistant U.S. Attorney Joon H. Kim for the Justice Department and Assistant Corporation Counsel Paul Marks for the City. The Stipulation notes that the EEOC investigated Parker's complaint and found probable cause to believe that his allegations of discrimination were true, prompting this lawsuit when the City refused to come up with a settlement offer acceptable to Parker and the EEOC during the administrative process. The City does not stipulate that it violated the statute, although it formally acknowledges that the ADA "prohibits discrimination against a qualified individual on the basis of disability." Under the terms of the settlement, the City agrees to submit to injunctive relief requiring that it refrain from disability discrimination covered by the employment provisions of the ADA and provides appropriate training on the non-discrimination and reasonable accommodation requirements of the statute to personnel in the Medical Assessment Section of the NYPD who are involved in assessing job applicants. The NYPD is required to report to the court on its compliance with these requirements. As to Parker, the NYPD informed him that his application has been reopened and he has a conditional offer of employment, contingent on

successful completion of the usual pre-hire screening process. Parker will also collect damages of $55,000 and his counsel, Fisher Taubenfeld LLP, will receive $30,000 in attorneys' fees and costs. Furthermore, without conceding a violation of the statute, the NYPD "acknowledges that its medical disqualification of Parker for the position of PCT on December 3, 2013, for 'HIV low CD4 count' was in error."

NEW YORK – Responding to a recommendation by Magistrate Judge Andrew T. Baxter to dismiss a second amended complaint by Shaun P. Garvey, *pro se*, who claims he was denied employment by Childtime Learning Center because he is a gay man in violation of Title VII's ban on sex discrimination, Senior District Judge Thomas J. McAvoy noted that the 2nd Circuit still draws a distinction between sexual orientation discrimination, not actionable under Title VII, and sex stereotyping, which is actionable under Title VII. While accepting the recommendation by Judge Baxter to dismiss an ADEA claim (because the plaintiff, age 36, is not a member of the protected class under federal age discrimination law) and a retaliation claim (because the only retaliation suggested by plaintiff is the failure to hire him because he is gay), the court did not accept the recommendation to dismiss all claims with prejudice, finding instead that the second amended complaint at least purports to articulate a sex stereotyping claim. Thus, it is dismissed without prejudice to give Garvey another chance to articulate facts in a new amended complaint that might be sufficient to state a stereotyping claim. *Garvey v. Childtime Learning Center*, 2017 WL 1378179, 2017 U.S. Dist. LEXIS 57201 (N.D. N.Y., April 13, 2017). One's first reaction to this case is to ask why Garvey is fooling around in federal court when there is a state human rights law that prohibits sexual orientation discrimination. He should be in state court. While it is possible, even likely, that one of the pending Title VII appeals in other cases will go to an *en banc* panel that might reverse circuit precedent, as of now the place to be on a sexual orientation discrimination claim in New York is in state court.

NEW YORK – Justice Barbara Jaffe denied the defendant's motion for summary judgment in *Santiago v. Bernard F. Dowd, Inc*., 2017 N.Y. Misc. LEXIS 1472, 2017 NY Slip Op 30791(U) (Sup. Ct., N.Y. Co., April 18, 2017), an unusual case involving a claim by Richard Santiago that while employed as a funeral director by the defendant, he was subjected to hostile environment sexual harassment in violation of the New York City Human Rights Law by the defendant's principal and sole shareholder, Bernard Dowd, in the form of a constant stream of sexually charged penis-oriented statements directed at Santiago during the course of his employment beginning in 1996 and ending in 2012, when he felt he had to leave because a female employee whom he considered the "buffer" between himself and Dowd had left for another position and he could not remain in Dowd's employ without her in that role. He obtained a position at the same annual salary at another funeral home and then filed this lawsuit. Dowd argued, as summarized by the court, that "absent any allegation of sexual touching, propositioning, or romantic overture, plaintiff's allegations amount to nothing more than trivial and subjective complaints by an apparently homophobic individual, and argues that there is no evidence that defendant treated plaintiff worse than other male employees." He also claimed that all of Santiago's allegations predating November 2010 were time-barred. He pointed out that Santiago's career was not hindered, he was promoted and given raises, and that Santiago cannot show that Dowd is gay or motivated in his conduct toward Santiago by sexual desire, or that Dowd was generally hostile to males in the workplace or treated members of the sexes differently. Santiago countered that Dowd "directed sexual comments only at male employees" and that these comments "were made daily and incessantly throughout plaintiff's years of employment, and despite plaintiff's complaints." Santiago asserted, contrary to Dowd's denials, that Dowd is gay and his conduct was motivated by sexual desire, that Santiago is not homophobic and Dowd's accusation to that effect "incorrectly attributes to him homophobic statements made by his colleagues." Santiago also countered the statute of limitations argument by asserting that Dowd's conduct "constitutes a single, continuing violation of the law." Justice Jaffe agreed with Santiago on the limitations points, finding sufficient factual allegations to support a "single continuing pattern of conduct." Rejecting Dowd's main contentions in support of his motion, Jaffe wrote, "Here, while defendant asserts that Dowd's comments constitute petty slights and trivial inconveniences, defendant does not address the totality of the circumstances and overall context of Dowd's conduct which, notwithstanding the alleged homosexuality or homophobia of either party, resulted in plaintiff's exposure to a constant barrage of sexual commentary solely referencing male genitalia within the confines of a funeral home. Such comments cannot be found to be truly insubstantial as a matter of law." She concluded that "whether Dowd's conduct constitutes gallows humor and typical locker room banter, or some form of sexual solicitation, is best decided by a jury." Furthermore, on the point of whether Santiago was victimized because of his sex, she wrote, "defendant offers no evidence that Dowd directed his comments to [the female co-worker], and even if he had,

plaintiff testified that Dowd directed his comments to males only, thereby raising a triable issue." Santiago is represented by David Abrams of New York, and Dowd by Eric Broutman, of Abrams, Fensterman et al., of Lake Success.

OHIO – In *Jane v. Patterson*, 2017 U.S. Dist. LECIS 55952, 2017 WL 1345242 (N.D. Ohio, April 12, 2017), U.S. District Judge Patricia A. Gaughan granted a motion by several co-defendants to dismiss a multi-count civil rights claim brought by a transgender woman who alleges verbal and physical harassment against her while she was a resident of public housing in Cleveland. Essentially, the ruling on this pre-trial motion whittles down the case to the few named defendants who might be sued under valid statutory and constitutional theories, and dismisses claims against various officials (the mayor, the commissioners of the Cuyahoga Metropolitan Housing Authority, and others) who are essentially immune from personal liability for the actions of persons such as the building manager of a public housing facility. The lack of some official policy of discrimination also saves the municipality and the housing authority itself from direct liability. The facts recited in the case are fairly horrendous, including harassment of the plaintiff by the building manager and fellow tenants, building up to and including physical assaults. Plaintiff Kayla Jane is represented by Gregory C. Sasse and Kent R. Minshall of Cleveland.

OREGON – U.S. District Judge Ann Aiken ruled on March 16 that Northwest Christian University had violated the state's ban on marital status discrimination in employment by discharging an unmarried "exercise science" teacher who had become pregnant by her cohabiting boyfriend and refused to break up with him. *Richardson v. Northwest Christian University*, 2017 WL 1042465 (D. Ore., March 16). The school claimed it should be entitled to a religious exemption from complying with antidiscrimination laws, based on its status as a "nonprofit, Christian University" that requires its faculty to adhere to "Biblical Christianity." As we all know, in the Bible nobody got pregnant unless they were married. (Just kidding, gentle readers.) Anyway, faculty were supposed to model Christian morals for their students, and the school decided it could not tolerate the situation. When they found out that Coty Richardson, already the single mother of two children, had become pregnant with a third, she was delivered an ultimatum: either marry her boyfriend or make him move out of the house. She said her private life was private and none of the school's business, and she was fired. Interestingly, the administration was willing to tolerate the situation so long as she did not continue to cohabit with her boyfriend. Evidently, that would have been flaunting her immorality. She sued under Title VII, whose sex discrimination provision expressly covers discrimination because of pregnancy or childbirth, as well as the Oregon Human Rights Act, which specifically bans discrimination because of marital status as well as sex discrimination, and also asserted claims of intentional infliction of emotional distress and breach of contract. Judge Aiken rejected the school's claim that the ministerial exemption under the 1st Amendment should protect it from liability, or should be expanded into an "ecclesiastical exception" that would give the school free reign to discriminate against its employees on grounds other than religion. She found that neither party was entitled to summary judgment on the sex discrimination claims, but that Ms. Richardson was entitled to summary judgment on her marital status discrimination claim. The school won s.j. on the intentional infliction of emotional distress claim – a cause of action reserved for the most outrageous sort of conduct by an employer in the context of an employee-employer lawsuit, but Aiken held that a trial would be needed on the breach of contract claim as well as the sex discrimination claims. She did, however, reject Richardson's request for punitive damages.

PENNSYLVANIA – It's official. The Pennsylvania Supreme Court has determined that the Southeastern Pennsylvania Transportation Authority, an agency that runs public transit in Philadelphia and the surrounding suburbs, is not subject to the jurisdiction of the Philadelphia Commission on Human Relations, which enforces the city's anti-discrimination ordinance, or other local agencies. *Southeastern Pennsylvania Transportation Authority v. City of Philadelphia*, 2017 WL 1489043 (April 26, 2017). This has been a much-litigated issue, for, among other reasons, the simple reason that attempts to amend Pennsylvania's state anti-discrimination law to add "sexual orientation" and "gender identity or expression" as prohibited grounds of discrimination have been stymied by Republicans who control the state legislature. Despite widespread public support in the state for outlawing anti-LGBT discrimination – as manifested by dozens of municipalities, large and small, that have added these prohibited grounds to their local anti-discrimination ordinances – the measure has not moved at the state level. SEPTA is a big employer, and the question whether it was free to discriminate against LGBT people in its operating area, even though the local laws prohibited such discrimination, is a recurring one. In this April 26 ruling, the state's high court divided 4-3 over the question, but concluded that the localities could not assert jurisdiction over SEPTA's activities.

CIVIL LITIGATION

PUERTO RICO – In *Gonzalez v. Nevares*, filed on April 6 in the U.S. District Court, Lambda Legal challenges the Commonwealth of Puerto Rico's categorical prohibition against changed to the gender marker in birth certificates, even for transgender individuals who have completely transitioned to the gender with which they identify. This policy conflicts with that of 46 out of 50 states and the District of Columbia, according to a statement by Lambda Staff Attorney Omar Gonzalez-Pagan in a press advisory about the lawsuit. The suit alleges violations of the 14th Amendment, which applies in Puerto Rico, on both due process and equal protection grounds, as well as a 1st Amendment claim of freedom of expression. The complaints demonstrates how transgender people deprived of appropriate documentation are subject to discrimination and harassment, and argues that there is no legitimate policy justification for denying them an amended birth certificate.

SOUTH CAROLINA – York County Family Court Judge Thomas White, embracing a retroactive interpretation of *Obergefell v. Hodges*, has ruled that a long-time cohabiting same-sex couple in the state whose relationship ended last year had a 30-year-long common law marriage that must be recognized as such by the state government and courts. Debra Parks, he ruled, should have the same rights as a heterosexual spouse upon dissolution of a marriage, including alimony, health insurance, tax treatment, and division of property. Wrote White, "Quoting William Shakespeare, 'A rose by any other name would smell as sweet.' The law established by the U.S. Supreme Court in *Obergefell* should be applied retroactively in South Carolina." South Carolina is one of eight states that recognize common law marriages, reported *heraldonline.com* (March 19) in an article about the decision, citing to the website of the National Conference of State Legislatures. Parks had been married to a man and had two children, but began living with her former female partner in 1977 and legally divorced her husband in 1987. Judge White held that the common law marriage began from the date of Parks' divorce. Parks filed the lawsuit to seek a division of property and spousal support but her former partner, who is not named in the article due to her concerns about her job and church membership, contested the suit, saying she had never asked Parks to marry and never intended to be married. Once White concludes the case on the merits, Parks' former partner may try to appeal the ruling.

TENNESSEE – A settlement on undisclosed terms has been reached in a federal lawsuit filed under Title IX by Lance Sanderson, an openly gay student at Christian Brothers High School who was denied permission to bring a same-sex date to the homecoming dance. He pointed out that male students who sought to bring female dates to the dance did not have to seek permission. The lawsuit was initially filed in Shelby County Circuit Court, then transferred to federal district court. The complaint alleged that the school had publicly promoted a "guiding philosophy based on faith, quality education, care for the poor and social justice, and inclusion and respect for all people." Furthermore, the school's code of conduct provided that all students "should feel safe, secure and accepted," regardless of "several factors including sexual orientation," according to a report on the settlement by the *Memphis Commercial Appeal* (April 12). Sanderson alleged that after he came out to the principal, the principal "acted ashamed, embarrassed and disapproving of his sexual orientation." These days, it seems, the principal of a Catholic boys' school in Memphis should not expect to get away with such conduct without criticism or, in this case, becoming a defendant in a lawsuit.

UTAH – U.S. District Judge Dee Benson granted a stay in response to a motion filed by all parties in a pending suit by Equality Utah against the Utah State Board of Education, challenging state education policies that the plaintiff charges prohibit positive speech in schools about LGBT people. The suit also named several school districts, citing adverse experiences of students in several schools as a result of the alleged policies. The suit relies on Title IX. The stay was sought after the Legislature passed SB 196, which eliminated the existing prohibition. That measure was signed into law on March 20 by Governor Gary Herbert. The matter is now stayed as an administrative process is ongoing to remove administrative rules that were specifically attacked in the complaint. The Utah State Board of Education was scheduled to address this issue at its May 5 meeting. *Deseret News*, April 18.

VIRGINIA – In *Lafferty v. School Board of Fairfax County*, 2017 Va. LEXIS 58, 2017 WL 1367008 (April 13, 2017), the Virginia Supreme Court affirmed a ruling by Fairfax County Circuit Judge Brett A. Kassabian that a student at a public high school, suing through his parents, did not have standing to sue the school board "based on his alleged distress over potential repercussions from the school board's expansion of its anti-discrimination and anti-harassment policy." The opinion is by Senior Justice Leroy F. Millette, Jr. The school board voted to protect the right of transgender students, consistent with Title IX, to use restroom and locker room facilities at the high school consistent with their gender identity. Identified as "John Doe" in the complaint (and joined by a local anti-gay activist, Andrea Lafferty, who is listed as lead plaintiff asserting "taxpayer standing"), the plaintiff alleges that he is "distressed" because he "has no idea what words or conduct might be interpreted as discriminating

on the basis of 'gender identity,' and therefore does not know what speech or conduct might subject him to discipline," and is also "distressed" because "he understands that the [school board's] decision will mean that the restrooms, locker rooms and other intimate spaces . . . will now be open to students who might have the physical features of one sex but are permitted to use the bathroom of the opposite sex which the student 'identifies' as, whatever that means." He also alleged that he was "unsure of whether he can question someone appearing to be a girl in his locker room or bathroom" and is "nervous about having to think about every statement or action and its potential sexual connotations," claiming this causes him "significant distress to the point that it adversely affects his ability to participate in and benefit from the educational program." He is also "terrified of the thought of having to share intimate spaces with students who have the physical features of a girl, seeing such conduct as an invasion of privacy." As a result of this policy, he no longer sees his school as a "safe place where he can learn without fear of harassment, being charged with harassment, and having his speech and conduct chilled for unknowingly violating the ambiguous code of conduct," and finally "inhibited in his 'ability to fully and freely participate in and benefit from the school's educational program." The trial court decided plaintiffs lacked standing, that there was an administrative process for seeking judicial review in the circuit court of board decisions, and that if "Jack Doe" ran into an individual problem, he could file suit at the appropriate time when he sustain an actual injury. The Supreme Court agreed, finding that "the complaint fails to allege actual or potential injury in fact based on 'present rather than future or speculative facts.'" Indeed, the court pointed out, "it is not clear what, if any, bathroom policies are being implemented, or even that Jack attends school with a single transgender student." The decision goes on in this vein, showing how the complaint is just a chain of conjectures about hypothetical situations, and "fails to assert 'specific adverse claims' of right that could be the basis of individual standing to challenge a government action. As to taxpayer standing, the court found the complaint on behalf of Doe's parents and Lafferty as taxpayers to be deficient, as they were not challenging a spending decision by the board of education. The court refused to "infer costs accompanying a policy change and to consider the costs of implementing the policy" as a basis for their standing, deeming this to be "wholly speculative on the part of this Court." It sounds like "Jack Doe" has spent too much time listening to the fear-mongering of Mat Staver of Liberty Counsel, the anti-gay litigation organization, who represents the plaintiffs in this case, which sounds "drummed up" to this writer. If "Jack Doe" actually exists, one hopes he is getting some counseling so he can continue attending school fears of persecution for being (presumably) a cisgender male with an anxiety complex.

WISCONSIN – Two transgender employees of the University of Wisconsin, represented by the ACLU, filed suit in federal court on April 7 against the state's insurance board and the University of Wisconsin System, after it stopped covering sex reassignment procedures under its employee benefits plan. The insurance board had added the benefits last summer, but board members voted 7-2 to drop them in December shortly before they were to become effective, after the state's misnamed Department of Justice suggested that the U.S. Department of Health and Human Services' interpretation of Title IX as requiring such coverage was not lawful. The plaintiffs are Shannon Andrews, who has paid for gender transition surgery out of her own funds, and Alina Boyden, who has foregone treatment due to lack of funds. *Milwaukee Journal Sentinel*, April 8.

CRIMINAL LITIGATION NOTES

ILLINOIS – Cook County prosecutors decided to drop criminal charges that had been brought against Jimmy Amutavi, a personal trainer from Wilmette who was accused by three women of having unprotected sex with them without disclosing that he is HIV-positive. If he were tried, he would face the possibility of up to seven years in prison on each of three counts, but during a pretrial hearing, the prosecutors said they were dropping the charges, and subsequently Cook County State's Attorney Kim Fox released a statement: "After consulting with medical experts, we concluded that the evidence in this case was insufficient to prove the criminal charges." In other words, intent to transmit the virus could not be shown in light of current HIV treatments. Amutavi's attorney, Jon Erickson, said he was taking medication and "did everything possible to prevent transmission." He did not intend to infect anybody, said Erickson. *Chicago Tribune*, *Windy City Times*, April 21.

IOWA – A panel of the Court of Appeals of Iowa voted 2-1 in *Sudduth v. State*, 2017 Iowa App. LEXIS 326, 2017 WL 1278239 (April 5, 2017), that Guy Dell Sudduth, who entered a no-contest plea in 2005 to two counts of criminal transmission of HIV and three counts of third degree sexual abuse arising from the same incidents, can pursue a post-conviction relief application filed in 2014 despite the three-year limitations period on filing such a motion, because the Iowa Supreme Court's decision in *Rhoades v. State*, 848 N.W. 2d 22 (2014), made a change in the substantive law that provided new grounds to seek post-conviction relief. Judge

Anuradha Vaitheswaran wrote for the majority. Prior to *Rhoades*, Iowa courts presumed that "exposing" a person to HIV through "intimate contact" would lead to transmission of the virus. In *Rhoades*, the court stated: "With the advancements in medicine regarding HIV between 2003 and 2008, we are unable to take judicial notice of the fact that HIV may be transmitted through contact with an infected individual's blood, semen or vaginal fluid, and that sexual intercourse is one of the most common methods of passing the virus to fill in the gaps to find a factual basis for Rhoades' guilty plea." Thus, argued Sudduth, his own plea from 2005 lacks a factual basis and should be set aside. The state, opposing Sudduth's application, argued that *Rhoades* did not change the law, but the Iowa Court of Appeals had already rejected that argument last year in *Stevens v. State*, 884 N.W.2d 223 (2016), stating: "What the jury was once able to accept as common knowledge with no further proof required from the State, now requires the State to offer 'expert medical testimony on the likelihood of transmission of HIV.'" In *Stevens*, the court remanded the case for consideration of whether "the *Rhoades* case should be retroactively applied." The Supreme Court did not accept a petition for review in that case, so the ruling became final in mid-2016. The court now found *Stevens* to be "persuasive authority in support of Suddith's request for reversal." The court concluded that Sudduth had "asserted a ground of law that could not have been raised within the applicable time period. His application falls within the 'ground of law' exception to the three-year time bar." And, of course, his application was filed shortly after the *Rhoades* decision was announced. The court reversed the trial court's dismissal of Sudduth's application and remanded for a hearing on his application. Dissenting, Chief Judge David Danilson argued that at the time Sudduth entered his plea, "it remained appropriate to take judicial notice of the adjudicatory fact," so he would still conclude that "any challenge to the factual basis for the pleas via Sudduth's application for post-conviction relief was untimely" when filed in 2014.

IOWA – Mondell V. Olson pled guilty a one count of first-degree harassment and one count of third-degree harassment for threats and inappropriate messages he targeted to a transgender student in the Nevada, Iowa, school district, reported the *Ames Tribune* on April 15. Olson allegedly called the student's home on February 3 and left two threatening messages based on the student's gender identity. He then allegedly called the school district the following week and left two messages, threatening to kill, brand, and cause bodily harm to the student. Olson was arrested in February after police were contacted about the threats. He was scheduled to be sentence on the plea counts on April 28.

KANSAS – The Kansas Supreme Court upheld the felony murder conviction of Maurice Stewart, who slaughtered another man in the course of the burglary of a hotel room and tried to defend himself with a "gay panic" defense. *State of Kansas v. Stewart*, 2017 WL 1534284 (April 28, 2017). Stewart stole a laptop from Stephen Cook, who was staying in the same hotel as Stewart, and apparently stabbed Cook to death in the course of the robbery. As recounted in the opinion by Justice Lee Johnson, "The defense theory was that Stewart killed Cook in self-defense after Cook attacked and injured Stewart with a knife when Cook's sexual advances were rejected. To corroborate the theory and Stewart's version of events relayed during his interrogation, defense counsel sought to portray Cook as a severe alcoholic who led a promiscuous homosexual lifestyle, soliciting men while he traveled the country and becoming verbally and physically abusive when drinking. Defense counsel characterized Stewart's murderous act as a post-traumatic stress disorder (PTSD) 'panic reaction' to Cook's sexual advances and assault." This theory was significantly undermined by conflicting stories that Stewart told police investigators when he was apprehended, although it was clear that he had settled on some version of a "gay panic" defense without having firmly fixed the details in his own mind. The Supreme Court's opinion does not discuss whether the prosecution objected to the introduction of evidence on this defense theory, or whether or how the trial court ruled on it. In any event, the jury convicted Stewart and he was sentenced to "life without the possibility of parole for 20 years plus 102 months" for "felony murder, aggravated robbery, burglary, and theft." On appeal, Stewart's arguments challenged the jury charge and the way his objections to proffered DNA and blood spatter evidence had been handled by the trial court, which declined to hold a new hearing on the objections, which had previously been rejected by a different judge during pre-trial proceedings. While the Supreme Court faulted the trial court for failing to afford the defense a hearing on its objections as part of the trial, it concluded, "on the record before us, any abuse of discretion by the trial judge in failing to independently consider the merits of Stewart's objection, is harmless." The court noted that "DNA testing and blood spatter analysis were not new or experimental techniques" and that the defense attorney at trial "made no other credible argument that would trigger the need for a hearing on the scientific bona fides of those accepted techniques." The testimony at issue definitely placed Stewart on the scene as his DNA was intermingled with that of the victim, and the blood spatter analysis contradicted Stewart's various accounts of how Cook came to die from stab wounds. Stewart

had proffered an incredible tale about Cook accidentally stabbing himself to death while trying to assault Stewart.

MICHIGAN – The Court of Appeals of Michigan affirmed the conviction of Ashmay Rodrigeuz, an HIV-positive man, for having sex with a 16-year-old male neighbor without disclosing his HIV status, in *People v. Rodriguez*, 2017 Mich. App. LEXIS 582, 2017 WL 1367110 (April 13, 2017). The opinion does not mention whether the virus was transmitted or whether condoms were used. Rodriguez was sentenced as a "third offense habitual offender," drawing a prison term of 3-8 years. His first argument on appeal was that the trial court abused its discretion by denying his motion for a mistrial based on comments that the prosecutor made in the opening statement. Although the parties had stipulated that Rodriguez knew he was HIV-positive, the prosecutor told the jury that Rodriguez had told the detective assigned to investigate the case that he was "clean" and free of HIV, but then "the police department 'began checking, and through checking records [they] were able to determine that, in fact, [he] was HIV positive." This, argued Rodriguez, signaled to the jury that he had a criminal record, biasing them against him. He moved for a mistrial, but the trial judge denied the motion, stating that it was "speculative at best" that the jury would draw that conclusion from the reference to "records," which could just as well have been medical records as criminal records. The appeals court agreed with the trial court on this. Rodriguez's second argument was that there was insufficient evidence to sustain his conviction, since the state had to prove beyond a reasonable doubt that he failed to disclose his HIV status. "The victim testified that defendant did not tell him that he was HIV positive," wrote the court. "Conversely, defendant testified that he told the victim, on two occasions, that he was taking medication for HIV, and defendant's brother and nephew both testified that they overheard defendant tell the victim that he was taking medication for HIV on one of those occasions. Accordingly, the jury was presented with a credibility contest." As far as the appeals court was concerned, in a credibility contest the jury's conclusion is final and the court will defer to it. The number of witnesses on each side is not dispositive.

TEXAS – Although the U.S. Supreme Court recognized in *Lawrence v. Texas*, 539 U.S. 558 (2003), that consenting adults have a right to be free of criminal prosecution for private sexual activity, the ruling does not extend to invalidate a state law prohibiting sexual conduct between a teacher and a student, even when the student has reached the age of majority under state law, held the Texas Court of Appeals in *Toledo v. State of Texas*, 2017 WL 1281437 (1st Dist., April 6, 2017), affirming the imposition of a 15 year prison sentence on a male high school women's varsity soccer coach who pursued a sexual relationship with a 17-year old girl on the team he was coaching. The court quoted from an article that stated, "If employees in positions of authority enter into sexual relationships with students that they teach, coach, counsel, etc. on a regular basis, mental or physical harm to the student as the result of the relationship is almost guaranteed."

PRISONER LITIGATION NOTES

ALABAMA – *Pro se* inmate Jaquine Roberto Taylor loses to summary judgment on all claims in a Report and Recommendation [R & R] by United States Magistrate Judge Charles S. Coody in *Taylor v. Thomas*, 2017 U.S. Dist. LEXIS 56826 (M.D. Ala., April 12, 2017). Taylor sued as a member of the class in *Henderson v. Thomas*, 913 F. Supp.2d 1267 (M.D. Ala. 2012) (state-wide Alabama injunctive challenge to HIV treatment of prisoners), and for violation of his individual rights under the Constitution and under the Americans with Disabilities, 42 U.S.C. § 12101 et seq. Act [ADA], and under § 504 of the Rehabilitation Act, 29 U.S.C. § 794 [RA]. One of Taylor's key claims is that he was forced to wear an identifying armband that revealed his HIV status. The R & R began by noting that *Henderson*, which granted relief only on the ADA and RA claims (and banned such armbands), created no damages claims and provided for mediation through class counsel of violations of the order. To the extent Taylor's claims fell within *Henderson*, the R & R dismisses them without prejudice. As to Taylor's claims of damages against defendants in their individual capacities under the ADA or RA, the Acts do not provide for same. As to constitutional claims, the defendants are entitled to qualified immunity, since it was not clearly established in Alabama that forced wearing of an armband revealing HIV status violated the Constitution. *Harris v. Thigpen*, 941 F.2d 1495, 1521 (11th Cir. 1991), upheld a constitutional challenge to full segregation of HIV+ inmates and remains the law of this circuit. *Henderson* was decided on statutory grounds. Even though Taylor is a member of the *Henderson* class, he must file a new lawsuit if he wishes to sue for official capacity claims under the ADA and RA for damages where he is currently incarcerated, since the R & R refuses to grant an amended pleading to state such allegations at the new prison. These claims are also dismissed without prejudice. Cruel and unusual punishment claims are dismissed with prejudice, since the R & R found no Eighth Amendment claim separate from the privacy claims under the Fourteenth Amendment, to which qualified immunity would attach. The R & R is very long and dense reading; however,

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for those who wish to follow a *pro se* attempt to turn class action injunctive relief into an individual damages case in the Eleventh Circuit, the prolix opinion should be studied. *William J. Rold*

CALIFORNIA – U.S. District Judge Jon S. Tigar has presided over several high profile rulings on medical care for transgender inmates. *See* coverage of *Norsworthy v. Beard*, 2015 U.S. App. LEXIS 17447 (9th Cir., October 5, 2015), reported in *Law Notes* (November 2015 at pages 517-8); and *Norsworthy v. Beard*, 2015 WL 1500971 (N.D. Cal., April 2, 2015), reported in *Law Notes* (May 2015 at pages 199-200). Now, in *Smith v. Tootell*, 2017 U.S. Dist. LEXIS 51576 (N.D. Calif., April 4, 2017), Judge Tigar allows *pro se* inmate Carey K. Smith to proceed past screening on claims that a mental health supervisor falsified and removed chart records to deny her treatment, calling her a "sexual deviant who is [at] high risk for HIV." She further alleges that the prison medical director was complicit in the denials of treatment and refused to correct the deliberate tampering with records. In an unusual move, Judge Tigar ordered the state officials to respond by summary judgment or other dispositive motion within 91 days of service. Interestingly, he relies on the standards of *Kosilek v. Spencer*, 774 F.3d 63, 86 (1st Cir. 2014) (en banc), for basic transgender care, even though he declined to follow *Kosilek*'s denial of sex reassignment surgery when he ordered same for an inmate in *Norsworthy*. Here, Judge Tigar's fast track indicates his desire to see the disturbing allegations resolved quickly. *William J. Rold*

GEORGIA – *Pro se* inmate Adey Fombang Fru sued the Liberty County (Georgia) Jail and others, alleging denial of protection from assault and unconstitutional deprivation of medical care for his injuries in *Fru v. Liberty Cnty. Jail*, 2017 U.S. Dist. LEXIS 56973 (S.D. Ga., April 13, 2017). U.S. Magistrate Judge G.R. Smith recommended dismissal of both claims on initial screening. As to the assault, Judge Smith dismissed without prejudice under *Farmer v. Brennan*, 511 U.S. 825, 833 (1994), allowing Fru to replead if he could show more than that his assailant was known to be dangerous – a description too general for liability for failure to protect in a prison. Fru must allege specifically (or by "John Doe") who knew that he was a target and when. As to medical care, Fru received a nurse's evaluation for a bite injury in the assault, as well as medication. His argument that he should have been given an HIV test (writer's note: without alleging his assailant was HIV+) was a mere disagreement about medical care that is not actionable under the Eighth Amendment. Judge Smith also dismissed claims against the county, but he does not cite the leading cases involving county governments and sheriffs in Georgia, who are considered sovereigns of the state under the Georgia Constitution, and therefore not "persons" under 42 U.S.C. § 1983. *See Carter v. Butts County, Georgia*, 821 F.3d 1310, 1323 (11th Cir. 2016) (and cases cited) (county and sheriff both entitled to sovereign immunity defense in Georgia under Eleventh Amendment). *William J. Rold*

MARYLAND – *Pro se* inmate Robert Wright Louis filed a federal civil rights case because an officer called him a "faggot and a homosexual" and said "you're in here for five year olds" while "the entire prison tier was watching and listening." He sought damages for defamation. U.S. District Judge Paula Xinis granted Louis an opportunity to refile, specifying "what federal law or constitutional provisions, if any, he believes have been violated, to state whether he has suffered any injury as a result of the actions alleged, and to state why he believes this Court has jurisdiction over the case." He failed on refiling to allege that he has been "threatened or assaulted by fellow inmates as a result of [the officer's] comments." Judge Xinis therefore dismissed the federal complaint in *Louis v. Patrick*, 2017 WL 1196626, 2017 U.S. Dist. LEXIS 49007 (D. Md., March 31, 2017), noting that Louis' general feeling of being "traumatized" was not actionable in a civil rights case. The case has a general discussion of dismissals on screening under 28 U.S.C. § 1915. *William J. Rold*

MASSACHUSETTS – *Pro se* transgender inmate Jojo Witkowski sued officials for denial of medical treatment under the Eighth Amendment and for malpractice under state law in *Witkowski v. Spencer*, 2017 WL 1423708 (D. Mass., April 20, 2017). U.S. District Judge Nathaniel M. Gorton granted a motion by state officials to refer her malpractice claim to state court for evaluation by a "Medical Malpractice Tribunal" – required under state law in medical malpractice claims as a condition of proceeding – *see* M.G.L. c. 231, § 60B. The "Tribunal" determines whether the case raises "a legitimate question of liability" or "merely an unfortunate medical result." If the latter, the plaintiff must post a $6,000 bond to proceed on the claim. Judge Gorton relied on *Feinstein v. Massachusetts Gen. Hosp.*, 643 F.2d 880, 883 (1st Cir. 1981), which held that Massachusetts medical malpractice claims that are in federal court based on diversity jurisdiction must be referred to the "Tribunal," finding no difference when the malpractice claim was pendent to a federal civil rights claim, citing *Turner v. Sullivan*, 937 F. Supp. 79, 80 (D. Mass. 1996). Judge Gorton noted that Massachusetts procedures provided for a reduction of the bond in appropriate cases. The opinion does not address the remaining

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federal civil rights causes of action, but the plaintiff does not have to exhaust state remedies to proceed on federal claims in federal court under 42 U.S.C. § 1983, regardless of malpractice board hurdles that delay state law claims. *See Monroe v. Pape*, 365 U.S. 167, 183 (1961) (state judicial remedies); *Patsy v. Board of Regents*, 457 U.S. 131, 504 (1982) (state administrative remedies). Nevertheless, the Prison Litigation Reform Act requires prisoners to exhaust prison grievances before filing a lawsuit on federal civil rights claims – a matter not addressed in this decision. Massachusetts practitioners should consider the impact of this ruling before filing pendent state malpractice claims when bringing deliberate indifference suits for prisoners in federal courts. *William J. Rold*

MICHIGAN – In a very long opinion that discusses case law on prisoner searches, processing of grievances, and supervisory liability at length, U.S. District Judge Paul L. Maloney dismisses most of *pro se* inmate Jermaine Hunter's civil rights action in *Hunter v. Palmer*, 2017 U.S. Dist. LEXIS 53181 (W.D. Mich., April 6, 2017). For purposes of *Law Notes*, the relevant discussion concerns allegations that a trainee officer groped Hunter, deliberately "lingering" over his testicles and buttocks and making crude remarks while conducting a search – which retriggered his trauma over sexual assaults more than three years ago at another prison. Other officers and inmates were present. Eventually an investigation occurred under the Prisoner Litigation Reform Act ["PREA"], 42 U.S.C. § 15601, *et seq*., including review of a videotape, which found the allegations unfounded. Judge Maloney found no definitive Sixth Circuit decision on whether PREA creates a private cause of action, but he joined other courts ruling that it does not. He found the force reasonable under *Hudson v. McMillian*, 503 U.S. 1, 9 (1992). He found the incident to be isolated and not unconstitutional merely because it was accompanied by inappropriate remarks, citing *Solomon v. Mich. Dep't of Corr*., 478 F. App'x 318, 320-21 (6th Cir. 2012) (two "brief" incidents of physical contact during pat-down searches, including touching and squeezing the prisoner's penis, coupled with sexual remarks, do not rise to the level of a constitutional violation); and *Jackson v. Madery*, 158 F. App'x 656, 661 (6th Cir. 2005) (same). He also surveyed other circuit cases, including *Boddie v. Schnieder*, 105 F.3d 857, 859-61 (2d Cir. 1997), without mentioning that it has been largely overruled two years ago in *Crawford v. Cuomo*, 796 F.3d 252, 254 (2d Cir. 2015). The heart of Judge Maloney's finding, however, is that "even if . . . [the officer] lingered over Petitioner's genitals and buttocks during the search, his conduct was not sufficiently severe to rise to the level of an Eighth Amendment violation." Under the Fourth Amendment, Judge Maloney was not prepared to find that prisoners have an expectation of privacy from searches that society is prepared to accept as reasonable, citing *Hudson v. Palmer*, 468 U.S. 517, 525 (1984). *Hudson* (and most of the other cases cited by Judge Maloney) concerned privacy in prison cells, not searches of persons. Nevertheless, Judge Maloney did not recognize a Fourth Amendment claim to unreasonable searches in the prison context that is separate from Eighth Amendment jurisprudence. Hunter's claims that officials retaliated against him for protesting survive and will continue in this case. *William J. Rold*

MINNESOTA – Kenneth Steven Daywitt and Kenneth Gernard Parks, *pro se*, are civilly committed sex offenders who "previously were involved in a sexual relationship," who sued jointly to become roommates in *Daywitt v. Minnesota Department of Human Services*, 2017 WL 1406374 (D. Minn. April 20, 2017). U.S. District Judge Wilhelmina M. Wright adopted, with modifications, the Report and Recommendation [R & R] of Magistrate Judge Franklin L. Noel that the case be dismissed with prejudice. The couple sued under the Civil Rights Act of 1964 (sex discrimination), the Equal Protection Clauses of the federal and state constitutions, and the Minnesota Human Rights Act. The R & R recommended dismissal of all claims with prejudice. Judge Wright modified the dismissal to be without prejudice as to some of the claims, even though plaintiffs tendered no objections to the R & R. Judge Wright upheld the R & R's recommendation of dismissal with prejudice under Titles II and III of the Civil Rights Act, dealing with public accommodations, which do not, inter alia, expressly include sex discrimination. ("Sex" was included as a prohibited ground of discrimination only in Title VII of the Civil Rights Act of 1964, dealing with employment, and a battle rages in the court over whether that can be construed to extend to sexual orientation discrimination claims.) Likewise, the court found that the Minnesota Constitution did not provide a cause of action recognizable under 42 U.S.C. § 1983, and upheld this dismissal with prejudice as well. The court modified the dismissal under the federal Equal Protection Clause to be without prejudice, without explanation. The R & R (reviewed on PACER, along with the Amended Complaint) showed that Judge Noel found that the allegation that the institution's allowance of other couples to be roommates was fatal to a claim of sexual orientation discrimination and showed the decision here was based on individualized factors in the plaintiffs' history. Judge Wright did not explain how this claim could be saved on re-pleading. Judge Wright also modified the state Human Rights claims to be without prejudice, leaving the plaintiffs the option of

continuing them in state court, without explaining why they could not also raise the Minnesota Constitutional claim in state court. Both opinions are very light on analysis or scholarship. *William J. Rold and Arthur S. Leonard*

MISSISSIPPI – A gay inmate who was assaulted loses in summary judgment on his protection from harm claims in *Lester v. Banks*, 2017 U.S. Dist. LEXIS 49257 (S.D. Miss., March 31, 2017). Marcus Laquez Lester, *pro se*, alleged that he was stabbed by another inmate (Tarakus Lee), who was hired by other inmates to harm Lester because Lester had "red tagged" the others as dangerous to him previously, as both gay and a "snitch." U.S. Magistrate Judge John C. Gargiulo conducted a *Spears* hearing – Fifth Circuit procedure (sometimes called an omnibus hearing) to review *pro se* complaints by the court, usually with testimony by telephone, to determine sufficiency to state a claim, per *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985) – and determined that no jury questions were presented. First, Judge Gargiulo found that Lester's injunctive claims were moot because he was no longer incarcerated in the Mississippi DOC. As to damages, Judge Gargiulo found that the defendants were either entitled to dismissal because Lester did not state a claim under *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); or they were entitled to qualified immunity as a matter of law under *Pearson v. Callahan*, 555 U.S. 223, 231 (2009), and *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Judge Gargiulo finds that, even if officials knew of the risk from Lester's letter of complaint and grievance (which "they may have actually received"), they were not deliberately indifferent because they took some action to protect him, such as transferring him (only to put him back at the same institution) – actions made difficult because of the number of "red tags." Judge Gargiulo notes that Lester's *Spears* evidence fails to establish the motivation for the assault – finding inadequate proof for a jury of either homophobic motivation or retaliatory motivation for targeting other inmates – writing: "It is not clear which motivation Lester ascribes to Lee," in disregard of the notion that the assault could have been motivated in part by both. Judge Gargiulo also disregards allegations of anti-gay harassment because much of it occurred after the assault and verbal harassment is not itself actionable, even though the Complaint (but not the grievance) alleges that other inmates were "targeting homosexuals." He finds the officials' actions "objectively reasonable" under *Farmer* and in accordance with clearly established law at the time of the assault, quoting *Collins v. Ainsworth*, 382 F.3d 529, 537 (5th Cir. 2004), and writing: "nothing suggests that the attack was foreseeable." In this writer's view, Judge Gargiulo's weighing and sifting of the evidence and the inferences to be drawn from it intrude upon the jury's prerogative in this case. Moreover, the use of *Spears* evidence to determine summary judgment exceeds its limited purpose to clarify *pro se* pleadings and, in effect, provide a *sua sponte* basis for obtaining a "more definite statement" of the claim under F.R.C.P. 12(e) – not to form the basis for a determination of summary judgment. *See Gason v. Holt*, 73 F.3d 600, 602-5 (5th Cir. 1996) (setting parameters for use of *Spears* testimony in dispositive determinations); *cf. McGeary v. Richardson*, 738 F.3d 651, 654 (5th Cir. 2013) (allowing discovery on qualified immunity after *Spears* hearing to determine reasonableness of prisoner's search). Judge Gargiulo also finds no claim in the allegations that officers delayed assisting Lester during the assault. He finds that the entire length of the assault was only "minutes" and that, although the officers had pepper spray, the inmates had shivs (according to the omnibus hearing); and "no rule of constitutional law requires unarmed officials to endanger their own safety in order to protect a prison inmate threatened with physical violence," citing *Longoria v. Texas*, 473 F.3d 586, 594 (5th Cir. 2006). *William J. Rold*

NEBRASKA – *Law Notes*' report turned out to be premature when we wrote last year that transgender inmate Riley Nicole Shadle (convicted as Dillon Shadle) had settled (with appointed counsel) her lawsuit against the medical director of the Nebraska Department of Corrections in *Shadle v. Kohn*, 15-cv-03132 (D. Nebr.) (October 2016 at page 447-8). Shadle is back in court in two cases. The first, a feature article in this issue, concerns her effort to marry another inmate in "Nebraska Inmates Seek to Marry; Federal Judge Appoints Counsel," reporting a lawsuit filed with her husband to be in *Wilson v. Geerdes*, 2017 U.S. Dist. LEXIS 49133 (D. Nebr., March 31, 2017). In the second new case, *Shadle v. Frakes*, 2017 U.S. Dist. LEXIS 53730 (D. Nebr., April 7, 2017), Shadle brings a new action *pro se* before the same federal judge (Senior District Judge Joseph F. Bataillon) who had signed-off on the settlement last year, seeking a TRO for medical care and gender appropriate clothing and housing. Judge Bataillon found that Shadle failed to meet the exacting requirements for a TRO, but there is some interesting *dicta* along the way. Shadle claims that she has been denied hormone treatment despite her "settlement" and that she is subjected to male staff strip searches "continuously." She also claims assault because of her transgender identity, spending time in segregation as if she were the victim. Judge Bataillon noted that the defendants had not yet been served, and he ordered: "in view of the alleged facts, the court will immediately issue an order on initial review, order the defendants to answer, and order the magistrate judge to fast track the discovery." He denied

the TRO without prejudice, finding: (1) "based on the facts presented to date, assuming them to be true, plaintiff has experienced harm because of his gender identity. However, the court does not believe at this point in the case that such harm is irreparable so as to require it to immediately order hormone therapy, a change of prisons, and permission to wear clothing that is more specific for the identified gender"; (2) the "balance of harm . . . leans towards the plaintiff . . . [who] has a right to be free from assault and harassment because of his gender identity, and a prisoner should not have to live in lockdown because of his gender identity"; (3) "at this stage . . . the court cannot say that plaintiff is likely to win on the merits"; and (4) "the public has an interest in ensuring our jails treat prisoners with respect and dignity, and without discrimination based on gender identity." While Shadle was denied her TRO, it appears that Nebraska officials have been foolish to renege on promises they made to the same judge who approved the settlement last year. *William J. Rold*

NEBRASKA – Senior U.S. District Judge Richard G. Kopf permitted transgender inmate Cornelius Brown, *pro se*, to proceed on a portion of her second amended complaint alleging retaliation for exercising First Amendment rights in *Brown v. Department of Health & Human Services*, 2017 WL 1495987 (D. Nebr., April 26, 2017). Her claims for denial of medical care and transgender discrimination were allowed to proceed earlier by Judge Kopf in *Brown v. HHS*, 2016 U.S. Dist. LEXIS 155500 (D. Nebr., November 9, 2016), previously reported in *Law Notes* (December 2016 at pages 533-4). The current opinion has a long recitation of "who did what" involving harassment and comments because of Brown's grievances and litigation. Judge Kopf dismisses most of it, but he allows Brown to proceed against two mid-level officials for giving her lower performance points, while seeming to admit they were doing so in retaliation for her complaints. There is a sense that Brown has some difficulty distinguishing between legally cognizable injury (medical care, discrimination, retaliation) and annoyances (dirty laundry area, crude comments, etc.). The retaliation claims will proceed before Judge Kopf, along with the medical and discrimination claims. In the latest round, Judge Kopf also dismissed claims against another inmate who received less punishment than Brown after they had sexual relations. Judge Kopf says (correctly) there is no state action by the other inmate for a civil rights claim, but he disposes of an equal protection argument in a footnote, because Brown failed to show that the disposition differences lacked a rational basis. Perhaps a better record on this point is needed as a threshold. In *Santiago v. Miles*, 774 F. Supp. 775, 786-88 (W.D.N.Y. 1991), a judge upheld a racial disparity in disciplinary punishment claim after trial when there was also proof of racial discrimination in housing and job assignments. *William J. Rold*

PENNSYLVANIA – United States Magistrate Judge Lisa Pupo Lenihan denied a preliminary injunction lifting a single cell order for transgender *pro se* prisoner Rodger Williams in *Williams v. Wingard*, 2017 U.S. Dist. LEXIS 53490, 2017 WL 1304136 (W.D. Pa., April 4, 2017). Judge Lehinan found that Williams failed to show that she was likely to suffer irreparable harm if the injunction were not granted, a condition for preliminary relief. Williams alleged that she had gender dysphoria, a history of sexual assaults and rapes in prison, and PTSD. Judge Lenihan held a hearing that included the testimony of two mental health professionals, who disagreed on a precise diagnosis but agreed that Williams had stress from her history. Williams testified that a cellmate would alleviate her stress and reduce reminders of her prior assaults, which occurred while she was single-celled. Over disputed evidence, Judge Lenihan accepted defendants' position that the assaults were too remote to cause irreparable harm currently, that her adjustment records indicate other causes for her stress, that she requested cellmates who were "high risk sex abusers," that she was already in general population (albeit in a single cell), that she dressed "inappropriately" in the cellblock, and that she had a single cell for a year without episodes consistent with stress causing irreversible injury. Williams maintained that her single cell order was a correctional over-reaction: "According to Plaintiff, she does not need protection from other inmates just because she is transgender." Judge Lenihan found that the prison allowed other transgender inmates unrestricted double-celling in population. Nevertheless, even conceding that a cellmate might reduce Williams' stress, Judge Lenihan deferred to correctional decision-making insofar as preliminary relief is concerned, citing *Anderson v. Davila*, 125 F.3d 148, 163-4 (3d Cir. 1997). *William J. Rold*

TEXAS – U.S. District Judge Xavier Rodriguez affirmed a magistrate judge's recommendation that *pro se* HIV-positive prisoner Joe Carpenter's suit for violation of his privacy be dismissed in *Carpenter v. Arrendondo*, 2017 WL 1424334, 2017 U.S. Dist. LEXIS 54099 (W.D. Tex., April 10, 2017). Carpenter alleges that officers overheard his telling a nurse at booking that he was HIV+-positive and conveyed this information to other officers and on forms that caused it to be mentioned in open court. The minimal complaint and the magistrate judge's recommendation, reviewed on PACER, show that Carpenter tried to sue under the Health Insurance Portability and Accountability Act of 1996 (HIPAA)

and under Texas state law, neither of which provide for private causes of action for patients, according to Judge Rodriguez. Judge Rodriguez then proceeds to discuss Carpenter's "Other Claims," including a constitutional right of privacy (not mentioned in the magistrate judge's recommendation), and finds no claim stated there either, citing two Fifth Circuit cases: *Alfred v. Corrections Corporation of America*, 437 F. App'x 281 (5th Cir. June 7, 2011); and *Moore v. Mabus*, 976 F.2d 268 (5th Cir. 1992). The older case, from the early days of HIV litigation in prisons, upheld segregation of HIV-positive inmates in Mississippi, writing in dismissive language that segregation of HIV-positive inmates "obviously serves a legitimate penological interest" under *Turner v. Safley*, 482 U.S. 78 (1987), a conclusion that is widely disputed today. *Alfred* is more nuanced than Judge Rodriguez's use of it. The Fifth Circuit reversed the district court's summary treatment of a constitutional privacy claim regarding HIV status, noting that, notwithstanding *Moore v. Mabus*, such a right could exist on particular facts: "As a matter of law, Alfred has pleaded a non-frivolous contention that the defendants committed a constitutional violation, either by intentionally disclosing his record or by fostering an atmosphere of disclosure . . . ." The court remanded, noting that constitutional claims had been found in other circuits, citing to cases in the Second, Third, and Sixth Circuits. In this writer's view, dismissal with prejudice in this case was unwarranted. Carpenter should have been given leave to amend under *Alfred*. *William J. Rold*

LEGISLATIVE & ADMINISTRATIVE

CONGRESS – Senator Patty Murray (D-Wash.) and Representative Ted Lieu (D-Calif.) are lead sponsors of S. 928/H.R. 2119, a proposal to "prohibit, as an unfair or deceptive act or practice, commercial sexual orientation conversion therapy." If enacted, the measure would be enforced by the Federal Trade Commission as part of its mandate to police unfair trade practices. The measure doesn't stand a snowball's chance in hell in the current session of Congress, as shown by the long but Republican-free list of co-sponsors: 22 in the Senate and 68 in the House. The Senate Committee with jurisdiction is the Commerce, Science, and Transportation Committee. The House Committee with jurisdiction is the Energy and Commerce Committee. The measure was introduced in both houses on April 27. Good luck!

EEOC (EQUAL EMPLOYMENT OPPORTUNITY COMMISSION) – With a majority of Democratic commissioners in control until one member's term expires in July, the EEOC recently closed a public comment period on a proposed guidance on sexual harassment that would make explicit the agency's recent determinations that Title VII's ban on sex discrimination extends to harassment because of an individual's sexual orientation, gender identity, or intent to transition. The proposed guidance states that "using a name or pronoun inconsistent with the individual's gender identity in a persistent or offensive manner" constitutes sex-based harassment. Two guesses about whether this proposed guidance will actually be implemented . . .

ALABAMA – The legislature has given final approval to a measure that allows faith-based adoption agencies to refuse services to gay couples seeking to adopt children. The bill prohibits the state from refusing to license faith-based agencies that refuse placements based on their religious beliefs. The House of Representatives approved the version that had passed the Senate by a vote of 87-0, after the Senate made some changes in a prior version that had passed the House. The measure was sent to Governor Kay Ivey for her approval. She had not made any public statements about the bill. *Associated Press*, April 25.

CALIFORNIA – Despite the repeal of H.B. 2 by North Carolina, California Attorney General Xavier Becerra confirmed that due to the passage of H.B. 142 in its place, which prohibits localities from protecting LGBT people from discrimination, California will continue to prohibit state-funded and state-sponsored travel and expenditures to that state.

HAWAII – State legislators failed to reconcile differences in conference committee on a bill that would provide equal access to fertility treatments for gay and lesbian couples and single women. Health care lobbyists had argued that the state should not require insurers to cover a fertility procedure for surrogate mothers upon whom gay male couples would rely to bear children for them. At present, Hawaii law requires insurers to cover one round of in vitro fertilization for married, heterosexual women. The bill sought to extend this mandate to same-sex female couples, single women and surrogate mothers, and to reduce the waiting time for the benefit. Health care providers suggests that they feared legal complications from allowing coverage for surrogates. *San Diego Union-Tribune*, April 23.

NEVADA – Governor Brian Sandoval signed A.B. 99 on April 12. The measure provides protection for LGBTQ children who are placed in a child welfare or juvenile detention facility, and requires child welfare

workers, including foster parents, to undergo training for working with children who identify as LGBTQ.

NEW MEXICO – Governor Susana Martinez signed legislation that bans the performance of conversion therapy on minors.

NEW YORK – The Democratic-controlled State Assembly passed a bill banning conversion therapy on minors for the third time, by a vote of 121-24, but the Senate, controlled by a coalition of Republicans and renegade Democrats who don't support the Democratic Party leaders in the Senate, has taken a pass so far. The measure passed by the Assembly was referred to the Senate's Higher Education Committee, for some odd reason, where it is expected to languish. Governor Andrew Cuomo authorized action last year to bar health insurers in the state from covering such "therapy." * * * The State Senate's Investigations and Government Operations Committee, maintaining a tradition of the Republican majority, voted 6-3 not to send to the floor the Gender Identity Non-Discrimination Act, which has frequently passed the Democratic-controlled Assembly.

NORTH CAROLINA – Our description of H.B. 142, the law enacted by North Carolina to repeal and replace H.B. 2, included an incorrect statement about the effect of H.B. 142. Although local governments and government institutions will be able to enact policies about employment and public accommodations beginning December 1, 2020, they will not be empowered to enact policies about access or restrictions on access to multi-user restrooms, changing rooms and locker rooms unless the state legislature has adopted policies on these subjects, and then the local policies must be consistent with the state legislative policies. Unless, of course, continuing constitutional and federal statutory challenges in the courts determine otherwise, or the legislature decides to address the subject further prior to that date. However, the Trump Administration informed the court on April 14 that it was dropping a lawsuit against H.B. 2 that had been initiated by the Justice Department shortly after the measure was passed, in response to the repeal. In a separate lawsuit brought by the ACLU and Lambda Legal, the plaintiffs will file an amended complaint aiming their fire at H.B. 142.

OHIO – Richfield's Village Council unanimously approved a resolution titled "Embracing Diversity and Denouncing Activities of Hate, Intolerance and Intimidation," which specifically condemns such actions because of a person's gender or sexual identity. *Ohio.com*, April 21.

RHODE ISLAND – The Providence City Council approved on first reading The Community Safety Act, an ordinance that would prohibit profiling by a long list of characteristics including gender identity, gender expression and sexual orientation. A second passage is required before the ordinance will be sent to Mayor Jorge Elorza for his signature. The mayor told reporters that he would sign the measure in the form that it was approved on first reading. *Rhode Island's Future Blog*, April 21.

TENNESSEE – The legislature approved Senate Bill 1085/House Bill 1111, which requires that Tennessee courts construe gendered terms in laws such as "husband," "wife," "father," or "mother" according to their ordinary meaning. The intent is to avoid the kinds of rulings rendered by some courts around the country in response to the advent of marriage equality in order to render laws gender-neutral as they relate to a variety of issues that may confront same-sex married couples. Opinion No. 17-29 issued by Attorney General Herbert H. Slattery III and Solicitor General Andree Sophia Blumstein in response to a request from State Representative Bill Beck, suggests that it was possible, "but unlikely," that the bill could be viewed as a violation of the state constitution's separation-of-powers doctrine, and noted a potential conflict with an existing statute that provides that gender-specific words in statutes are to be construed as gender inclusive. However, the Opinion asserts that conflicts between statutes are normally resolved by specific commands taking priority over general commands, thus the new bill would control, although it might, in some cases, come up against the federal constitutional requirement under *Obergefell* to treat same-sex marriages as equal in every respect under the law to different-sex marriages. "Statutes that are wholly unrelated to marriage or the terms, conditions, benefits, or obligations of marriage would not necessarily be in conflict with *Obergefell* if gender-specific words in those statutes were construed literally," they wrote. But, of course, it is precisely the statutes that deal with marriage that the proponents of the bill were seeking to affect. Where this will all go is anybody's guess. The measure was sent to Governor Bill Haslam on April 27, and he did not immediately announce what he would do with it. LGBT rights groups criticized it as unconstitutional and urged the governor to veto it.

TEXAS – The State Senate tentatively approved S.B. 522, which would allow county clerks to recuse themselves from issuing a same-sex license if to do so conflicts with their religious beliefs, so long as they made sure that somebody else in the office was available to issue

the license. The April 11 vote was 21-10, with a final vote scheduled to take place soon thereafter.

LAW & SOCIETY NOTES

ALASKA – Voters in Anchorage took a historic step when they elected two openly gay candidates to the city council. Christopher Constant won with 52 percent of the vote, and Felix Rivera, won with 47 percent of the vote. Winners were the highest vote getters for six seats open on the 11-member body. *alaskacommons.com*, April 5, 2017.

NORTH CAROLINA – The *Charlotte Observer* reports that Montreat College, a Christian college "that has long been associated with the Billy Graham family," has caused consternation on campus by requiring that faculty and staff "sign and live in accordance with a new document that opposes same-sex marriage and abortion," which they are calling the "Community Life Covenant." Several faculty members have indicated they may quit rather than sign, suggesting that their private life is none of the school's business, and a small group of students at the rural college held a public protest in solidarity with faculty and staff. (Students are not being required to sign the Covenant.) The Billy Graham Evangelistic Association, which is a regular donor to the college, has disclaimed any involvement in the drafting or adoption of the Covenant, but family members have served as trustees of the school. Religious educational institutions enjoyed certain exemptions from requirement with anti-discrimination laws, but their relevance to this kind of situation is much disputed, and several religious schools around the country are now defending lawsuits filed by gay staff members who were discharged after the school learned that they were marrying same-sex partners. Eventually the Supreme Court may have to determine the scope of statutory and constitutional exemptions for religious educational institutions in connection with same-sex marriages of faculty and staff.

METHODISTS – The High Court of the United Methodist Church ruled that consecration of openly-gay bishops violated church law and was invalid. The 6-3 vote was made public on April 28. However, the Judicial Council ruled that the bishop in question, Karen P. Oliveto of Denver, "remains in good standing" pending further proceedings, although the likely result would be suspension or forced retirement. *New York Times*, April 28. Several other mainline Protestant denominations in the U.S. have moved to allow openly gay people to serve as clergy, but the Methodists, responding to a significant contingent of the church in conservative parts of the country and overseas, have moved in the opposite direction.

INTERNATIONAL NOTES

EUROPEAN COURT OF HUMAN RIGHTS – The court ruled on April 6 in *A.P. and Others v. France*, Nos. 79885/12, 52471/13 & 52596/13, that a requirement that transgender people undergo sterilization in order to get official recognition of gender transition violated their rights under Article 8 of the European Convention on Human Rights – respect for private life. Three transgender people had sued when national courts refused to amend their birth certificates without proof that they had been rendered sterile. However, the court rejected the argument that a government cannot demand proof of a diagnosis of gender dysphoria as a prerequisite to birth certificate changes, or require medical examinations as part of such proof. The decision issued by the 5th Chamber of the court was rendered only in French on the court's website.

AUSTRALIA – Tasmania's Premier, Will Hodgman, has issued an apology on behalf of the state to people who previously were convicted under the state's repealed anti-gay laws. He also told the parliament on April 13 that he supports legislative action to expunge convictions for acts once considered a criminal offence, such as gay sex and public cross-dressing. Tasmania was the last Australian state to repeal antigay laws, in 1997. Hodgman characterized such laws as "unfair and unjust" in his comments. *AAP Newswire*, April 13.

CHECHNYA – International human rights organizations relayed a report by *Novaya Gazeta*, Russia's only independent newspaper, that the government in the Russian republic of Chechnya has begun a roundup of gay men, targeted through social networks, put them into harsh detention, imposed torture, and even executed some men. The government denied the reports, claiming that there were no gay men in Chechnya, and if they existed, they would be released to their families who would dispatch them quickly. Charitable human rights organizations began to raise money to support efforts to help gay men relocate from Chechnya. The Russian government claimed that the reports the news reports were "unsubstantiated," a denial that was greeted with skepticism by western media.

FALKLAND ISLANDS – The Falkland Islands, a British overseas dependency, enacted a new Marriage Bill on March 30 that allows same-sex marriages and civil partnerships for both same-sex and heterosexual couples, according

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to an April 13 press release by the government there. The press release explains that although the Constitution of the country "already includes anti-discrimination and pro-equality rights," the law "needed updating to keep pace." A "public consultation" on the proposed bill revealed that 90% of the respondents "were in favor of same-sex marriage." The same survey of opinion revealed that 94% favored lettering both same-sex and opposite-sex couples form civil partnerships.

FRANCE – A terrorist attack in Paris led to the death of Xavier Jugele, an openly gay police officer who was an active champion of LGBT rights. At a national memorial ceremony attended by government leaders (including the president) and candidates for the presidency, his surviving partner, Etienne Cardiles, spoke movingly of his "extreme pain" at his beloved partner's death, but stated that he had "no hatred" for the jihadist who had killed him. *Agence France Presse English Wire*, April 25.

GUYANA – The government announced that a referendum will be held on the question whether homosexual acts should remain criminal. The government announced this in a letter to the Inter-American Commission on Human Rights, an organization that recently discussed human rights violations against young people in Guyana. The National Assembly has been presented with this issue, but decided it should not be determined legislatively. There was no indication in this letter about when the referendum will be held. *Guyana Chronicle*, April 20.

HONG KONG (PEOPLE'S REPUBLIC OF CHINA) – The Hong Kong judiciary maintains a certain degree of autonomy from the People's Republic, as evidence by a ruling that a gay civil servant's husband is entitled to the same benefits provided to different sex spouses of government employees. A senior immigration officer, Leung Chun-kwong, married his New Zealander boyfriend, Scott Adams, in New Zealand in 2014, then challenged the refusal of his employer to recognize the marriage for purposes of employee benefits and rights. The High Court of Hong Kong rejected the Civil Service Bureau's position that it was necessary to deny the benefits in order to protect "the integrity of the institution of marriage." In a 44-page judgment, Justice Anderson Chow Ka-ming said that the Bureau's policy was "indirect discrimination" and said: "I am unable to see how denial of 'spousal' benefits to homosexual couples legally married under foreign laws could or would serve the purpose of not undermining the integrity of the institution of marriage in Hong Kong, or protecting the institution of the traditional family." Although the court ruled affirmatively on Leung's benefits claim, it did not rule that the government must recognize the marriage for tax purposes. Reported the *South China Morning Post* (April 29), "The bureau said it would examine the judgment in detail with the Department of Justice to decide what it should do next. The Equal Opportunities Commission said there was a need for the government to review existing policies to ensure the protection of sexual minority rights."

INDIA – The legislature passed a bill to ensure equal rights to people affected by HIV and AIDS in getting treatment, admissions in educational institutions, and jobs, according to various press reports early in April. Health Minister JP Nadda said that the government "stands committed for free treatment of HIV patients. The measure passed on March 21.

IRELAND – The *Irish Times* (April 14) reported that the Central Statistics Office released data showing that 4.7 percent of marriage which took place in Ireland in 2016 involved same-sex couples, close to 1 in 20. The same-sex marriage referendum was passed on May 23, 2015, with 62 percent in favor, and enabling legislation came into effect on November 16, 2015. 2016 was, consequently, the first full calendar year for which there were statistics to report. The average age of same-sex couples becoming married was significantly higher than the average age for different sex couples, which is logical when you consider that many same-sex couples had been living together for a long time when same-sex marriage was legalized.

ISRAEL – The *Times of Israel* (April 26) reported a historic first for the nation: A gay prisoner was allowed to have a conjugal visit with his male partner. Tarlan Hankishayev, imprisoned for "fabricating evidence against a suspect in a deadly shooting at a Tel Aviv gay youth club in 2009," received permission for the visit from prison authorities after having been turned down twice previously. In January 2016, the Beersheba District Court accepted his petition that rejection of his request was discriminatory. He is serving a 65-month sentence at the Ramon Prison for falsely incriminating Hagai Felicien in two deaths. Police have yet to apprehend the shooter, who injured dozens in addition to the two who were killed.

JAPAN – It was reported on-line by the BBC that Osaka has become the first city in Japan to recognize a same-sex couple as foster parents of a child. Local officials approved a request by a gay male couple to foster a teenage boy.

NIGERIA – Prosecutors have charged 53 men with "conspiracy to organize

a gay wedding" and related crimes punishable by substantial prison terms. The accused were presented at a magistrate's court in Zaria, Kaduna State, on April 19, after being arrested at a hotel where they had allegedly attended a same-sex wedding. They were charged with conspiracy, unlawful assembly, and belonging to an unlawful society, but, perhaps ironically, the couple who married managed to escape prior to the arrests on April 15. *Agence France Presse English Wire*, April 20.

PHILIPPINES – The Court of Appeals has affirmed the guilty verdict of U.S. Marine Lance Corporal Joseph Scott Pemberton, on a charge of killing Jennifer Laude, a transgender woman, three years ago at a hotel in Olongapo, near the former U.S. navy base. He was sentenced to six years in jail on a Philippine military base. According to an account published April 11 in *Shenzhen Daily*, "Pemberton had admitted choking but not killing Laude after, he said, he discovered that a man was giving him oral sex, not a woman. He had been charged with murder but was convicted the lesser offence of homicide, which does not require malicious intent." The court of appeals decision was rendered on April 3, but made public on April 10. It raised the compensation to Laude's family by almost double.

SAIPAN – Saipan, a U.S. dependency island in the Pacific governed by American law, has become a prime marriage destination for same-sex couple from China seeking to tie the knot, reported the *Saipan Tribune* on April 25. "Since 2015 when same-sex marriage was legalized in the U.S. and its protectorates," the paper reported, "there has been a significant jump in the number of same-sex marriages on Saipan, majority of which involve Chinese tourists." The Mayor's office officiated 12 same-sex marriages in 2015, half for Chinese couples. In 2016, there was 30 licenses issued, 25 to Chinese couples. The trend is continuing in 2017. (It strikes us that the Hong Kong High Court decision this month, reported above, may lead to a little boom in same-sex couples from that city going to Saipan to marry.)

SOUTH KOREA – Military Human Rights Center reports that the South Korean military is engaged in a "crackdown" against gay soldiers, having suddenly charged several dozen men with the crime of "sodomy or other disgraceful conduct." The subject of "gay rights" is generally treated as taboo in the country, according to a lengthy article by Choe Sang-Hun published on the *New York Times* website on April 26.

TAIWAN – *China Post* (April 24) reported that Taiwan's highest court has confirmed that the 14 justices who heard arguments from gay rights activists last month will issue a ruling concerning the constitutionality of the denial of marriage to same sex couples on May 24. The plaintiffs' argument in the lawsuit is that the civil code provision defining marriage violates the Constitution's guarantee that "all citizens, irrespective of sex shall be equal before the law."

PROFESSIONAL NOTES

THE WILLIAMS INSTITUTE AT UCLA SCHOOL OF LAW, an academic center focused on LGBT rights, has announced that its new Executive Director will be **JOCELYN SAMUELS**, who previously served from July 2014 until this January as Director of the Office for Civil Rights at the U.S. Department of Health & Human Services, where she oversaw civil rights enforcement of hospitals, healthcare providers, insurers and human services agencies. Previously she served as Acting Assistant Attorney General for Civil Rights at the Justice Department, and as an attorney at the Equal Employment Opportunity Commission. Before joining the Obama Administration, she was Vice President for Education & Employment at the National Women's Law Center. * * * The Williams Institute has also announced that Brad Sears will be the Inaugural David Sanders Distinguished Scholar after he leaves the Executive Director role this summer.

NORTH CAROLINA GOVERNOR ROY COOPER has appointed openly gay former appeals court judge **JOHN ARROWOOD** to the state's Court of Appeals to fill a sudden vacancy created by the resignation of Judge Douglas McCullough. The move came three days after Cooper vetoed a bill that would have decreased the court from 15 judges to 12, blocking Cooper from appointing replacements as various Republicans on the bench reached retirement age. Republicans have a veto-proof majority in the legislature, and were expected to override the veto. McCullough, who was to leave the court next month under its mandatory retirement rules, offered to retire early to give the governor a chance to appoint a successor, since the next mandatory retirement won't come up for two years. "I didn't want my legacy to be the elimination of the seat," said McCullough! He rejects Republican legislators' argument that the court does not have enough business to justify fifteen members. McCullough said, "We're a very, very busy court." Arrowood had served briefly many years ago, after being appointed by a Democratic governor to a vacant seat in 2008, but losing the election for that seat the next year and again when he made a run for the seat in 2014. *greensboro.com*, April 25.

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In addition, Lambda Legal filed a petition on March 31 with the Atlanta-based 11th Circuit Court of Appeals seeking an *en banc* rehearing in *Evans v. Georgia Regional Hospital*, in which a three-judge panel voted 2-1 on March 10 to reject a sexual orientation discrimination claim under Title VII. The panel sent the case back to a trial judge for possible litigation under a gender stereotyping theory. Eight of the eleven active judges on the 11th Circuit are appointees of Clinton or Obama.

The 2nd and 11th Circuits both had many vacancies filled during President Obama's first term, tipping the ideological balance of both circuits in a much more liberal direction, leaving hope that they might follow the lead of the Chicago-based 7th Circuit, which recently became the first federal appeals court to ruled that sexual orientation claims are covered by Title VII. That case was brought by lesbian college instructor Kimberly Hively, *Hively v. Ivy Tech Community College of Indiana*,, 853 F.3d 339 (Apr. 4, 2017), represented before the appeals court by Lambda Legal. The issue might be brought to the Supreme Court by a disappointed plaintiff or employer, depending how the courts rule on these continuing appeals. ■

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In consultation with the Chief Judge of the District, Judge Kopf ordered all proceedings stayed (including the state's motion to dismiss) until Mr. Gooch was up to speed and the case removed from the *pro se* docket and re-assigned to an active judge.

This may be the marriage test case the LGBT/prisoner bar has been seeking since *Obergefell*. Amici, take notice! – *William J. Rold*

William J. Rold is a civil rights attorney in New York City and a former judge. He previously represented the American Bar Association on the National Commission for Correctional Health Care.

PUBLICATIONS NOTED

1. Adside, Charles, III, Constitutional Damage Control: Same-Sex Marriage, Smith's Hybrid Rights Doctrine, and Protecting the Preacher Man After *Obergefell*, 27 Geo. Mason U. Civ. Rts. L.J. 145 (Spring 2017) (the author argues that *Obergefell* might be construed to make ministers vulnerable to public accommodations discrimination charges if they refuse to officiate marriages for same-sex couples, and proposes theoretical defenses against such charges).
2. Arriola, Elvia Rosales, Amor y Esperanza: A Latina Lesbian Becomes a Law Professor, 66 J. Legal Educ. 484 (Spring 2017) (Symposium: The Founding of the AALS Section on Sexual Orientation and Gender Identity Issues).
3. Baxter, Teri Dobbins, Marriage on Our Own Terms, 41 N.Y.U. Rev. L. & Soc. Change 1 (2017).
4. Bonilla, Siobhan N., The Social Fabrication of Society: The Law of the Land and Gay Rights, 10 S. J. Pol'y & Just. 9 (Spring 2016).
5. Carbone, June, and Naomi Cahn, Parents, Babies, and More Parents, 92 Chi.-Kent L. Rev. 9 (2017) (suggestions for how the law should handle situations where it should recognize that a child has simultaneously more than two legal parents).
6. Cohen, Charles, Losing Your Children: The Failure to Extend Civil Rights Protections to Transgender Parents, 85 Geo. Wash. L. Rev. 536 (March 2017).
7. Cornwell, John Kip, The Quasi-Criminality Revolution, 85 UMKC L. Rev. 311 (Winter 2017) (among the areas examined are laws restricting residency and other aspects of life for convicted sex offenders after they have served their prison terms).
8. Cox, Barbara J., Time for a Change: 20 Years After the "Working Group" Principles, 66 J. Legal Educ. 531 (Spring 2017) (Symposium: The Founding of the AALS Section on Sexual Orientation and Gender Identity Issues).
9. Farmer, Shannon, and Ashley Wilson, Predicting the Unpredictable: The Future of LGBTQ Protections Under the Trump Administration, BloombergBNA Daily Labor Report: News Archive, 72 DLR I-1 (April 17, 2017).
10. Flumenbaum, Martin, and Brad S. Karp, A Step Toward Protection From Sexual Orientation Discrimination Under Title VII, New York Law Journal, April 25, 2017 (analysis of *Christiansen v. Omnicom* decision by 2nd Circuit).
11. Freeman, Marsha B., Holier Than You and Me: "Religious Liberty" is the New Bully Pulpit and its New Meaning is Endangering Our Way of Life, 69 Ark. L. Rev. 881 (2017) (about claims to special rights to discriminate without consequence based on religious beliefs as a threat to our way of life).
12. Green, Matthew W., Jr., Same-Sex Sex and Immutable Traits: Why *Obergefell v. Hodges* Clears a Path to Protecting Gay and Lesbian Employees from Workplace Discrimination Under Title VII, 20 J. Gender Race & Just. 1 (Feb. 2017).
13. Grothouse, Matthew R., Implicit in the Concept of Ordered Liberty: How *Obergefell v. Hodges* Illuminates the Modern Substantive Due Process Debate, 49 J. Marshall L. Rev. 1021 (Summer 2016).
14. Harris, Leslie J., *Obergefell*'s Ambiguous Impact on Legal Parentage, 92 Chi-Kent L.Rev. 55 (2017).
15. Hubertz, Elizabeth, Loving the Sinner: Evangelical Colleges and Their LGB Students, 35 Quinn. L.Rev. 147 (2017
16. Joslin, Courtney Grant, The Gay Rights Canon and the Right to Nonmarriage, 97 B.U. L. Rev. 425 (March 2017) (drawing from *Windsor* and *Obergefell* a theory for constitutional protection for non-marital families).
17. Kalb, Johanna, Human Rights Proxy Wars, 13 Stan. J. Civ. Rts. & Civ. Liberties 53 (February 2017).
18. Katri, Ido, Transgender Intrasectionality: Rethinking Anti-Discrimination Law and Litigation, 20 U. Pa. J. L. & Soc. Change 51 (2017).
19. Kurtzer, Aaron, Jordan Lipschik, Deirdre Lok, and Malya Kurzweil Levin, Vulnerable Veterans Left in the Lurch: The Continued Harm of "Don't Ask, Don't Tell," 89-APR N.Y. St. B.J. 38 (March/April 2017).
20. Lee, Rachel M., One Step Forward, Two Steps Back: The Board of Immigration Appeals Must Remind Courts That

Family is the Quintessential Particular Social Group to Prevent Courts From Sidestepping Family-Based Asylum Claims, 50 Creighton L. Rev. 405 (March 2017).
21. McStravick, Kathleen Rainey, Gay Rights Versus Religious Freedom, and the Influence of *Obergefell v. Hodges* on Distinguishing the Dividing Line, 48 St. Mary's L.J. 409 (2016).
22. Mohapatra, Seema, Assisted Reproduction Inequality and Marriage Equality, 92 Chi.-Kent L. Rev. 87 (2017).
23. O'Brien, Raymond C., *Obergefell*'s Impact on Functional Families, 66 Cath. U. L. Rev. 363 (Winter 2016) (author's prediction: not much).
24. O'Mahony, Conor, Marriage Equality in the United States and Ireland: How History Shaped the Future, 2017 U. Ill. L. Rev. 681.
25. Oman, Nathan B., Doux Commerce, Religion, and the Limits of Antidiscrimination Law, 92 Ind. L.J. 693 (Spring 2017).
26. Register, Tessa M., The Case for Deferring to the EEOC's Interpretations in *Macy* and *Foxx* to Classify LGBT Discrimination as Sex Discrimination Under Title VII, 102 Iowa L. Rev. 1397 (March 2017).
27. Thomaston, Brett, A House Divided Against Itself Cannot Stand: The Need to Federalize Surrogacy Contracts as a Result of a Fragmented State System, 49 J. Marshall L. Rev. 1155 (Summer 2016).
28. Uhland, Audrey, The Business of Expression: A Commercial, Constitutional, and Historical Evaluation of the Line Between the First Amendment and Antidiscrimination Laws, 26 S. Cal. Interdisc. L.J. 405 (Spring 2017) (despite the cover date, this article seems to have been written not long after *Obergefell* and omits reference to some significant subsequent developments).
29. Valdes, Francisco, Sexual Minorities in Legal Academia: A Retrospection on Community, Action, Remembrance, and Liberation, 66 J. Legal Educ. 510 (Spring 2017) (Symposium: The Founding of the AALS Section on Sexual Orientation and Gender Identity Issues).
30. Varol, Ozan O., Structural Rights, 105 Geo. L.J. 1001 (April 2017).
31. Zugelder, Michael T., Toward Equal Rights for LGBT Employees: Legal and Managerial Implications for Employers, 43 Ohio N.U. L. Rev. 193 (2017).

SPECIALLY NOTED

Although it may be early days to draw final conclusions, the Gerontological Society of America has published in its journal, The Gerontologist, the following article: "Who Says I Do: The Changing Context of Marriage and Health and Quality of Life for LGBT Older Adults," by Jayn Goldsen, Amanda Bryan, Hyun-Jun Kim, Anna Muraco, Sarah Jen, and Karen I. Frederiksen-Goldsen (57 *The Gerontologist* No. S1, S50-S62 (2017). The conclusion: same-sex marriage (and even same-sex cohabitation without marriage) is good for the health and welfare of older LGBT people. This is based on a detailed survey with over 1800 participants, about half of whom are partnered; of the half who are partnered, half are same-sex married and half are not. * * * The University of Leiden (The Netherlands) has established a LawsAndFamilies Database to track the development of the law related to families in Europe. The database was officially launched on Tuesday, April 25, in The Hague. Those seeking information about the database and access information can find a press release with appropriate links at https://www.univeriteitleiden.nl/en/news/2017/04/same-sex-couples-in-europe-more-rights-in-more-countries. * * * Three organizations – Lambda Legal, Children's Rights, and the Center for the Study of Social Policy – have collaborated on a new report, Safe Havens: Closing the Gap Between Recommended Practice and Reality for Transgender and Gender-Expansive Youth in Out-of-Home Care, which is available through the organizations' websites.

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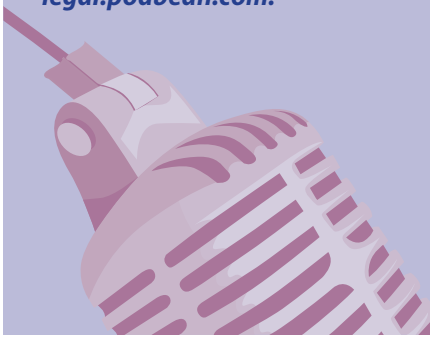

EDITOR'S NOTES

This proud, monthly publication is edited and chiefly written by Arthur S. Leonard, Robert F. Wagner Professor of Labor and Employment Law at 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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