

L G B T
LAW NOTES

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RETROACTIVE

*Date of U.S. Supreme Court Decisions in 2013 Does Not Necessarily
Foreclose Survivor Benefits for Lesbian Widow*

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Federal Court Applies *U.S. v. Windsor* Retroactively to Allow Lesbian Widow to Seek Pension Benefit

U.S. District Judge Phyllis J. Hamilton ruled on January 4 in *Schuett v. FedEx Corporation*, 2015 U.S. Dist. LEXIS 244, 2015 WL 39890 (N.D. Cal.), that the Supreme Court's 2013 decision in *U.S. v. Windsor*, 133 S.Ct. 2675, striking down Section 3, a key provision of the Defense of Marriage Act (DOMA), could be applied retroactively to allow Stacey Schuett, a lesbian widow, to sue her late spouse's employer for a survivor annuity. Although the judge rejected a claim that the lawsuit could be brought directly under the company's pension plan or as a breach of fiduciary duty action against the plan's administrators, she accepted the argument that the plan could be sued

As required by ERISA, the plan states that if an employee with a vested pension dies before retiring, their surviving spouse is eligible to receive a "qualified joint and survivor annuity" for the rest of their life. The written pension plan uses the federal definition of spouse, directly referring to Section 3 of DOMA, which defined a spouse as "a person of the opposite sex who is a husband or wife." This is the definition that the Supreme Court declared unconstitutional on June 26, 2013.

Ms. Taboada-Hall was diagnosed with cancer in February 2010, and as her condition worsened she took a medical leave of absence from FedEx in November 2012. In February 2013, facing the fact that she would not be

Taboada-Hall looked again through the benefits package, and noticed that the plan defined "spouse" with reference to DOMA. Between June 3 and June 13, they had several conversations with FedEx human resources personnel trying to find out what would happen to Taboada-Hall's benefits, and on June 13 they received the answer: Schuett would not receive a surviving spouse benefit because only opposite-sex partners could be recognized under the plan.

They quickly arranged with a Sonoma County Supervisor to come to their home and perform a civil marriage ceremony, even though they could not get a marriage license because Proposition 8 was still in effect. The ceremony was witnessed by friends and

Judge Hamilton accepted the argument that the plan could be sued for violating the Employee Retirement Income Security Act by failing to authorize the annuity for the plaintiff.

for violating the Employee Retirement Income Security Act (ERISA) by failing to authorize the annuity for the plaintiff.

The story is complicated. This account is based on what Stacey Schuett alleged in her complaint, as summarized by Judge Hamilton.

Schuett lived together in a committed relationship for 27 years with Lesly Taboada-Hall, who passed away from cancer on June 20, 2013, just a week before the Supreme Court's momentous June 26 decisions rejecting an appeal of the federal court ruling that struck down California's Proposition 8 (*Hollingsworth v. Perry*, 133 S. Ct. 2652), and striking down Section 3 of DOMA. For almost the entire length of their relationship, Taboada-Hall had been employed by Federal Express (FedEx), and she was a fully-vested participant in the FedEx Pension Plan.

able to resume working, she contacted a FedEx human resources representative about her pension and other employee benefits, since she was eligible for early retirement under the terms of the pension plan. The representative advised her not to retire, since she could continue on medical leave and have her medical expenses covered under the FedEx employee benefits plan. She was asked about her other benefits, and was advised to name Schuett as her sole beneficiary on the other plans. She also asked whether Schuett would get the "defined pension benefit" to which Taboada-Hall would be entitled, if Taboada-Hall died before retiring. The representative said he did not know the answer to that and said "ask someone else."

On June 3, 2013, the doctor advised that Taboada-Hall was terminal and did not have long to live. Schuett and

family members on June 19. The next day Taboada-Hall died, and six days later Prop. 8 and DOMA were declared unconstitutional.

What to do next? Two days after the Prop. 8 decision, the 9th Circuit Court of Appeals lifted its stay and Judge Vaughan Walker's 2010 ruling holding Prop. 8 unconstitutional went into effect. Of course, the logical implication of the Supreme Court's decision that the proponents of Prop. 8 did not have standing to appeal Judge Walker's decision was that Walker's ruling should have been in effect from the summer of 2010 when it was issued, so by rights Taboada-Hall and Schuett should have been able to get a marriage license at any time since then. Furthermore, the logical implication of the DOMA decision was that the federal definition of marriage was unconstitutional from the date it was enacted in 1996.

Schuett went into Sonoma County Superior Court on August 6, 2013, filing a Petition to Establish the Fact, Date, and Place of Marriage, contending that the June 19 marriage should be retroactively validated. That court agreed, ruling on September 18, 2013, that the marriage was valid as of June 19, 2013, issuing a delayed certificate of marriage carrying that date. This means that Schuett was a surviving widow when Taboada-Hall died on June 20, and thus she should be entitled to be treated as a surviving spouse by FedEx.

But not so fast! FedEx turned her down for the benefit, arguing that eligibility depended on the terms of the written plan, which was limited to surviving different-sex spouses. In Schuett's federal lawsuit against FedEx for the benefit, Judge Hamilton agreed with FedEx that Schuett could not sue for the benefit directly, since

June 19, 2013, the day before Taboada-Hall died, she should be considered a surviving spouse for purposes of this ERISA provision. She pointed out that in the *Windsor* case, the Supreme Court not only declared DOMA unconstitutional, but also ordered that the federal government refund with interest the money Edie Windsor had paid to cover estate taxes of her wife, Thea Speyer, which would not have been due if the federal government recognized their Canadian marriage. Thus, the ruling in *Windsor* was itself retroactive.

Judge Hamilton accepted Schuett's argument, finding that "ERISA requires a fiduciary to follow plan documents insofar as such documents are consistent with Title I of ERISA. ERISA requires defined benefit plans such as the Plan at issue to provide a qualified preretirement survivor

Hamilton found that the *Windsor* decision "appears to invalidate Section 3 of DOMA retroactive to 1996, the date of enactment. Notably, the decision in *Windsor* applied retroactively."

"In the present case," she wrote, "although California denied recognition of the term 'spouse' to same-sex couples at the time of Ms. Taboada-Hall's death on June 20, 2013, the Sonoma County Superior Court determined that plaintiff and Ms. Taboada-Hall were married on June 19, 2013, and issued a delayed marriage certificate. . . [T]his court defers to the California court's certification of the marriage. . . The court finds that plaintiff has adequately alleged that FedEx has violated Title I of ERISA by acting contrary to applicable federal law and failing to provide plaintiff with a benefit mandated by ERISA, and that she is entitled to pursue equitable relief to remedy that violation." She concluded on this point that she was not persuaded "under the facts alleged in the complaint that there is any basis for denying retroactive application of *Windsor*." Thus, Judge Hamilton denied FedEx's motion to dismiss Schuett's claim under the ERISA violation theory.

Stacey Schuett is represented by Nina Rachel Wasow, an attorney with Feinberg, Jackson, Worthman & Wasow (Oakland); Amy Whelan, Christopher Francis Stoll, and Shannon Minter of the National Center for Lesbian Rights (San Francisco); Julie Wilensky of Civil Rights Education & Enforcement Center (Berkeley); and Tate A. Birnie (Sebastopol). FedEx used in-house counsel to litigate its motion to dismiss, but would probably retain outside counsel if it seeks to appeal this ruling to the 9th Circuit. Since the FedEx plan administrators are under a fiduciary duty not to pay out any benefits that are not required by the plan or the law, they might conclude that they have to appeal this ruling, although the pragmatic approach could be to avoid the costs of litigation and grant Schuett's claim for the annuity. Of course, it is also open to Schuett to appeal the court's order dismissing her claim on the other legal theories. ■

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only beneficiaries under a plan can sue for benefits and under the terms of the written plan, she was not a beneficiary. Furthermore, Judge Hamilton agreed with FedEx that the administrators of the plan had not violated their fiduciary duty, which required them to follow a reasonable interpretation of the written plan's terms. The judge granted FedEx's motion to dismiss Schuett's claims under these two legal theories.

However, plan administrators are required to administer plans "in accordance with applicable law," wrote Judge Hamilton. ERISA provides that a plan must provide an annuity benefit to the spouse of an employee who has a fully vested pension benefit, but dies before they have retired and begun to receive retirement benefits. Schuett argued that since California recognized her as being married on

annuity to all married participants who are vested and die before the annuity starting date, unless the participant has waived the benefit and the spouse consented to the waiver." Furthermore, the Department of Labor had issued a "guidance" document making clear that "ERISA's mandatory benefits provisions apply to all spouses, including same-sex spouses."

Among the cases Judge Hamilton relied upon were *Cozen O'Connor P.C. v. Tobits*, 2013 U.S. Dist. LEXIS 105507, 2013 WL 3878688 (E.D. Pa. 2013), specifically an ERISA survivor benefits claim involving a same-sex couple, and *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), for the proposition of retroactivity when the Supreme Court announces a new rule of federal law and applies it retroactively to the parties in the case.

11th Circuit Revives Transgender Employee's Title VII Discrimination Claim

In *Chavez v. Credit Nation Auto*, 2016 U.S. App. LEXIS 598, 2016 WL 158820 (January 14, 2016), the 11th Circuit Court of Appeals partially reversed a decision by the U.S. District Court for the Northern District of Georgia, which had granted summary judgment to the employer on a transgender employee's claim that she had been discharged because of her gender identity in violation of Title VII. Although the court of appeals agreed with the district court that Jennifer Chavez had failed to present direct evidence of discriminatory intent or to prove that the reason given for her discharge by the company was purely pretextual, the court found that her allegations created a material fact question on circumstantial evidence of discriminatory intent that should have precluded summary judgment. U.S. District Judge Jose E. Martinez of the Southern District of Florida, sitting by designation, wrote the opinion for the three-judge appellate panel.

The court of appeals started off with the assertion, based on its own precedents, that gender identity discrimination claims are actionable under Title VII, citing *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), in which it had recognized a gender identity discrimination claim as a sex discrimination claim for purposes of equal protection analysis in a public sector context.

Chavez began working as an auto mechanic for Credit Nation on June 18, 2008, and was discharged on January 11, 2010. "She was never disciplined before she announced her gender transition on October 28, 2009," wrote Martinez, and was "fired on January 11, 2010, for 'sleeping while on the clock on company time.'" Indeed, because she actually was found sleeping in a customer's car during her shift, and the company had also discharged another non-transgender employee for the same offense, the court found that Chavez could not establish that the company's reason given for her discharge was

pretextual. That makes it into a mixed-motive case, under which Chavez could still prevail if she showed by a preponderance of the evidence that discriminatory intent played a role in her discharge.

The district court found that there was no direct evidence of discriminatory intent, and on that basis defaulted Chavez. But the court of appeals explained, at some length, that a plaintiff can establish discriminatory intent by plausibly alleging facts sufficient to create a material issue of fact as to whether the company was motivated by her gender identity through circumstantial evidence that would support an inference to that effect.

also imposed a dress code requirement, including that she was "not to wear a dress back and forth to work." A vice president of the company told Chavez to "tone it down," to not talk as much about her gender transition in the shop, and to be "very careful" because Torchia "didn't like" the implications of the planned gender transition. Chavez's evidence included hand-written notes by the shop foreman of conversations with Torchia providing support for her claims, including one comment by a co-worker who told Chavez that he knew "for a fact you were run out of Credit Nation."

An important part of Chavez's case was the allegation that the

The court of appeals started off with the assertion, based on its own precedents, that gender identity discrimination claims are actionable under Title VII, citing *Glenn v. Brumby*.

In this case, Chavez alleged various conversations with the owner of the company and other employees that would certainly support such an inference. For example, she reported a conversation with the president of the company, Mr. Torchia, in which he seemed "very nervous" about her gender transition and its "possible ramifications." According to Chavez, "Torchia stated that 'he did not want any problems created for [Chavez] or any of his other employees' due to Chavez's 'condition.' Torchia said it was Chavez's fault that Credit Nation had lost a tech applicant. Notably, Torchia added that he thought Chavez was going to 'negatively impact his business,'" wrote Judge Martinez. There were also statements indicating Torchia didn't want Chavez to raise the issue of her gender identity with co-workers. He

company consulted its lawyer seeking ways to justify discharging her, as a result of which she was subjected to "heightened scrutiny" of her work, and that management was looking for any reason to fire her. She also noted that co-workers had objected to "special treatment" for her which consisted of the company accommodating her during the period of her transition surgeries, and she pointed out that the company's established "progressive discipline" policy was not followed in her case. "Considering all the evidence put forth by Chavez and Credit Nation together and viewing it in the light most favorable to Chavez, we conclude triable issues of fact exist as to (1) her employer's discriminatory intent and (2) whether gender bias was 'a motivating factor' in Credit Nation's terminating her." ■

N.Y. Appellate Division Finds Wedding Venue Unlawfully Excluded Same-Sex Couple

A unanimous five-judge panel of the New York Appellate Division, 3rd Department, upheld a decision by the State Division of Human Rights (SDHR) that Liberty Ridge Farm LLC, an upstate business corporation that rents facilities for wedding ceremonies and other life-cycle events, violated the state's Human Rights Law (HLR) in 2012 when the business turned away a lesbian couple looking for a place to hold their wedding ceremony and reception. The court's January 14 opinion in *Gifford v. McCarthy*, 2016 N.Y. App. Div. LEXIS 238, 2016 WL 155543, was written by Justice Karen K. Peters.

In June 2011, New York enacted its Marriage Equality Law, which went into effect the next month, providing

services, flower arrangements and event coordination," and Ms. Gifford serves as the "event coordinator." Liberty Ridge also contracts with a caterer to provide food and beverages for wedding receptions and "employs catering, kitchen and wait staff for that purpose."

When Gifford figured out from Melisa's use of a female pronoun to refer to her fiancé that she was engaged to a woman, she immediately said that there was a "problem" because the farm did "not hold same-sex marriages." When Melisa asked why not, Gifford responded that "it's a decision that my husband and I have made that that's not what we wanted to have on the farm." The McCarthys followed up by filing a discrimination

a decision that Liberty Ridge Farm LLC was a place of public accommodation and that the denial of the facility to a same-sex couple for use as a wedding venue violated the statute. Constitutional questions were necessarily reserved to the subsequent court proceeding. The ALJ recommended that each of the McCarthys receive \$1,500 to compensate for the emotional distress they suffered as a result of being discriminated against, and that the Giffords have to pay a fine to the agency of \$10,000. The ALJ also recommended that the petitioners be directed to "cease and desist" from violating the statute, and establish anti-discrimination training and procedures at their business. The Commissioner of Human Rights accepted the ALJ's findings and recommendations with minor changes, and the Giffords filed their appeal to the Appellate Division, raising both statutory and constitutional challenges to the decision.

This case presented questions of first impression for New York, but the issues are not new for anyone who has been paying attention to similar cases that have arisen in other states. To date, appellate rulings in New Mexico, Oregon, Colorado, and Washington State have all rejected the idea that businesses can deny their services or goods to same-sex couples in connection with commitment or wedding ceremonies when state or local laws forbid sexual orientation discrimination by businesses. Justice Peters cited those cases – most prominently the *Elane Photography* case from New Mexico (309 P.3d 53 [2013]), which was denied review by the U.S. Supreme Court on the constitutional questions – in reaching a ruling consistent with the decisions from other states.

Turning first to the statutory claims, the court easily dispensed with the Giffords' argument that their farm is not a "public accommodation" under the statute. They are incorporated as a for-profit business and they advertise the availability of their facilities to members of the public, so their argument that they are just a privately-owned farm that rents

When Gifford figured out from Melisa's use of a female pronoun that she was engaged to a woman, she immediately said that there was a "problem."

that same-sex couples could marry and that their marriages would be treated the same under all provisions of New York law as different-sex marriages. In October of 2011, Melisa McCarthy and Jennifer McCarthy became engaged, intending to marry during 2012. In the fall of 2012, Melisa phoned Cynthia Gifford, co-owner of Liberty Ridge Farm, to ask about holding the wedding there.

Ms. Gifford and her husband Robert co-own the farm in Rensselaer County. It is a working farm, but parts of the premises are regularly rented to the public for use as a wedding venue. According to Justice Peters' opinion, "When providing a venue site, Liberty Ridge offers several wedding-related services, including transportation of guests within the premises, a light beverage station, decoration and set-up

complaint with the State Division of Human Rights against the Giffords and their corporation, and found a different venue for their wedding.

The HRL provides that places of public accommodation may not discriminate in their provision of services because of the sexual orientation of those seeking the services. The Giffords responded to the charge of sexual orientation discrimination that they did not believe their operation was a "public accommodation" subject to the law and that they were not discriminating based on sexual orientation, but rather exercising their 1st Amendment rights of freedom of speech, association and religious exercise. They did not inquire into the sexual orientation of potential customers, they insisted.

A public hearing before an Administrative Law Judge (ALJ) led to

out its barn occasionally for a wedding ceremony was not going to cut it under the broad interpretation of the statute that the state courts have followed. “The fact that the wedding ceremonies occur on private property and pursuant to a written contract does not, as petitioners contend, remove Liberty Ridge’s facilities from the reach of the Human Rights Law,” wrote Justice Peters; “the critical factor is that the facilities are made available to the public at large.”

As to the argument that they were not discriminating based on sexual orientation, the court was equally dismissive. “As the record clearly reflects,” wrote Justice Peters, “Cynthia Gifford displayed no unwillingness to allow the McCarthys to marry at the farm until Melisa McCarthy referred to her fiancé as a ‘she.’ Despite Cynthia Gifford’s clear rejection of the McCarthys as customers, petitioners nonetheless argue that, in advising Melisa McCarthy that ‘we do not hold same-sex marriages here at the farm,’ they did not deny services to the McCarthys ‘because of’ their sexual orientation. Instead, petitioners claim that the decision to do so was based solely upon the Giffords’ religious beliefs regarding same-sex marriage. Such attempts to distinguish between a protected status and conduct closely correlated with that status have been soundly rejected.” Justice Peters cited the U.S. Supreme Court’s decision involving the refusal of University of California Hastings Law School to recognize a chapter of the Christian Legal Society, which excluded gay students from membership, in which Justice Ruth Bader Ginsburg expressly rejected this kind of status/conduct distinction, as well as the famous Bob Jones University case, which upheld a denial of tax exempt status to the school because of its policy forbidding interracial dating by students.

The court found that the “act of entering into a same-sex marriage is ‘conduct that is inextricably tied to sexual orientation,’” so there was no basis to distinguish this from an outright denial of services because of a potential customer’s sexual orientation. The Giffords had tried to bolster this defense by claiming that they would have been happy to host a wedding reception for

the McCarthys, so long as the actual wedding ceremony was not held on their premises, but the court rejected this defense, pointing out that the statute “does not permit businesses to offer a ‘limited menu’ of goods or services to customers on the basis of a status that fits within one of the protected categories.”

The court then turned to the Giffords’ constitutional claims, and here rested its analysis on the proposition that neither the federal First Amendment nor the analogous provision in New York State’s constitution allow people to violate general anti-discrimination laws based on their religious beliefs. “While we recognize that the burden placed on the Giffords’ right to freely exercise their religion is not inconsequential,” wrote Peters, “it cannot be overlooked that SDHR’s determination does not require them to participate in the marriage of a same-sex couple. Indeed, the Giffords are free to adhere to and profess their religious beliefs that same-sex couples should not marry, but they must permit same-sex couples to marry on the premises if they choose to allow opposite-sex couples to do so. To be weighed against the Giffords’ interests in adhering to the tenets of their faith is New York’s long-recognized, substantial interest in eradicating discrimination. Balancing these competing interests, we conclude that petitioners failed to show that SDHR’s determination constituted an unreasonable interference with the Giffords’ religious freedom.”

The court similarly rejected the Giffords’ other First Amendment claims. “Here,” wrote Peters, “SDHR’s determination does not compel the Giffords to endorse, espouse or promote same-sex marriages, nor does it require them to recite or display any message at all. The Giffords remain free to express whatever views they may have on the issue of same-sex marriage. The determination simply requires them to abide by the law and offer the same goods and services to same-sex couples that they offer to other couples.” The court rejected the Giffords’ assertion that holding same-sex marriages in their barn would broadcast to passersby their “support for same-sex marriage.” The court doubted that anyone would think that a business providing a service in compliance with a law that

requires them not to discriminate was making any kind of statement of the owners’ personal beliefs by providing the service.

The court also rejected the “expressive association” claim, finding that “there is nothing in this record to indicate that petitioners’ wedding business was ‘organized for specific expressive purposes’ rather than for the purpose of making a profit through service contracts with customers.”

The court also concluded that the remedy imposed by SDHR was “reasonably related to the wrongdoing, supported by evidence and comparable to the relief awarded in similar cases,” so there was no reason to change it. The standard for judicial review of the agency’s remedy is “abuse of discretion,” and the court found that SDHR did not abuse its discretion by imposing the \$3,000 damage award and the \$10,000 fine.

The Giffords and their business are represented by Alliance Defending Freedom, an anti-gay religiously oriented litigation group that actively seeks to vindicate the proposition that free exercise of religion, at least by Christians, should always trump other legal duties. They will undoubtedly try to get the state’s highest court, the Court of Appeals, to review this ruling, but that court does not have to take the case and is not likely to do so, given the unanimity of the five-member Appellate Division bench and the consistency with appellate rulings from other states involving wedding photographers, florists, and bakeries. Review by the U.S. Supreme Court is also unlikely, since it turned down the wedding photographer case from New Mexico and there is no division among the lower courts that have been ruling on these types of cases.

The McCarthys are represented by Mariko Hirose of the New York Civil Liberties Union and Rose A. Saxe of the ACLU. SDHR’s appellate attorney Michael Swirsky argued on behalf of the agency in defense of its ruling, and a variety of civil rights and gay rights organizations weighed in as friends of the court, including the NAACP Legal Defense Fund, Lambda Legal, and the National Center for Lesbian Rights, as well as New York Attorney General Eric Schneiderman. ■

Texas Appeals Panel Denies Transgender Man Standing to Bring Paternity Action Concerning Children He Was Parenting

A three-judge panel of the Court of Appeals of Texas in San Antonio issued a new opinion on January 27, reaffirming a prior ruling issued on August 12 of last year, that a transgender man who had been parenting children adopted by his long-time former female partner lacked standing to seek custody and visitation rights because he didn't assert such a claim shortly after the couple broke up. At the same time, the full bench of the Court of Appeals denied a petition for en banc review of the prior ruling, which conditionally granted a writ of mandamus sought by the children's mother challenging the trial court's jurisdiction over the case. *In re Sandoval*, 2016 WL 353010, 2016

bring such actions is limited to sperm-producing men who could conceivably be the biological father of the children at issue.

Born a genetic female, Dino Villarreal "self-identified as a male for all of his adult life," wrote Justice Pulliam in the panel opinion. "Dino moved in with [Sandra] Sandoval in 1994 and lived with her, and later the two children [who Sandoval had adopted in 2002 and 2004], until January 2011 when Dino and Sandoval separated." Dino continued to have contact with the children until sometime in 2013, after which Sandoval refused further contact. Dino filed a petition to adjudicate parentage in December 2013,

is changed from female to male." This was an unopposed action, brought under a 2009 statute that authorized Texas courts to make gender declarations in cases of transition.

Dino then filed a second petition to adjudicate parentage under Texas Family Code Ann. Sec. 102.003(a) (8), which authorizes a suit by "a man alleging himself to be the father of the minor children," asserting that he was now filing as a "man" and thus had standing. He sought temporary orders appointing him joint managing conservator of the two minor children and equal periods of possession and access. Sandoval filed a new plea challenging the court's jurisdiction. This time, the trial court sided with Dino, finding that because he was now legally "male," he could proceed under the provision authorizing such an action by "a man alleging himself to be the father of the minor children." The trial court issued a temporary order giving Dino visitation rights with the children while the case was pending, while Sandoval petitioned the court of appeals for a writ of mandamus, challenging the jurisdictional order.

Under normal rules of Texas procedure such a writ would be out of order, since the trial court's order was not a final judgment in the case and Sandoval could obtain relief by litigating the case to a final order and then appealing in the normal course if Dino had won. The panel decided, however, that this was not an ordinary case, quoting a 2014 ruling by the Corpus Christi branch of the Court of Appeals, *In re First Mercury Ins. Co.*, 437 S.W. 3d 34, recognizing "several exceptions to this general prohibition against mandamus review of a trial court's order denying a plea to the jurisdiction. In short, a remedy by appeal may be an inadequate remedy when there are extraordinary circumstances present." "We conclude," wrote Justice Pulliam, "that eventual review of the jurisdictional question on appeal from a final judgment would be inadequate in this instance. Mandamus review is therefore appropriate."

At the heart of the case is the question of whether a transgender man can bring a paternity action under the Texas Family Code, or whether standing to bring such actions is limited to sperm-producing men.

Tex. App. LEXIS 754, 756, 758, 759. Justice Jason Pulliam wrote the new decision for the unanimous three-judge panel. Justice Patricia O. Alvarez, who was not on the panel, wrote a concurring opinion on the vote to deny en banc reconsideration. Justice Luz Elena D. Chapa, also not on the panel, wrote a dissent from the denial of en banc reconsideration, claiming that it was procedurally improper for the panel to have granted the writ. Justice Rebecca C. Martinez, also not on the panel, wrote a dissent as well, going further to disagree with the panel's conclusion on the merits, arguing that the trial court correctly allowed the transgender man to maintain his suit.

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almost three years after the parties had split up. Sandoval objected to Dino's standing, and the trial court agreed with her, dismissing the petition, a ruling that was affirmed by the Court of Appeals on March 11, 2015. Sandoval successfully argued that when the petition was filed, Dino was legally a woman, and thus did not fit into any of the categories under the Texas Family Code conferring standing to initiate a parentage adjudication.

However, on January 3, 2014, shortly after having filed that petition, Dino had instituted a separate action, eventually obtaining an Order Granting Change of Identity, which "acknowledged his name change from Diana to Dino and included the following finding: '3. Petitioner's sex is male.' Following the trial court's findings, the order concluded, 'IT IS ORDERED that Petitioner's identity

Referring to the statutory scheme for litigation concerning parent-child relationships, Pulliam observed that “standing to file suit under the Texas Family Code is limited. A suit to establish a parent-child relationship may only be brought by certain individuals falling within identified categories,” and that it was a question of “straight statutory construction of the relevant statute” to decide whether a petitioner had standing. Dino was relying on his status as a “man alleging himself to be the father of a child filing in accordance with Chapter 160.” Chapter 160 says that such a suit can be brought by “a man whose paternity of the child is to be adjudicated.” Texas courts have stated that standing must exist at the time the suit is filed and be maintained throughout the suit. This was the ground on which the court had affirmed dismissal of Dino’s first petition, which was filed before he obtained the gender declaration in the separate proceeding.

This time, Dino argued that he got the declaration that he is “male” before filing this second case, so he should be home free on standing, but the court disagreed. Justice Pulliam asserted that the 2009 statute authorizing the gender declaration was enacted to deal with the problem of marriage, in response to prior litigation where Texas courts had refused to recognize change of gender in determining who could marry whom. As far as this panel of the court is concerned, Dino’s gender change rendered him “male” for purposes of the state’s marriage law as it then was, but not for purposes of the Family Code provisions on standing to adjudicate parentage. “While the clear language of the Family Code recognizes such an order as sufficient to provide proof of Dino’s identity and age for purpose of obtaining a marriage license,” wrote Pulliam, “we conclude that it is not sufficient to adjudicate parentage under subsection 160.602(a)(3). . . If all that was required for standing was to be a man, then any man could maintain a suit to adjudicate parentage to any child. We do not believe that to be what the Texas Legislature intended.”

“In this case,” wrote Pulliam, “Sandoval’s children are adopted and there is no contention that Dino is

the biological father. A man alleging ‘paternity’ is a man asserting standing as the biological father of the subject children.” He pointed out that relevant Texas Family Code provisions define “paternity index” and “probability of paternity” “in relation to the determination the likelihood that a man is the biological father of a child.” Even had Dino been identified male at birth and capable of impregnating a woman with sperm through intercourse or donation, he could not have made this “parentage” claim regarding the children at issue in this case whose procreation was accomplished by earlier biological parents prior to their adoption by his then-partner, Sandoval. “The only basis under which Dino attempts to assert that he has statutory standing as ‘a man whose paternity of the child is to be adjudicated,’ is that he acted as a parent to the children and provided actual daily care for them from the time of their adoption until his relationship with Sandoval ended in 2011. Dino’s status as a person with actual care, control and possession of the children may have conferred standing to file suit had he done so within ninety days of the date on which his actual care, control and possession of the children terminated” under Tex. Fam. Code Ann. Sec. 102.003(a)(9), but he waited much too long to avail himself of that provision. In other words, the court was unwilling to let Dino use Section 160 as a mechanism for giving any legal effect to a claim to *de facto* or *equitable* parental status. Pulliam asserted that since Texas had adopted a very specific statutory scheme governing standing, the court was limited to construing and applying those provisions.

The Court of Appeals panel conditionally granted the petition for writ of mandamus and directed the trial court to set aside its April 17, 2015, order that had denied Sandoval’s plea to the jurisdiction, so Dino’s petition was to be dismissed for lack of standing. An actual writ will be issued to the trial court if it refuses to comply. Presumably a dismissal would set up the case for Dino to file an appeal, which he would undoubtedly lose in the court of appeals, and he could then try to bring an appeal

to the Texas Supreme Court. But this would undoubtedly stretch out for years during which he will be denied contact with the children, perhaps so long that they would no longer be minors once the case is concluded.

As noted above, while reaffirming its August 12 ruling, the court also denied a motion filed by Dino on August 26 for en banc reconsideration, which drew three separate opinions from judges who were not on the three-judge panel.

Justice Alvarez concurred, expanding on the court’s view of the limited effect of the separate court order declaring Dino to be “male.” She pointed out that that court order “does not mention the Texas Family Code or address its effect under the Texas Family Code,” which “defines ‘man’ as ‘a male individual of any age.’ The Texas Family Code does not, however, define the term ‘male,’” she continued, observing that when the legislature does not define a word, the court will apply its “ordinary meaning,” for which it usually looks to a dictionary definition. Reverting to the early decision by the Court of Appeals that had affirmed dismissal of Dino’s first petition, “we cited Webster’s Dictionary which defines ‘male’ as ‘an individual that produces small usually motile gametes . . . which fertilize the eggs of a female.’” Justice Alvarez asserted that this definition “has not changed and is controlling in this mandamus. Therefore, regardless of his possession of a court order changing his identity, Villarreal still does not meet the statutory definition of ‘man’ under the Texas Family Code.”

The judge also pointed out that Dino could have brought an action, as the panel noted, had he moved quickly after the parties split up. “By waiting until November of 2013 to file, Villarreal missed his opportunity because he could no longer meet the statutory requirement of having had care, control, and custody of the children for at least six months ending not more than 90 days before he filed his petition.” This argument is frustrating to read, since it seems clear that Dino would have perceived no need to file suit until his contact with the children was cut off by Sandoval in 2013, shortly before he filed his first petition.

Alvarez characterized the standing ruling in this case as “heart-wrenching and sad,” but said that “an appellate court is bound by the law and not emotions,” so she agreed with the decision to deny en banc reconsideration of the panel decision.

Justice Chapa dissented from the voting denying en banc reconsideration. She focused her argument on what she saw as a conflict between this ruling and prior rulings of the Texas courts about when it was appropriate to allow a party who loses a plea to jurisdiction to obtain interlocutory review of that decision. She argued that the cases relied upon by the panel majority to grant mandamus review were all distinguishable. “Absent a decision from a higher court or this court sitting en banc that is on point and contrary to the prior panel decision or an intervening and material change in the statutory law, a panel should not ignore the prior holding of another panel of this court,” she argued. Thus, the panel should have denied the petition for mandamus review. She also rejected the panel’s conclusion that this case presented “extraordinary circumstances,” pointing out that there was lots of child custody litigation in the Texas courts, and this ruling could open the floodgates for mandamus petitions every time a trial court rejected a respondent’s claim that the petitioner lacked standing to seek custody.

Justice Martinez was the sole dissenter on the merits, writing a sophisticated argument engaging concepts of sex and gender and invoking *Obergefell* along the way.

She pointed out that, as far back as 1985, Texas had enacted a statute governing statutory interpretation that required gender neutrality in construing statutes. “The Legislature’s clear intent to apply its provisions gender-neutrally is the context within which our court should construe ‘each rule adopted under a code,’” she wrote, quoting from the statute. “Further, the Texas Legislature had also previously adopted an understanding of gender that is broader than one’s anatomy at birth by granting legal recognition as a ‘man’ to a person born anatomically female. A

court of law ordered legal recognition to Dino’s identity as a man regardless of his anatomical sex, without exclusion to its applicability. That he was born female is now altogether secondary. A majority of this court determines this case by addressing and viewing gender as inextricable from anatomy, by disregarding Dino’s legally-recognized gender-identity as male, and by forcing a narrow definition of being a ‘man’ without specific and evident direction from the Legislature. Dino asked for equal dignity in the eyes of the law, and both the Constitution and the trial court granted him that right. There is no reasonable explanation to deny his identity under every provision of the law and, in particular, the Family Code. The statute does not impose biological sex as the fixed marker of gender identity, nor should it be interpreted to use it as a mechanism for discrimination. That Dino lacks standing stems solely from the fact that he is transgender.” The reference to “equal dignity,” or course, is to the term used by Supreme Court Justice Anthony Kennedy in his concluding remarks in *Obergefell*, where he held that the states had unconstitutionally denied “equal dignity” to same-sex couples by refusing to allow them to marry or to recognize their marriages.

Martinez pointed out that the U.S. Supreme Court’s decisions in *Windsor* and *Obergefell* concerned, importantly, the harm to children when their parents’ relationships were not recognized. “The Supreme Court saw no reasonable explanation for that. This should suggest to us that the Court’s analysis would extend to cases not simply involving marriage, but also to eligibility for adoption and custody. For our en banc court to read the statute to now encompass marriage and not standing to bring suit to adjudicate parentage is thus problematic.” She supplemented this argument with reference to other streams of fundamental rights doctrine and standing doctrine.

“There is no prohibition against applying Dino’s legal identity as male to every other provision of the law, and this court is without license to limit the consideration of one’s gender identity exclusively for purposes of marriage,”

she wrote. “This court cannot create a separate entrance to the courthouse for Dino, nor close the door to him as I believe the court’s opinion does. It disappoints me that we would sanction treating an individual differently than how the law allows, and I therefore encourage further review of this decision. Dino is a male as a matter of law. Whether he can meet the burden to prove his *allegation* of paternity which *is to be adjudicated* is not yet before us to review.”

Unfortunately, Justice Martinez’s lone dissent is a single voice in the wilderness on the Texas Court of Appeals. And the notion that a “man” or a “male” for purposes of Texas law (other than marriage) is limited to individuals who can produce sperm that are capable of biological procreation seems absurd. Would this mean that after a vasectomy a person is no long a “man” for purposes of the Texas Family Code or any other Texas statute? What about a person born male who suffers an accident or medical complication prior to puberty and thus never attains the capacity to generate motile sperm? Not a “man”??? Furthermore, after *Obergefell*, the “exclusive purpose” that the court of appeals panel finds for the statute on declaration of gender has been rendered nugatory, since gender identification is no longer relevant to the right to marry under the 14th Amendment. Does this mean that the Texas statute now has no purpose, since it doesn’t matter whether one is legally male or female in applying for a marriage license? Or, as Justice Martinez argues, does the gender identity statute remain significant for all those instances in Texas law apart from the right to marry where gender is relevant to a statutory right, privilege or benefit? The court’s ruling may have many ramifications that it failed to consider.

A news article dated January 21, 2015 in *OutInUSA.com* had an interview with Dino, indicating he was represented in the litigation by Deanna L. Whitley, who opined that the argument before the court of appeals panel that had recently been held seemed to have gone well. They must have been quite disappointed by the January 27 ruling. ■

Colorado Court of Appeals finds State Trooper Suffered Sexual Orientation Discrimination but Rejects his Claim for Front Pay

The Colorado Court of Appeals has upheld the decision of an Administrative Law Judge and the Colorado State Personnel Board finding a former State Trooper suffered sexual orientation discrimination in seeking reinstatement with the Patrol, in *Williams v. Dep't of Pub. Safety*, 2015 Colo. App. LEXIS 2042, 2015 WL 9584012, 128 Fair Empl. Prac. Cas. (BNA) 933, 2015 COA 180 (Co. Ct. of Appeals, December 31, 2015).

Williams was hired by Colorado State Patrol ("CSP") in 1998, eventually becoming a captain. He kept his sexual orientation secret, even "displaying a photograph of a supposed girlfriend on his desk." After being assigned to a desk job he resigned, assured that if he returned to the force within a year, the reapplication would be streamlined without a polygraph examination and full background check. After three months when Williams applied for reinstatement, he was required by the new Chief to undergo a full background check and polygraph examination, during which he admitted to inadvertently viewing child pornography, and revealed he received a massage in Thailand that "ended in sexual content." Despite policies prohibiting questioning a person's sexuality, Williams was asked the gender of the "masseur" and he revealed that it was a man. He was subsequently denied reinstatement. Williams filed a complaint with the State Personnel Board which was referred to an Administrative Law Judge ("ALJ") who found CSP's actions were arbitrary, capricious, and constituted unlawful discrimination based on sexual orientation and awarded front pay, back pay, and attorney's fees and costs. The case was appealed to the Board, which remanded the case and new damages were ordered and both Williams and CSP appealed, the board affirmed, and both parties appealed the Board decision.

Judge John R. Webb, writing for a three-judge panel in which one judge concurred and the other concurred but dissented in part, stated that it was

unnecessary to require Williams to appeal both an arbitrary or capricious claim to the State Personnel Director or the Board. Judge Webb ruled the Board lacked authority over Williams' claim CSP acted arbitrarily or capriciously and remanded the case to the Director.

With respect to CSP's argument that CSP did not unlawfully discriminate against Williams, Judge Webb ruled that "we discern ample record support to affirm the ALJ's conclusion." He stated that to make a prima facie discrimination claim, Williams must show: 1) he belongs to a protected class; 2) he was qualified; 3) he suffered adverse employment action; and 4) the circumstances give rise to an inference of discrimination. Applying that standard, Judge Webb found that since Williams had an "impeccable record," the decision to refuse reinstatement was swift, and that all decision-makers "had some reasons to believe that Williams was gay" at the time of the refusal. Judge Webb found pretextual CSP's arguments regarding Williams' inadvertent viewing of child pornography, given the departure from prior policy in requiring Williams to take a polygraph test, having two supervisors observe the examination, formulating questions to elicit Williams' sexual orientation against policy, and failing to retest Williams. Finally, Judge Webb found the timing and sequence of CSP's decision to be suspect, and further ruled that the employer remains liable even when they rely on the reports or recommendations of a biased subordinate.

Judge Webb next analyzed the ALJ's decision, upheld by the Board without analysis, that Williams was entitled to "front pay," (money awarded for lost compensation during the period "between judgment and reinstatement or in lieu of reinstatement."). After an extensive discussion of the legislative history of the Colorado Anti-Discrimination Act ("CADA") and its various amendments over the years, Judge Webb ruled that Williams did not establish that front pay was a remedy under CADA at the time

Williams sought it, rejected arguments by Williams and the Board analogizing CADA to Title VII, and reversed the Board's order granting front pay.

With respect to Williams' request for attorney's fees, Judge Webb found that the ALJ's ruling that CSP's reasons for refusing to reinstate Williams were merely post-hoc justifications showed a pretext for intentional discrimination, and ruled that "the record contains sufficient evidence showing CSP acted in bad faith and without any reasonable basis" and affirmed the Board's award of attorney's fees.

Judge Webb declined to reverse the Board's order and ruled that the CSP's "anti-gay culture" was "well documented," finding that Williams had not sought relief on the basis of a pattern and practice of discrimination and further that he had already ruled that CSP had intentionally discriminated against Williams.

Judge Michael H. Berger, concurring in part and dissenting in part, stated that the majority correctly affirms that Williams suffered sexual orientation discrimination in his application for reinstatement, but that they failed "to recognize that nothing in pre-2015 CADA prohibits, in appropriate cases, an alternative award of front pay when reinstatement is not feasible." Judge Berger found that just because the pre-2015 CADA "does not state that front pay is *not* a remedy," did not mean it was excluded as a remedy, especially given the circumstances when an employer's "persistent animosity towards the plaintiff has destroyed the plaintiff's ability to be an effective employee." He noted that just because the 2015 CADA amendments added front pay as a remedy did not mean the prior statute prohibited front pay, and further disagreed that the 1979 amendment to CADA removing the phrase "including (but not limited to)" to the list of remedies was not as significant as the majority held, stating he would have found Williams entitled to an award of front pay. – *Bryan C. Johnson*

Federal Court Rules State Compassionate Use Act and Disability Discrimination Laws Do Not Shield HIV-Positive Marijuana User from Discharge

U.S. District Judge William P. Johnson ruled on January 7 that a man living with HIV who is using medical marijuana under New Mexico's Compassionate Use Statute could not contest his discharge under his employer's drug use policy, finding that the employer was not required to accommodate the man's disability by waiving its requirement that its employees refrain from using marijuana. *Garcia v. Tractor Supply Company*, 2016 WL 93717 (D. New Mex.).

The plaintiff, Rojerio Garcia, alleges that his physician recommended use of medical marijuana to deal with some of the effects of his HIV infection, and he obtained it by enrolling in the state's

disability discrimination, arguing that the employer was required to accommodate his disability (HIV infection) by allowing him to use medical marijuana under the state's program. The Division found no probable cause to believe its anti-discrimination statute was violated. Having exhausted administrative remedies, Garcia filed suit in New Mexico District Court in Santa Fe, claiming he was dismissed because of his "serious medical condition" (HIV infection), which was unlawful because he was using medical marijuana upon his physician's recommendation under a state program. The employer removed the case to federal court, arguing that the federal controlled substance statute

to employees in New Mexico. The court agreed with this argument, finding that although the CUA authorized the state's health department to set up the Medical Cannabis program and shielded those enrolled in the program from any state law penalties for using cannabis obtained through the program, the law had no effect on the employer-employee relationship whatsoever.

"Here, Mr. Garcia was not terminated because of or on the basis of his serious medical condition," wrote the judge. "Testing positive for marijuana was not because of Mr. Garcia's serious medical condition (HIV/AIDS), nor could testing positive for marijuana be seen as conduct that resulted from his serious medical condition. Using marijuana is not a manifestation of HIV/AIDS."

Garcia had argued that since the U.S. Department of Justice was refraining from prosecuting individuals under the Controlled Substances Act when they obtained medical marijuana through a state program such as New Mexico's, the court should, in effect, find their use of marijuana could not lawfully be the basis for their discharge, but the court wasn't buying this argument either, agreeing with the employer that "reliance on the enforcement policy of the United States Attorney General is not law, and instead, is merely an ephemeral policy that may change under a different President or different Attorney General." The court wasn't going to tell a national employer operating in 49 states that it would have to modify its company-wide drug policies to take account of compassionate use laws in a handful of states.

"In sum," wrote Johnson, "the Court finds that the CUA combined with the New Mexico Human Rights Act does not provide a cause of action for Mr. Garcia as medical marijuana is not an accommodation that must be provided for by the employer." Even though New Mexico courts had found that under certain circumstances the state's Workers Compensation program was required to pay for medical marijuana, "the Court finds a fundamental difference between requiring compensation for

The plaintiff alleges that his physician recommended use of medical marijuana to deal with some of the effects of his HIV infection.

Medical Cannabis Project operated by the New Mexico Health Department pursuant to the state's Compassionate Use Act (CUA). The Health Department determined that Garcia met all statutory and regulatory criteria for participation. With his symptoms under control, he applied for a management level job for which he was qualified with Tractor Supply Company, a national employer doing business in 49 states. During his interview, he told the hiring manager that he was HIV positive and was enrolled in the New Mexico Medical Cannabis Program. He was hired and directed to report to the company's testing facility for drug testing as the company required for all new hires. Garcia tested positive for having used marijuana, of course. He was then discharged under the company's zero-tolerance policy for drug use.

Garcia complained to the New Mexico Human Rights Division alleging

(CSA), which outlaws marijuana use, would preempt Garcia's claim and that the New Mexico anti-discrimination law did not require it to employ marijuana users. Judge Johnson's opinion does not make specific whether the basis for federal jurisdiction is diversity (Tractor Supply being incorporated in another state) or federal question (the federal preemption argument).

The judge divided his analysis into two parts, the first dealing with the confluence of the state's Human Rights Act and the Compassionate Use Act, the second with the federal preemption argument.

The court sided with Tractor Supply, which argued that it did not discharge Garcia because of a disability, but rather because of his use of marijuana in violation of the company's drug policy. Tractor Supply was arguing that the Compassionate Use Act does not require it to forego applying its drug use policy

medical treatment and affirmatively requiring an employer to accommodate an employee's use of a drug that is still illegal under federal law."

Turning to the preemption point, Johnson rest his ruling on a distinction between federal and state laws and how they function with respect to medical marijuana. The federal law makes use illegal, but the DOJ has exercised discretion not to prosecute. The state law, on the other hand, provides immunity from prosecution, but only immunity under state law. Johnson looked to a ruling by the Oregon Supreme Court, in which a concurring judge stated "the fact that the state may exempt medical marijuana users from the reach of the state criminal law does not mean that the state can affirmatively require employers to accommodate what federal law specifically prohibits."

"State medical marijuana laws that provide limited state-law immunity may not conflict with the CSA," wrote Judge Johnson. "But here, Mr. Garcia does not merely seek state-law immunity for his marijuana use. Rather, he seeks the state to affirmatively require Tractor Supply to accommodate his marijuana use. Thus, the Court finds the Oregon cases closer to the facts of this case and more persuasive. To affirmatively require Tractor Supply to accommodate Mr. Garcia's illegal drug use would mandate Tractor Supply to permit the very conduct the CSA proscribes."

In general, states have not moved to protect medical marijuana users from employment discrimination on that account, and this ruling from a New Mexico federal district court is consistent with the trend. The bottom line, it appears, is that employers operating in New Mexico or other states that have decided as a matter of state policy to allow compassionate use of marijuana for people whose medical conditions would justify it, are not required to accommodate such use, even if the medical condition that justifies the use, such as HIV infection, is considered a disability under the state's anti-discrimination law.

Garcia is represented by E. Justin Pennington of Albuquerque. The company's lawyers include Jessica R. Terrazas of Albuquerque and Michael W. Fox of Austin, Texas, both with firms in those cities. ■

7th Circuit Affirms Denial of HIV Positive Mexican's Asylum and CAT Relief Claims

The U.S. Court of Appeals for the Seventh Circuit has affirmed the Board of Immigration Appeals' denial of asylum, withholding of removal, and Convention Against Torture (CAT) relief to an HIV-positive Mexican man in *Lopez v. Lynch*, 2016 U.S. App. LEXIS 448 (January 12, 2016).

Lopez, a Mexican citizen who had lived in the United States for over two decades, was arrested and charged with four counts of dealing and possessing drugs, to which he plead guilty to one count of dealing in cocaine over 3 grams in violation of Indiana's criminal code. He was sentenced to 20 years imprisonment, with 10 years suspended and 10 years of probation. The Department of Homeland Security (DHS) recommended his removal from the United States. After Lopez established a credible fear of returning to Mexico he was given a hearing before an Immigration Judge who ruled his conviction to be of a "particularly serious crime" barring him from asylum and withholding of removal, and ruled with respect to Lopez's CAT claim that he did not prove it "more likely than not" that he would face torture if returned. On appeal, the Board of Immigration Appeals ruled (without addressing whether the conviction was an aggravated felony but instead based on the overall circumstances) that the crime was particularly serious and that Lopez had not shown it was more likely than not that he would be tortured if returned to Mexico. Lopez filed a timely Petition for Review.

Writing for the 7th Circuit panel, Chief Judge William Joseph Bauer stated the court must determine whether the conviction would constitute a felony under federal law and accordingly be considered an "aggravated felony." Judge Bauer noted that since manufacturing and delivering illegal drugs was a crime both federally and in Indiana but the Indiana statute also criminalized financing the manufacture or delivery of illegal drugs, some but not all convictions under the statute could be aggravated felonies. Since the statute "proscribes multiple types of conduct, some of which would

constitute an aggravated felony and some of which would not," Judge Bauer applied the "modified categorical approach" to compare Lopez's conviction to the federal definition of illicit trafficking in a controlled substance. Examining the charging document to which Lopez plead guilty, an information alleging that Lopez "did knowingly deliver cocaine," Judge Bauer found that Lopez's crime would have constituted a felony had he been charged under federal law, and that therefore his conviction was an aggravated felony.

Lopez had argued that the case should be remanded because the Board applied the incorrect legal standard in assessing the overall circumstances in deciding whether his crime was particularly serious; however, Judge Bauer found that while the Board may have applied the wrong standard in their "particularly serious" analysis, pursuant to statute any aggravated felony for which a person was sentenced to more than five years is without exception considered "particularly serious," remand would not change the outcome for Lopez who was sentenced to 20 years.

Having affirmed the Board's ruling that Lopez was ineligible for asylum and withholding of removal, Judge Bauer reached only the CAT claim. Judge Bauer found that while Lopez may face violence if returned to Mexico on account of his sexuality and HIV positive status, it was not "more likely than not" that he would face harm. Lopez argued that he would face danger living in Acapulco with his sister, particularly because a childhood bully who had stabbed him continued also to live there, and that his HIV positive diagnosis makes relocation unreasonable. Judge Bauer stated that Lopez could avoid harm by relocating to a more gay-tolerant region in Mexico, stating that Lopez "has lived the last twenty-five years without his sister," and further noting that there were 57 clinics offering free HIV treatment in Mexico. Accordingly, Judge Bauer ruled that the Board's decision was based on substantial evidence, and the court denied Lopez's petition for review. – *Bryan C. Johnson*

CIVIL LITIGATION

MARRIAGE EQUALITY AFTERMATH

– The *National Law Journal* reported on January 25 that twenty-five states that had unsuccessfully defended their bans on marriage equality in court had either agreed or been ordered by courts to pay more than \$13.5 million in legal fees to the prevailing parties. Just hours after the article was published, Montana officials agree to pay legal fees of \$100,000.00, increasing the total to \$13.6 million. The article said that fee awards in these cases have ranged from \$4,500.00 to \$1.9 million. Fee petitions were pending in several other states, including a petition for \$2 million in Tennessee. Other cases are still in litigation and haven't yet reached the stage of fee awards. Three cases were on appeal: In Texas, the state was challenging a \$605,672.00 award by U.S. District Judge Orlando Garcia, who had declared a ban unconstitutional in 2014, a ruling upheld by the 5th Circuit shortly after the *Obergefell* decision was issued by the Supreme Court. Although Garcia awarded much less than plaintiffs had requested, the state criticized the award as "excessive." Some trial judges have ruled that *Obergefell* had "mooted" pending cases, as a result of which plaintiffs were not "prevailing parties" entitled to fees, and those determinations are also being appealed. In many of the cases, large firms who had undertaken the cases on a *pro bono* basis were committed to donating their fees to non-profit LGBT rights groups, and some of the fees will go directly to the LGBT groups that provided direct representation of plaintiffs in several of the cases.

2ND CIRCUIT COURT OF APPEALS

– A native and citizen of Suriname seeking withholding of removal and relief under the Convention against Torture failed to convince an Immigration Judge that he is gay, and the 2nd Circuit ruled that it was without authority to second-guess the credibility determination of

the judge. *Toolsie v. Lynch*, 2016 U.S. App. LEXIS 1327 (Jan. 28, 2016). As is frequently the case with summary dispositions by the courts of appeals in these kinds of cases, the court's opinion lacks a coherent factual narrative of the plaintiff's allegations. However, from its brief discussion, it appears that Toolsie gave conflicting testimony concerning his sexual orientation, stating on direct examination that he had "practiced homosexuality" with a man he met through Facebook, then admitting on cross-examination that he "never had physical contact with another man." Then Toolsie argued that the Immigration Judge erroneously assumed that "practicing homosexuality" must entail intercourse or other sexual touching. The court wrote: "Toolsie's argument misreads the record. Not only did the IJ also find Toolsie not credible because he failed to produce available corroborating evidence, but also Toolsie did, in fact, claim on direct examination that he had 'sexual relations' with the man he met through Facebook, disproving Toolsie's claim that the IJ's decision rested on a specific and arbitrary definition of 'practicing homosexuality.' Thus, despite Toolsie's efforts to recharacterize the IJ's decision, the argument 'merely quarrels' with a factual finding and is therefore beyond our jurisdiction." Toolsie had also challenged the BIA's finding on likelihood of persecution for gays in Suriname. Even if his evidence – which included a convincing statement in the State Department's 2013 County Report on Suriname – were accepted, however, as the court noted, the IJ found Toolsie's assertion that he was gay not to be credible, so this evidence wouldn't really matter to the outcome of his case.

9TH CIRCUIT COURT OF APPEALS

– In *Moiseev v. Lynch*, 2016 U.S. App. LEXIS 744, 2016 WL 158649 (9th Cir. Jan. 13, 2016), the court affirmed a decision of the Board of Immigration

Appeals denying the plaintiff's petition to reopen her asylum proceedings. Plaintiff is a native of Russia. She had originally petitioned for asylum based on her Jewish identity, and the petition was denied in 2004. In 2011, she moved to reopen the asylum case, this time seeking asylum based on her status as a transgender woman, and arguing that "mental health issues" had prevented her from raising this issue sooner. While acknowledging that in its past cases the 9th Circuit has agreed to waive deadlines due to "mental health issues" of the petitioner, in this case the court pointed out that Moiseev's own declaration shows that she claimed to have suffered persecution because of her transgender identity since her youth in Russia, long before her original asylum application, so she could have raised this issue at that time. Her failure to do so then precluded her doing so now, in light of the strict statutory deadlines and the restriction on reopening cases based on arguments that could have been made in the original application. Moiseev is represented by Marc Howard Cohen and Michael Phillip Esser of Kirkland & Ellis LLP.

9TH CIRCUIT COURT OF APPEALS

– The Board of Immigration Appeals erred bigtime in *Ramos v. Lynch*, 2016 WL 158676, 2016 U.S. App. LEXIS 745 (9th Cir. Jan. 13, 2016). Jaime Ramos, a/k/a Jasmine Ramos, a transgender woman, had petitioned for asylum, withholding of removal, and relief under the Convention against Torture. The BIA denied her claims, finding that her accounts of being beaten up by police officers were not sufficient to show she had been the victim of official persecution. Wrote the court, "Ramos's beating by police officers constituted state action for purposes of establishing past persecution, and the BIA erred by requiring her to make some further showing that the Salvadoran government acquiesced in that attack.

CIVIL LITIGATION

Because the BIA's denial of Ramos's withholding claim relied on an incorrect legal standard, we grant the petition and remand for the BIA to reassess her eligibility for withholding under the correct standard." The court found that "with respect to Ramos's CAT Claim, the BIA likewise erred in evaluating whether Ramos had proved that the Salvadoran government was unable or unwilling to protect her. Because Ramos was attacked by police, her beating was necessarily 'inflicted by ... a public official.' She did not need to show that the government otherwise acquiesced in the assault." The court also found that in evaluating her claim, the immigration judge "improperly conflated Ramos's gender identity and sexual orientation. Although the BIA acknowledged that Ramos is transgender, its opinion offers no indication that it actually considered whether she is entitled to withholding or CAT relief as a result." Strike three, and remand for total reconsideration on withholding and CAT protection. (Ramos was not appealing the denial of asylum, presumably because her application was procedurally defective.) She is represented by Niels W. Frenzen and students from the University of Southern California Law School's Jean Elizabeth Lantz Immigration Clinic.

11TH CIRCUIT COURT OF APPEALS

– *Jeune v. U.S. Attorney General*, 2016 WL 98574 (11th Cir., Jan. 8, 2016), is one of those heartbreaking cases where it appears that the plaintiff, a gay (or perhaps transgender) person from Haiti, may actually have decent grounds for staying in the United States but has been stymied by the complications of the system that Congress has erected to make it difficult for foreign nationals to achieve refugee status in the United States. Jeune came to the U.S. at age 16 and was accorded legal status as a dependent under the Haitian Responsibility and Immigration Fairness Act. Now 24, he blew his chances to stay

here untroubled by conduct that led him to convictions in Florida state courts for cocaine possession and concealed weapons possession. This made him removable, unless he could prove entitlement to withholding of removal by showing the likelihood he would be subject to persecution in Haiti because of membership in a particular social group. He asserted his claim as a gay man, pointing to various incidents during his childhood in Haiti, but the Immigration Judge found them insufficient to constitute persecution, as they amounted to harassment and some discrimination but no physical harm. Failing to prove past persecution raises great difficulty for the petitioner, who then must try to prove the likelihood of future persecution if returned to Haiti, which will not be presumed in the absence of past persecution. The IJ found, however, that Haiti decriminalized gay sex in 1986 and there is no evidence of official persecution of homosexuals by the government, although, as the opinion relates, homosexuality remains a "taboo" there socially and there is likely to be harassment and discrimination against a gay person. However, the IJ found reports that this was less of a problem in rural areas, so Jeune could avoid these problems by settling in one of those rural areas. The Board of Immigration Appeals approved the judge's decision denying Jeune's petition for withholding of removal and protection under the Convention against Torture. The court found that it was quite limited in its ability to review, given Jeune's status as a convicted criminal on drug and weapons charges. In effect, the court could only provide relief if it found that the BIA or IJ had committed an error of law, and this it did not find. Jeune had raised a new issue before the court, claiming a transgender identity and asserting the likelihood that this would raise the risk of persecution and/or torture in Haiti. But the court found this claim was not properly before it, since it had not been raised to the IJ or the

BIA and thus administrative remedies were not exhausted, precluding judicial review. Jeune is represented by Romy Louise Lerner, Rebecca Sharpless, and Lindsay Adkin through University of Miami Law School.

FEDERAL CIRCUIT COURT OF APPEALS

– Lambda Legal announced settlement of its long-running suit against the Department of Veterans Affairs over benefits for same-sex spouses of military veterans. Lambda has represented the American Military Partner Association as organizational plaintiff. The Veterans Administration has changed its policies in line with *U.S. v. Windsor* and *Obergefell v. Hodges*, and will no longer limit marriage recognition based on residence or place of performance, complying with the Supreme Court's mandate. The settlement in *American Military Partner Association v. McDonald* was announced on January 20.

ALABAMA – Alabama Chief Justice Roy Moore, taking the position that the Supreme Court's ruling in *Obergefell v. Hodges* applied only to the four states within the 6th Circuit, issued an Administrative Order on January 6, 2016, to the probate courts in his state, asserting that the Alabama Supreme Court's pre-*Obergefell* ruling of March 3, 2015, rejecting a constitutional claim for same-sex marriage, remains binding on Alabama courts until such time as the Alabama Supreme Court issues a new ruling on the question. Moore's court stated on March 3 that the state's constitutional and statutory bans on same-sex marriage required the state's probate judges, who administer the licensing process, to refrain from issuing marriage licenses to same-sex couples. After *Obergefell* issued on June 26, 2015, the court directed parties to submit their views to the court as to the impact of *Obergefell* on its March 3

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order. Those comments were submitted, but the Alabama Supreme Court has yet to rule, and most of the probate judges in the state actually began issuing licenses to same-sex couples shortly after *Obergefell* was announced. Asserting that “confusion and uncertainty exist among the probate judges” about the effect of *Obergefell* on the Alabama Supreme Court’s order, Moore pointed out that some of the federal circuit courts before which marriage equality appeals were pending when *Obergefell* issued had subsequently opined that the cases before them were not moot and then issued substantive rulings on those appeals, consistent with the Supreme Court’s decision in *Obergefell*. To Moore, this meant that the question whether same-sex couples in Alabama are entitled to marriage licenses was not mooted by *Obergefell* and has yet to be decided. As Administrative Head of the state’s judicial system, Moore ordered: “Until further decision by the Alabama Supreme Court, the existing orders of the Alabama Supreme Court that Alabama probate judges have a ministerial duty not to issue any marriage licenses contrary to the Alabama Sanctity of Marriage Amendment or the Alabama Marriage Protection Act remain in full force and effect.” One wonders why the Alabama Supreme Court has not issued a decision. . . but, then, with Judge Moore at their head, one may suspect he is trying to string this out as long as possible, giving cover to the significant minority of Alabama probate judges who persist in refusing to issue marriage licenses to same-sex (or any, in some counties) couples. Part of Moore’s position is necessarily that decisions by lower federal court have no binding effect on Alabama’s probate judges, since the federal district courts have now declared Alabama’s same-sex marriage bans unconstitutional more than once over the past year, and on October 20, the 11th Circuit, ruling on appeal by a probate judge from one of those decisions, took the position

that the arguments being advanced by Probate Judge Tim Russell, seeking relief from a district court order, were moot as a result of *Obergefell*. *Strawser v. State of Alabama; Tim Russell*, No. 15-12508-CC. * * * Southern Equality, a gay rights organization, circulated a list on January 20 showing that it was difficult or impossible for same-sex couples to get marriage licenses in up to 15 counties. “Alabama is the only known state in the country where non-compliance with the *Obergefell* ruling persists,” wrote the organization. SE’s survey turned up 4 counties which would not respond to the question whether same-sex couples could obtain licenses, and 11 counties that had closed their license offices entirely and were refusing to issue licenses to any couple, different-sex or same-sex, until some final resolution was achieved between the Alabama Supreme Court and the federal district court.

CALIFORNIA – The AIDS Health Care Foundation has filed a lawsuit against Gilead Sciences in the Northern District of California, arguing that the patent Gilead obtained for a new version of Tenofovir – which is more effective and has fewer side effects than the prior version – is invalid, and that Gilead maximized profits on the prior version by unnecessarily delaying the introduction of the new, better version, until the patent on the old drug was close to expiring. AHCF argues that the new version is just an “obvious modification” of the older version, intended to stave off competition from generic drugs that will start to appear when the earlier patent expires. Therefore, it does not constitute “new art” and is not entitled to patent protection as a genuine discovery. The availability of a generic version of Tenofovir would significantly reduce the cost of medication upon which persons with HIV rely to maintain an acceptable state of health by suppressing

replication of HIV. The lawsuit also accuses Gilead of not releasing Tenofovir as a stand alone medication in order to avoid competitors from being able to reverse-engineer the drug or incorporate it into competitive versions of the cocktail. Said Michael Weinstein, president of AHCF in an interview with the *New York Times* (Jan. 27), “They waited 10 years to actually release this [new version], and coincidentally it’s one year before the patent on Tenofovir expires. You consider how many people have suffered kidney damages and bone loss during that time.” (The new version is said to avoid the kidney and bone complications that are observed among users of the original version.) Gilead is also the subject of a new investigation launched by Massachusetts Attorney General Maura Healy concerning the pricing of its new drugs intended to cure hepatitis C, a previously incurable condition for which existing treatments may reduce symptoms and put the infection into remission, but not eliminate it entirely. The new drugs require a substantial payment – \$84,000 to 94,500 depending on the formulation – for treatment sufficient for a “cure” of a condition that is most prevalent among people without financial resources to pay for the drug. (On the other hand, it is argued, the lifetime cost of maintaining people with hepatitis C infection under existing treatment regimens far exceeds the cost of the cure, making the high one-time charge economically justified, as limiting the company from charging it would create incentives against the heavy research investments needed to find and bring through FDA approval to market distribution innovative new cures.)

DISTRICT OF COLUMBIA – In *Horvath v. Dodaro*, 2015 WL 7566665 (D.D.C., Nov. 24, 2015), U.S. District Judge Colleen Kollar-Ketelly found that a gay federal employee’s claim for damages for the refusal to enroll his husband in the employee benefits plan

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when they married in Massachusetts in 2004 was time-barred. At the time of the marriage, of course, the Defense of Marriage Act (DOMA) was in effect, so the GAO, his employing agency, could not authorize the benefits, and his administrative appeal was rejected. He did not file suit at that time, considering it unlikely that he could win. Subsequently, of course, others who had been denied benefits did file lawsuits, eventuating in the Supreme Court 2013 decision, *U.S. v. Windsor*, 133 S.Ct. 2675, finding the relevant provision unconstitutional. After the *Windsor* ruling, Mr. Horvath, now a retiree, applied for coverage for his husband, which was granted. But then he sought compensation for the prior denial, and the court found, granting the government's motion to dismiss, that the statute of limitations for such claims is a bar to the lawsuit. Horvath had argued a continuing violation, but the judge did not buy it, finding that his claim accrued when his original application for benefits was turned down. Edward Horvath represented himself *pro se* in this lawsuit.

FLORIDA – The U.S. Supreme Court has declined to review a decision by the Florida courts rejecting the parental rights claims of a woman against her former partner who bore their child. *Willis v. Mobley*, 2016 WL 100396 (U.S. Supreme Ct., Jan. 11, 2016), denying certiorari in *Willis v. Mobley*, 171 So.3d 739 (Table) (Fla. 5th Dist. Ct. App. July 24, 2015). The decision below by the Florida Court of Appeals is unpublished. The petition for certiorari as available at 2015 WL 6153093. According to an *Associated Press* report about the *certiorari* denial, Peggy Willis and Anne Marie Mobley had an 11-year relationship, during which they agreed to raise a child together. They purchased semen from a donor through the internet and Mobley became pregnant and bore their child. The relationship between

the women ended when the child was one year old. Willis sued to establish parental rights, but the Florida courts rejected her claim, finding she was not a legal parent of the child. She argued that this ruling violated her constitutional rights as she could not marry Mobley prior to the birth of their child due to Florida's unconstitutional ban on same-sex marriage. Evidently the Supreme Court is not interested in addressing this kind of retroactive application of *Obergefell*. We speculate that if a state court does apply *Obergefell* retroactively to extend parental rights to a former non-marital same-sex partner of a birth mother, an appeal by the birth mother might be more likely to attract the Court's attention, presenting the question whether the state court's grant of parental rights violates the constitutional rights of the birth mother under the Due Process Clause. Counsel for Willis on the Petition for Certiorari was Sean M. Wagner of Melbourne, Florida.

FLORIDA – Another small milestone has been passed in the effort to get coverage for sexual orientation discrimination claims under Title VII of the Civil Rights Act of 1964. Rather than filing the a motion to dismiss on jurisdictional grounds, the U.S. Department of Justice has filed an answer on January 28 in the pending civil action brought in U.S. District Court in Miami under Title VII by David Baldwin, a gay air traffic controller who claims he was denied a permanent position in the Miami control tower because of his sexual orientation. Baldwin had originally filed a complaint, as required by federal procedures, with the Department of Transportation, which had ruled that it would consider the complaint under its internal anti-discrimination policies but not under Title VII. Baldwin appealed that determination to the Equal Employment Opportunity Commission, which issued a ruling

last July 15 holding that Baldwin could proceed under Title VII, either through further administrative proceedings or by filing suit in federal district court, which he did in the fall. The Justice Department sought extensions of time while pondering whether to file an answer or a motion to dismiss. Evidently, the Justice Department has now decided to side with the EEOC on the jurisdictional issue, and filed an answer opposing Baldwin's claim on the merits without raising any jurisdictional issue. This echoes the path taken on the issue of gender identity coverage, where the EEOC's opinion finding that Title VII applies was subsequently echoed by the Justice Department. The Obama Administration now appears fully committed to the argument that both sexual orientation and gender identity discrimination are forms of sex discrimination prohibited by Title VII (and presumably all other federal laws and policies that ban sex discrimination). Although some courts of appeals have accepted the argument on gender identity, at least to some extent, the process of building judicial precedents on the issue of sexual orientation is at an early stage. Cases are pending in the circuits.

FLORIDA – Felix L. Luna, a gay man, filed suit in federal court against his former employer, Bridgevine, Inc., asserting a variety of claims but failing to identify any specific statute that he alleged had been violated. *Luna v. Bridgevine, Inc.*, 2016 U.S. Dist. LEXIS 3523, 2016 WL 128460 (S.D. Fla., Jan. 12, 2016). He had previously filed a charge with the Equal Employment Opportunity Commission, so in dealing with the defendant's motion to dismiss the complaint, District Judge Marcia G. Cooke construed the complaint as attempting to assert a discrimination claim under Title VII of the Civil Rights Act of 1964. However, she wrote, "Plaintiff may not assert a

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claim for discrimination under Title VII based upon sexual orientation because courts have consistently found that Title VII does not apply to discrimination claims based on sexual orientation.” The judge cited to *Espinosa v. Burger King Corp.*, 2012 U.S. Dist. LEXIS 135162, 2012 WL 4344323 (S.D. Fla. 2012), noting parenthetically that the court in *Espinosa* had cited to “various federal cases wherein courts held that Title VII does not provide protection for discrimination based on sexual orientation.” Citing *Espinosa* for this point would produce that obvious result, because federal courts did not being accepting that argument that sexual orientation claims might be covered under Title VII’s ban on sex discrimination until after 2012, and the 11th Circuit has not ruled on the question since the Supreme Court issued its ground-breaking gay rights decisions in *Lawrence v. Texas*, *U.S. v. Windsor*, and *Obergefell v. Hodges*. Furthermore, the EEOC’s decision finding such claims actionable in an administrative ruling, *Baldwin v. Foeux*, 2015 WL 4397641, was not issue until July 2015. Disappointingly, Judge Cooke makes no reference to that ruling or the handful of federal district courts that have followed it. This is itself surprising, since Luna is represented by counsel, Jacqueline Elizabeth Cannavan of Hollywood, Florida, so one would expect that these authorities would have been brought to the court’s attention in opposition to defendant’s motion to dismiss.

HAWAII – A gay man’s sexual orientation discrimination complaints against the city of Honolulu (and specifically its parks department) was found to be time-barred in *Chung v. City & County of Honolulu*, 2016 U.S. Dist. LEXIS 9391 (D. Haw., January 26, 2016). Nelson Chung worked for the parks department from December 2006 until he was in an automobile accident on March 2, 2008. He alleges

that during that 2006-2008 period, he was subjected to a hostile environment and suffered discrimination at the hands of supervisors because of his sexual orientation. He filed a Workers Compensation claim related to the auto accident, claiming that work-related stressed caused him to be inattentive at the wheel, but he was turned down through all appeals levels, as he was not actually performing work functions at the time of the accident. He stopped going to work after the accident, taking long-term leave without pay. After his last appeal in the Workers Comp case was lost, see *Chung v. City & County of Honolulu Dept of Parks & Rec.*, 2014 Haw. App. LEXIS 579 (Haw. Ct. App. 2014), he received a letter from the Department Director stating that if he did not return to work by November 8, 2011, his continued absence would be deemed a resignation. He did not return to work. On May 3, 2012, he filed a discrimination complaint with the Hawaii Civil Rights Commission, and five days later a similar complaint under Title VII with the Equal Employment Opportunity Commission. Both agencies declined to pursue his claims, issuing a right to sue letters, and he filed suit in state court on August 19, 2013. By alleging Title VII claims in his state lawsuit, he afforded the defendants the opportunity to remove the case to federal court, which they did, followed by a motion for summary judgment. In granting the motion, U.S. District Judge Derrick K. Watson observed that Chung had failed to file his state discrimination claim within 180 days of the time the claim accrued, and that his EEOC filing did not even come within the extended 300 day filing period to file with the EEOC when a plaintiff first files with a state agency. Because of the time bar, the court had no need to address the question whether Chung could bring a sexual orientation discrimination claim under Title VII. Chung had argued that because it was a “constructive discharge” case, his time ran from the

date he “quit.” While disputing this, Judge Watson pointed out that there was not some specific discriminatory incident that precipitated “quitting,” since it consisted of not coming back to work upon receipt of the letter sent to him in October 2011. The last time he had set foot in the workplace was years earlier, and the letter itself was not discriminatory, merely an instruction to come back to work by a given date or be counted as a resignation. Chung was represented by the Hawaii chapter of the ACLU.

ILLINOIS – U.S. District Judge Andrea R. Wood is yet another federal district judge who feels no need to deal expressly with recent cases finding sexual orientation discrimination claims actionable under Title VII. In *Igasaki v. Illinois Department of Financial and Professional Regulations*, 2016 U.S. Dist. LEXIS 6209, 2016 WL 232434 (N.D. Ill., Jan. 20, 2016), Judge Wood dismissed the plaintiff’s sex discrimination claim, having concluded that it is really a sexual orientation discrimination claim, and thus “must be dismissed because sexual orientation is not a protected class under Title VII,” citing a 7th Circuit holding from 2000. However, she noted that Title VII “does protect victims of ‘sex stereotyping’ or ‘gender stereotyping.’” The problem she saw, however, was that Igasaki’s allegations of gender stereotyping, based on remarks by a discriminatory supervisor, all arose after the supervisor learned that Igasaki was a gay man. Wrote Judge Wood, “He may argue that now, when faced with a motion to dismiss, but that is not what he plead. What Igasaki plead in his amended complaint is that ‘Forester found out that [he] was a homosexual and shortly thereafter Forester began to harass Plaintiff.’ Nowhere in his amended complaint does Igasaki assert that the alleged harassment by Forester began prior to her finding out that he was a

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homosexual. Igasaki's allegations that he was criticized for being 'too soft' and 'not aggressive enough' do not save his claim. Igasaki contends that such criticism evidences sex or gender stereotyping – i.e., discrimination for failing to conform to stereotypical male roles of authority – which amounts to sex discrimination. His amended complaint, however, clearly alleges that he was subject to those comments only after Forester learned of his sexual orientation. Presumably, neither Igasaki's gender nor his approach to his cases materially changed. (At least, nothing in the amended complaint suggests that to be the case.) Yet, Igasaki does not allege any criticism of his approach to cases until Forester learned of his sexual orientation – in fact, Forester's feedback to Igasaki regarding his work appears to have been positive prior to her learning of his sexual orientation. Thus, as alleged, Igasaki's complaints regarding discrimination due to sex stereotyping are more accurately described as complaints about discrimination on the basis of his sexual orientation." The judge dismissed the sex discrimination claim without prejudice, giving Igasaki the opportunity to seek to file an amended complaint that would adequately allege a sex stereotyping claim. Judge Wood also dismissed a claim based on respondeat superior liability of the company for discriminatory remarks by the supervisor, and a separate claim against the supervisor, finding that Title VII does not authorize a direct action against a discriminatory supervisor. Igasaki is represented by Anne I-Pin Shaw, Caryn I. Shaw and Marie De Grado of Shaw Legal Services, Chicago. One wonders why they didn't bring this case in state court, since Illinois bans sexual orientation discrimination in employment and 7th Circuit controlling precedent would seem to reject their assertion that sexual orientation claims are actionable under federal law, thus making it unlikely they could survive a

motion to dismiss before a district judge within the circuit. It is worth noting, however, that the 7th Circuit has heard oral argument in another case presenting this issue, so it is possible that things will turn around in the circuit eventually, and perhaps it would be good to get an appeal of this dismissal ruling on file.

INDIANA – The plaintiffs in a lawsuit challenging the validity of a provision passed by the legislature last year to "fix" the state's Religious Freedom Restoration Act so that it could not be wielded by defendants in discrimination cases have progressively widened the scope of their case, expanding it to contest the validity of local sexual orientation and gender identity discrimination provisions adopted in Carmel, Indianapolis-Marion County, Bloomington, and Columbus. The claim that the "fix" measure is preempted by state and federal constitutional protection for free exercise of religion. Among the co-plaintiffs are the Indiana Family Institute, Indiana Family Action, and the American Family Association of Indiana. These misnamed organizations all strenuously argue that gay people cannot form families and not should have any legal recognition for their families, and that any move by the state or political subdivisions to protect the non-discrimination rights of gay people would impose a substantial burden on the ability of their members to exercise their religious beliefs. *Tribstar.com*, Jan. 26.

KENTUCKY – U.S. District Judge Charles R. Simpson III has awarded \$1,082,905.10 in attorney fees and \$32,727.86 in costs to the plaintiffs in *Bourke v. Beshear*, 2016 U.S. Dist. LEXIS 4064, 2016 WL 164626 (W.D. Ky., Jan. 13, 2016), the challenge to Kentucky's ban on same-sex marriage that was consolidated with other cases from the 6th Circuit resulting

in the Supreme Court's marriage equality ruling, *Obergefell v. Hodges*. In an opinion explaining the award, Judge Simpson rejected most of the defendants' challenges to particular items, found that the plaintiffs were requesting reasonable hourly fees and, in general, spent a reasonable amount of time on the case. On the other hand, the court found appropriate the "lodestar" amounts without any multiplication, explaining that contrary to the plaintiffs' assertions, this was not an unpopular case when they took it on in 2013. "Plaintiffs enjoyed support from a wide-range of individuals and organizations at every level of litigation, including amicus briefs filed in support by the American Bar Association, 167 United States Congressmen, 44 United States Senators, and officials from multiples states," wrote Judge Simpson, observing that the plaintiffs did not face "overwhelming adversity. Not only would many attorneys have taken up similar cases, many attorneys across the county had and were representing similar clients with similar claims," citing cases from Virginia, Pennsylvania and Oregon. "The lack of undesirability which may merit a fee enhancement is underscored by the number of similar cases that were joined for oral argument. While this litigation had an important effect on society, a fee enhancement was not required to attract attorneys to take up this call to litigate." The judge also discounted the "novelty" and "complexity" of the case, saying that these factors were "tempered by the previous and ongoing litigation in other districts and circuits during litigation. This case did not exist within a vacuum and Plaintiffs did not treat their path to the Supreme Court on their own. The issues in this case were important to the clients and to the general public. The attorneys provided high quality representation and certainly did achieve a successful result. These reasons alone, however, are not enough for the Court to enhance the requested

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attorney fees. The lodestar calculation already accounts for the attorneys' skill, experience, labor, and success." Perhaps the most unusual fee request was for the time the attorneys spent participating with attorneys from the other cases in narrowing down the number of oral advocates for the Supreme Court arguments. Defendants urged that this time not be charged to them, but Judge Simpson reasoned that by consolidating the cases and then specifying that only one attorney could argue on each of the two questions posed, despite the fact that the consolidated cases came from four different states, the Supreme Court had thrust this task on the attorneys and so the expense of their meeting to settle who would be arguing was a legitimate one to charge to the defendants.

LOUISIANA – Not surprisingly, U.S. District Judge Martin L. C. Feldman, one of the few federal district judges who ruled *against* a marriage equality claim after the Supreme Court's decision in *U.S. v. Windsor* (2013), also rejects the proposition that sexual orientation discrimination claims can be brought under Title VII's ban on sex discrimination. Granting a motion to dismiss in *Phipps v. Housing Authority of New Orleans*, 2016 U.S. Dist. LEXIS 4714, 2016 WL 164916 (E.D. La., Jan. 13, 2016), Feldman rejected the discrimination claims of a bisexual Housing Authority police officer, who filed charges with the Equal Employment Opportunity Commission and then filed suit in federal court upon receiving his right to sue letter from the EEOC. "Phipps alleges that HANO discriminated against him based on his sex and sexual orientation," wrote Judge Feldman. "Because sexual orientation is not a protected characteristic under Title VII, the Court focuses its attention on whether Phipps has stated a claim for disparate treatment based on his gender." As to that proposition, Feldman found that Phipps was merely asserting

with no specific factual basis that his status as a bisexual male was viewed by his employer as "not consistent with Defendant's perception of acceptable gender roles" and "did not conform with Defendant's gender stereotypes associated with men." Rejecting Phipps's submission, Feldman wrote, "These allegations are nothing more than Phipps's theories of recovery stated in conclusory terms. What's missing is factual content supporting his theories of recovery." Phipps's factual allegations specifically focus on anti-gay remarks made by an official of the HANO police force and rumors circulating about Phipps's possible sexual relationship with another man, compounded by retaliation against him, and his subsequent discharge, when he complained about these things both internally and to the EEOC. In a footnote, Feldman produced a long string cite of cases rejecting the contention that sexual orientation claims can be asserted under Title VII, noting that Phipps had "challenged these holdings, calling them flawed." "But," wrote Feldman, "the text of Title VII is clear." Assuming that Phipps's attorney, Christopher L. Williams, presented the court with the recent cases accepting such claims or the EEOC's administrative decision on point, Feldman did not see fit to mention or distinguish them. Instead, he insisted that "the factual content" of Phipps's complaint "does not point to animus based on gender, but, rather, at most based on his perceived homosexual relationship or bisexuality. As the text of Title VII as well as *Price Waterhouse* and its progeny make clear, this distinction is fatal to his Title VII claim." Having dismissed the Title VII claim, which was the sole basis for federal jurisdiction, Feldman declined to assert jurisdiction over various state law claims that Phipps had also asserted. Phipps had asserted a Title VII retaliation and discrimination claim based on HANO's reaction to his first EEOC charge, but Feldman found this

claim premature as he had not presented it first to the EEOC, so that claim was dismissed without prejudice and Phipps could bring it back after exhausting the administrative process. But, of course, since Feldman rejects the claim that sexual orientation charges are actionable under Title VII, bringing it back looks like a non-starter unless Phipps could win a reversal from the 5th Circuit.

MASSACHUSETTS – U.S. District Judge Douglas P. Woodlock granted the employer's motion for summary judgment in *Tinory v. Autozoners, LLC*, 2016 U.S. Dist. LEXIS 8760, 2016 WL 320108 (D. Mass., Jan. 26, 2016), in which a male Massachusetts store manager for a national car part retailer and distributor claimed to have been subjected to discrimination and a hostile environment because of his perceived sexual orientation in violation of Massachusetts' anti-discrimination law and Title VII. James Tinory worked at the defendant's store in Brockton from August 8, 2011, until July 27, 2012. He supervised about 25 employees. His complaint relied on three incidents in which he claims to have been made uncomfortable because of statements and pranks by employees that apparently imputed to him a homosexual orientation. (The opinion never states whether Tinory is gay.) After leaving work on July 18, 2012, he went to his doctor and got a note excusing him from work for four days because of some medical issues. On July 23, he retained an attorney, who faxed a letter to the company's HR Manager the next day, stating that Tinory had been subjected to harassment based upon sexual orientation and could "no longer tolerate" the hostile environment created by his co-workers at Brockton. Tinory's supervisor tried to contact him by phone on July 25 when he had not returned to work, and Tinory had his lawyer again fax a letter stating he could no longer tolerate the hostile

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environment at the store. AutoZone then launched an investigation of his complaint, concluding after interviewing the co-workers that Tinory's claim was not substantiated, but nonetheless issuing "Corrective Action Review Forms" to several employees whose conduct the company felt had been inappropriate. Addressing his Title VII sex discrimination claim, Judge Woodlock had to contend with 1st Circuit precedent rejecting the argument that Title VII prohibits sexual orientation discrimination, *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999). In a subsequent case, *Centola v. Potter*, 183 F. Supp. 2d 403 (D. Mass. 2002), a fellow Massachusetts district court judge had accepted a sex stereotyping argument to find coverage of a gay plaintiff's Title VII claim. Woodlock also noted the Supreme Court's same-sex harassment case, *Oncale*, which post-dated *Higgins* and would be applicable here because the co-workers of Tinory were all male. Ultimately, however, relying on Tinory's factual allegations and the results of the company's investigation, Woodlock concluded that Tinory failed to show that he was discriminated against or harassed "because of sex," obviating the need to make a firm ruling about Title VII coverage for a sexual orientation claim. Among other things, "Tinory's own participation in, and encouragement of, a crude and insensitive environment belies the notion that he himself found it abusive or hostile. A reasonable person in his position would not have found it to be so." The Massachusetts state law expressly bars sexual orientation discrimination, removing one complication with the Title VII claim, but Woodlock concluded that Tinory's factual allegations fell short here as well. "Tinory's case under Massachusetts law fails because the conduct he describes does not rise to the level required to form a cognizable claim," he wrote. "However, even had he alleged sufficient harassment to

form such a claim, he would also have to show that AutoZone was aware of the issue and took no remedial action." When Tinory raised the problem with his supervisor after the first incident, the supervisor pointed out that Tinory was the top supervisor in the Brockton store who had disciplinary authority to address the matter with his co-workers, a reasonable response. When Tinory made the company aware of the broader problem through his lawyer's fax, the company did investigate and issued disciplinary warnings to several employees, despite finding that Tinory's allegations did not reach the legal threshold for a hostile environment claim. Finding the company's response to Tinory's allegations "reasonable and sufficient," Woodlock noted, "This is true particularly in light of the fact that Tinory no longer worked at the location, making many possible alternative remedial measures (such as counseling or transfer of location) impossible for AutoZone. Because the conduct alleged was not objectively pervasively abusive enough to affect the terms and conditions of Tinory's employment, Tinory's claim fails under M.G.L. Ch. 151B." Tinory is represented by attorney Brian T. Hatch of Attleboro. If Tinory were to appeal to the 1st Circuit, the case might provide a vehicle to bring the EEOC's Baldwin decision to the court's attention, hoping for a ruling favoring Title VII coverage for sexual orientation claims. But if the circuit were persuaded by Judge Woodlock's analysis of the facts, it might also refrain from deciding the question, so this case might not be the best vehicle for that purpose.

MICHIGAN – U.S. District Judge Nancy G. Edmunds, who refused in November to dismiss a lawsuit by a group of transgender plaintiffs challenging the constitutionality of the state's policy concerning changes of sex designation on driver licenses, issued a brief decision on January 10 rejected the state's motion

asking the court to rule on the merits of various legal theories of the complaint as to which the court had abstained. *Love v. Johnson*, 2016 WL 106612, 2016 U.S. Dist. LEXIS 2647 (E.D. Mich.). In her November ruling, Judge Edmunds found that plaintiffs had plausibly alleged that the current policy, making it difficult or impossible for applicants to get a changed sex designation on their license by requiring them to first obtain a new birth certificate showing their desired gender – a requirement impossible for some applicants born in states that refuse to issue such revised birth certificates, and imposing a substantial barrier in Michigan and other states that require complete surgical transition as a prerequisite – found a plausible allegation of a violation of the right to informational privacy under the 14th Amendment due process clause. Having so found, Judge Edmunds thought it appropriate to abstain from addressing the potential merits of the other constitutional claims asserted by plaintiffs. In this motion, the state protested that it might be required "to pursue costly and voluminous discovery as to claims that may not be facially viable" as a result of the court's failure to dismiss the other claims. Judge Edmunds pointed out that the relief plaintiffs were seeking was the same on all of their alternative claims. "It comes as little surprise, therefore," she wrote, "that Defendant was unable to substantiate any of the purported 'discovery problems' created by the Court's decision. Moreover, the bulk of Plaintiffs' remaining constitutional claims present issues of first impression in this Circuit. This further supports the Court's decision to invoke the long-standing principle of judicial restraint."

MICHIGAN – The *Saginaw News* reported on January 14 that Midland County Circuit Judge Michael J. Beale has dismissed Yvette Cormier's lawsuit against a Planet Fitness location that had

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adopted a “transgender-friendly” locker room policy. Cormier claimed that her privacy had been violated when a transgender woman use the locker room. When Cormier complained, Planet Fitness cancelled her membership. Cormier’s lawsuit alleged a violation of the state’s Elliott-Larsen Civil Rights Act (sexual harassment), breach of contract, and other claims not specified in the news article, but undoubtedly a tort claim of invasion of privacy, to judge by the newspaper’s quote from Beale’s unpublished January 4 opinion: “There was no intrusion upon the solitude or seclusion of the plaintiff by the presence of the clothed male in the common area of the restroom.” Also, because Cormier was not subjected to sexual advances, she could not allege a “quid pro quo” sexual harassment claim under the civil rights law. Cormier’s lawyer announced that she would appeal the ruling to the state court of appeals, asserting that the decision “ignores the fact that Planet Fitness’s policy allowing the presence of a man in the women’s locker room when women are in various stages of undress is offensive behavior in and of itself.” Planet Fitness’s policy allows members and guests to use the facilities that correspond with their “sincere self-reported gender identity.”

MINNESOTA – Vernon Wallace was discharged from employment by Metro Center for Independent Living and applied for unemployment benefits. “During his eleven months of employment with the center, Wallace received several warnings and corrective actions related to inappropriate language and conduct and disregarding directions from his supervisors,” wrote Judge Chutich in the opinion of the Court of Appeals of Minnesota in *Wallace v. Metro Center for Independent Living, Inc.*, 2016 Minn. App. Unpub. LEXIS 74 (Jan. 19, 2016). Wallace was initially determined ineligible for benefits because he was discharged for

misconduct. In appeal these rulings, it came out that Wallace believed there was a vendetta against him by his lesbian supervisor, who he claimed “hates men.” The Unemployment Judge asked him for concrete examples, stating that if his only argument was that she is a lesbian, then “it’s utterly irrelevant and I couldn’t care less.” “Wallace replied that he had no dispositive evidence, but that he felt generally ‘uncomfortable’ knowing that his supervisor was a lesbian and that he ‘didn’t want to be around her or the workplace because it felt like she was a bigger man than I was and she acted the part.’” The Unemployment Judge wasn’t buying this, and neither was the Court of Appeals, finding that the record provided substantial evidence to support the conclusion that Wallace was discharged for misconduct and thus ineligible for benefits.

MINNESOTA – Brittany Tovar has filed suit in U.S. District Court in St. Paul, challenging the refusal by her employer, Essentia Health, and its insurance provider, HealthPartners, to cover medical treatment and sex reassignment surgery for her seventeen-year-old child, who is transitioning from female to male. The teenager was diagnosed with gender dysphoria in November 2014, but the insurer has refused to cover her prescriptions to initiate the transitioning process by suppressing menstruation and stimulating the development of male secondary sex characteristics. Tovar paid for the first medication herself while appealing the denial, and her employer agreed to cover that expense as a “one time exception,” but refused to cover testosterone, which Tovar found unaffordable. She sought pre-authorization in December 2015 for her child’s sex reassignment surgery, which was denied by the insurer. Tovar had filed a complaint with the EEOC before going to court, obtaining a finding that she had “reasonable cause” to pursue a discrimination claim under Title VII.

The EEOC has taken the position since 2012 that gender identity discrimination violates Title VII, and it has begun filing amicus briefs in pending cases and initiating some of its own litigation on gender identity claims. *Minneapolis Star-Tribune*, Jan. 28.

MINNESOTA – U.S. District Judge Ann D. Montgomery approved a consent decree in *Equal Employment Opportunity Commission and Britney Austin v. Deluxe Financial Services, Inc.*, Case No. 0:15-cv-2646 (ADM/SER) (D. Minn. Jan. 20, 2016), concluding litigation against an employer by a transgender worker alleging unlawful discrimination and harassment. This is one of several cases around the country filed by the EEOC under Title VII on behalf of transgender complainants. Britney Austin intervened as a co-plaintiff through her counsel, Jillian Weiss, a New York transgender law specialist, adding a claim of violation under the Americans with Disabilities Act. Under the consent decree Austin will receive damages and attorneys’ fees exceeding in total \$100,000, as well as a written apology from the employer for the way she was mistreated by the company; the company also commits itself to policy changes and training, among which will be an express ban on gender identity discrimination in employee benefits, a key point of the settlement negotiation. BloombergBNA’s *Daily Labor Report* gave this settlement front page treatment in its issue of January 21 (see 13 DLR A-1), quoting Weiss: “The EEOC is doing exactly what it needs to do to move forward on this issue.” The claim under the ADA is the more controversial one in the case. The EEOC ruled several years ago that gender identity discrimination claims can be brought under Title VII, with a sound foundation in existing federal court rulings and most courts have since fallen in line with this interpretation.

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The ADA, however, was amended during its consideration by Congress to exclude “transsexualism” as a disability. At the time in 1990, the general view was that “transsexualism” was a mental condition, but subsequent research has found strong evidence of a biological basis for some people to experience a gender identity different from their observable anatomy at birth, and the argument is now being made – yet to be accepted in a precedential federal court ruling – that the ADA amendment should not block gender identity discrimination claims by workers diagnosed with gender dysphoria under the ADA. The argument goes that gender dysphoria does affect major life activities of an individual, and that discriminatory employers tend to see it as an impairment, thus fitting within the disability definition of the statute. The EEOC has enforcement authority under the ADA, and transgender rights advocates argue that the agency should cite both statutes as it goes forward to initiate lawsuits on behalf of transgender complainants. An important component of the ADA is the requirement that employers afford reasonable accommodations to workers who have disabilities.

MISSOURI – In a procedurally complex ruling, U.S. Senior District Judge Ortrie D. Smith granted summary judgment to the government in a discrimination case brought by Kenneth D. Bland against Sylvia Mathew Burwell, Secretary of the Department of Health and Human Services, challenging the termination of his employment and revocation of his security clearance, *Bland v. Burwell*, 2016 WL 110597, 2016 U.S. Dist. LEXIS 2032 (W.D. Mo., Jan. 8, 2016). Smith transferred to the U.S. Court of Appeals for the Federal Circuit Bland’s appeal of the Merit Systems Protection Board’s decision upholding his termination. Most directly on point to the concerns of *Law Notes* readers,

Judge Smith rejected Bland’s assertion that a dismissal because of his sexual orientation violated Title VII of the Civil Rights Act of 1964. Without any mention of the EEOC’s decision last summer that sexual orientation claims are actionable under Title VII, Judge Smith wrote, “Sexual orientation is not a protected class under Title VII,” citing to the 8th Circuit’s decision in *Williamson v. A.G. Edwards and Sons, Inc.*, 876 F.2d 69 (1989), with a *see also* cite to *Simonton v. Runyon*, 232 F.3d 33 (2nd Cir. 2000). Federal district courts in circuits that have court of appeals ruling rejecting Title VII claims by gay litigants have usually proved non-receptive to such claims despite the recent EEOC decision. Bland had also asserted that his discharge was tainted by race and sex discrimination, but Judge Smith observed that all his factual allegations went to his sexual orientation claim and none specifically related to race or sex discrimination as such, so his Title VII claim must fail. The court found itself without jurisdiction to rule on a challenge to the revocation of a security clearance, and found that as Bland had appealed the agency’s final ruling against him to the MSPB without presenting his Title VII discrimination claim to the Board, he had failed to exhaust administrative remedies as to that claim. Furthermore, Smith concluded, the appeal from the MSPB’s decision rejecting Bland’s allegations of violation of his rights under the Civil Service Reform Act was properly addressed to the Federal Circuit Court of Appeals, not the district court in Missouri. Bland represents himself *pro se*, generally a poor choice when attempting to cope with the complications of federal administrative and statutory rules governing federal employee claims.

MONTANA – Opponents of a non-discrimination ordinance covering sexual orientation and gender identity

that was adopted by the city of Bozeman to go into effect in July 2014 have brought their legal challenge to the ordinance to the Montana Supreme Court. A group of Bozeman citizens filed suit in the Gallatin County District Court, contending that the city lacked authority to legislate on this subject. Their case was dismissed by Gallatin County District Judge John Brown in September 2015 on standing grounds. Brown ruled, according to a report in the *Bozeman Daily Chronicle* (Jan. 27), that none of the plaintiffs were threatened with potential injury or were in a position where they could be named in any action alleging a violation of the ordinance. Presumably this group of “concerned citizens” does not include any employers, landlords or operators of places of public accommodation. Brown subsequently dismissed a motion for reconsideration. The plaintiffs determined to contest Brown’s ruling, filing an appeal in *Arnone v. City of Bozeman* and submitting their brief on appeal on January 25, arguing that the ordinance is preempted by state law and “makes a drastic and impermissible incursion into areas of state concern.” They argue that Brown erred by failing to recognize the harms suffered by citizens whose municipality passes invalid legislation. They also argued that Brown erred by dismissing outright on immunity grounds the individual government officials who were named as co-defendants in the suit.

NEVADA – In a lengthy ruling addressed to discovery issues in a gender identity discrimination suit brought under Nevada’s anti-discrimination law and Title VII, U.S. Magistrate Judge Peggy A. Leen found that the defendant’s wide-ranging discovery demand for medical records of the plaintiff going back many years was unduly broad and intrusive. *Roberts v. Clark County School District*, 2016 U.S. Dist. LEXIS 3590, 2016 WL 123320 (D. Nev., Jan. 11,

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2016). The opinion should prove useful for transgender litigants seeking to cope with wide-ranging discovery requests from employers who are charged with gender identity discrimination. Roberts, identified as female at birth and hired as a police officer by the Clark County School District (CCSD), ceased to identify as female in 2009 “when he began formally transitioning to male,” according to Judge Leen’s opinion. “By the beginning of the 2011 school year, he was identifying himself as a male transgender person,” she continued. “Since then Roberts has been subjected to harassment and humiliation in his CCSD work place that began when he asked to have his records changed.” This humiliation included a bathroom directive that force Roberts, in effect, not to use any of the restroom facilities in the schools to which he was assigned. He had obtained a legal name change prior to making this request. He alleges that the district was unprepared to deal properly with his situation. His request to them was made a few days after Nevada’s gender identity amendment to its anti-discrimination law went into effect, and the Nevada Equal Rights Commission found in an administrative ruling that his rights had been violated under that statute. Judge Leen rejected the defendant’s argument that Title VII did not apply to this case, finding persuasive the EEOC’s *Macy* ruling from 2012 and noting that the ruling was based on several federal district court decisions, and further noting a 9th Circuit precedent recognizing gender identity discrimination as actionable under Title VII. In rejecting the defendant’s argument that it needed to discover all of Roberts’ medical records pertaining to his gender identity and associated medical treatments in order to defend the case, Leen rejected the argument that “Roberts must provide proof of his genitalia, and the details of his transgender treatment and stages in the process to prove CCSD violated Title VII and/or caused him emotional

distress.” Judge Leen responded: “The court categorically rejects this position. The phrase ‘private parts’ has been in my vocabulary for more than 50 years for good and common sense reasons. It is difficult to fathom a subject more likely to cause embarrassment than requesting proof of one’s genitalia. Roberts is not claiming that his emotional distress is caused by his transgender status as CCSD seems to claim in its motion to compel. To the contrary, counsel for Roberts made it clear during oral argument that Roberts will testify how pleased he is that he went through the transgender transition process. Roberts’ claim is that CCSD employees, supervisors and in-house counsel caused him emotional distress by the manner in which they responded to his request for a change in his personnel file to reflect he is a transgender male, instruction not to use the male restrooms, demands for proof of male anatomy, and by questions asked by employees and supervisors about his genitalia.” When it comes to gender identity discrimination issues, this is a judge who really seems to “get it.” Kathleen J. England represents Bradley Roberts.

NEW YORK – The Appellate Division, 1st Department, agreed with New York County Surrogate Nora S. Anderson to deny a petition to revoke letters testamentary that had been issued to David Hunter, a former domestic partner of decedent Mauricio Leyton. *In re Estate of Leyton; Latorre v. Hunter*, 2016 WL 39655, 2016 N.Y. Slip Op. 00020 (Jan. 5, 2016). Leyton had designated Hunter to be his executor in a will made before the two men ceased to live together. Leyton never changed his will, and the men remained friendly. Some of Leyton’s surviving heirs at law protested against Hunter’s designation, urging the court to apply a provision that would disqualify Hunter on the ground that he and Leyton were divorced, but Surrogate Anderson refused to use

Obergefell retroactively to deem the Hunter-Leyton partnership a marriage that had terminated in divorce. Said the Appellate Division: “The Supreme Court’s recognition of same-sex couples’ fundamental right to marry in *Obergefell* does not compel a retroactive declaration that the ‘Commitment Ceremony’ entered into by decedent and Hunter in 2002, when same-sex marriage was not recognized under New York law, was a legally valid marriage for purposes of the ‘former spouse’ provisions of EPTL Sec. 5-1.4. Even assuming that decedent’s and Hunter’s union should be retroactively recognized as having constituted a legal marriage, in order for Section 5-1.4’s ‘former spouse’ provisions to apply, the end of the marital relationship must have been effected by a formal judicial ‘decree or judgment.’ (EPTL Sec. 5-1.4[f][2]). No such decree was ever issued here.” Indeed, the court said that retroactive application “would have inconsistent with their understanding that they had never been legally married.” The court pointed out that their separation was “informal, with no dissolution ceremony analogous to the commitment ceremony which marked their personal union.” In fact, even though New York enacted marriage equality in 2011, the two men “took no steps to obtain any judicial decree declaring an end to their union.” Brian J. Isaac of Pollack, Pollack, Isaac & DeCicco LLP represents David Hunter.

NEW YORK – In *Raji v. Societe Generale Americas Securities LLC*, 2016 WL 354033 (S.D.N.Y., Jan. 21, 2016), District Judge Analisa Torres denied plaintiff’s motion to file a second amended complaint to add Societe Generale as a defendant. In his first and amended complaints, Raji, a French national, had alleged discrimination in violation of the New York State and City Human Rights laws against SG Americas, the subsidiary of Societe Generale for which he had worked in New York, as well as one of its directors,

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a New York resident. Raji claims to have been subjected to “various forms of homophobic ridicule and derision at the hand of [Thomas] Jacquot, a New York resident who was a director of SG Americas, and witnessed similar abuse of others.” His proposed second amended complaint arose from his discharge by his subsequent employer, Altran Technologies, a consulting firm that did work for Societe Generale. Raji claims that Societe Generale pressured Altran to discharge him, which is why he wants to add the French parent company to the complaint. In denying his motion, Judge Torres pointed out that adding Societe Generale, a French corporation, would destroy the diversity of citizenship requirements under 2nd Circuit case law, which is the basis for federal jurisdiction in this case. Thus, if he wants his case to continue in federal court, his defendants must be limited to the American subsidiary for which he had worked and Mr. Jacquot.

OREGON – Although the court did not explicitly refer to it by name, the Court of Appeals of Oregon used a version of the “cat’s paw” theory to reverse a summary judgment that had been entered against a gay employment discrimination plaintiff, Richard C. La Manna, III, who claimed that he was forced to withdraw his application to be a police officer in Cornelius, Oregon, for discriminatory reasons. *La Manna v. City of Cornelius*, 2016 Ore. App. LEXIS 83, 276 Ore. App. 149 (Jan. 27, 2016). The city defended against La Manna’s sexual orientation discrimination claim by arguing that the individual who made the decision to discourage La Manna’s application did not know that La Manna was gay. “Although Waffle ultimately made the decision to require plaintiff to withdraw from the hiring process,” wrote Justice Nakamoto, “that decision was based on information from Wellhouser and Roth about plaintiff and the hiring process. Wellhouser knew of plaintiff’s sexual

orientation, and he discussed plaintiff, plaintiff’s application for the police officer position, and plaintiff’s run for sheriff with Waffle, in support of his view that plaintiff should not be hired. Even if a trier of fact cannot infer from that evidence that Wellhouser actually told Waffle that plaintiff was gay, Wellhouser’s complaint to Waffle can support an inference that Wellhouser was a ‘biased subordinate’ who ‘influenced or was involved in the decision or decisionmaking process,” citing a prior 9th Circuit ruling. “We agree with the 9th Circuit,” wrote the court, “that, to show that defendant – the City of Cornelius – discriminated against him, plaintiff must show that his protected characteristic caused the discrimination; plaintiff is not required to show that the person who made the decision had the protected characteristic in mind if that person or the decisionmaking process was influenced by a subordinate who was biased against the plaintiff because of the protected characteristic.” Under Oregon’s state anti-discrimination law, sexual orientation discrimination is prohibited.

SOUTH CAROLINA – Noting the U.S. Supreme Court’s *Obergefell* decision striking down state bans on performance or recognition of same-sex marriages, the Court of Appeals of South Carolina has remanded to the Greenville County Family Court the case of *Swicegood v. Thompson*, 2016 WL 192045 (Jan. 13, 2016), in which the Family Court had dismissed Cathy J. Swicegood’s complaint against Polly A. Thompson for an order of separate support and maintenance on May 5, 2014, on the ground that a same-sex marriage could not be recognized under South Carolina law so the Family Court did not have jurisdiction to entertain the complaint. The Court of Appeals decision does not mention where or when the women were married. It states, “Neither the family

court nor the parties to this appeal had the benefit of *Obergefell* during the hearing on Thompson’s motion to dismiss. Accordingly, we remand this case to the family court to consider the implications of *Obergefell* on its subject matter jurisdiction.” Without stating any conclusions as to this, the action of the Court of Appeals in remanding sends a clear signal that *Obergefell* may be construed retroactively to endow the family court with jurisdiction to entertain Swicegood’s complaint. Swicegood is represented by John G. Reckenbeil of Spartanburg. Margaret A. Chamberlain and Melissa Hope Moore of Greenville represent Thompson. The state’s Attorney General, Alan McCrory Wilson, and Solicitor General, Robert D. Cook, had intervened in the case, but the court’s opinion does not indicate what position they took on the jurisdictional question.

TENNESSEE – Former state senator David Fowler, who is head of the anti-gay Family Action Council of Tennessee, has filed a lawsuit in Williamson County Chancery Court against County Clerk Elaine Anderson, asserting that she is violating state law by issuing marriage licenses. Fowler is a bitter-ender who refuses to concede the validity of the Supreme Court’s decision in *Obergefell v. Hodges*, and he argues that since the Supreme Court struck down Tennessee’s definition of marriage, the county clerk lacks authority to issue marriage licenses to anybody. Fowler filed the suit on behalf of three ministers and two other “citizen” plaintiffs, seeking a declaratory judgment that “those provisions of the Tennessee law relative to the licensing of marriages are no longer valid and enforceable since the *Obergefell* decision and that the continued issuance of marriage licenses under those circumstances violates their aforesaid rights under the Tennessee Constitution.” Fowler’s long-term strategy is to keep appealing this

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case until it gets to the U.S. Supreme Court, hoping that in the interim national elections and appointments of new justices could tip the balance on the Court against same-sex marriage. A statement issued by Fowler asserts: “The lawsuit calls attention to the fact that if everyone continues to pretend that the Supreme Court can ‘pass’ a law to replace an existing law that the Court rules invalid, then we will no longer be living under the rule of law but under pretend laws made by judges who pretend to be legislators.” *Knoxville News-Sentinel*, Jan. 21.

CRIMINAL LITIGATION NOTES

ILLINOIS – In *People of Illinois v. Richard*, 2015 Il App (1st) 133184-U (Jan. 11, 2016), the Appellate Court of Illinois rejected the appeal of Charles Richard, convicted of murdering a gay man, Ricky Randolph, and stealing his car and other things from his apartment. Randolph, who was then 21, claimed that the 48-year-old Randolph had drugged him and then raped him anally while he slept, and that upon awakening he got into a fight with Randolph, during which he bludgeoned Randolph to death with a hammer in self-defense. The jury rejected this story, for which there was no corroborating testimonial or forensic evidence, and convicted Richard on all charges, resulting in a 54-year prison sentence. The court found that the forensic evidence retrieved from the scene, including a used condom and DNA evidence, could have persuaded the jury that Richard and Randolph had consensual sex. In any event, after the murder Richard had told several friends who testified against him that he had killed Randolph, but he had never mentioned to anybody prior to his testimony that Randolph had sexually assaulted him. Police identified Richard as the killer by tracking down the stolen car.

NEW YORK – The office of U.S. Attorney Robert Capers (Eastern District of New York, based in Brooklyn) has entered a formal indictment against Jeffrey Hurant and Easy Rent Systems, Inc., the founder-proprietor and corporate owner of Rentboy.com, a website established in 1997 as a vehicle for male escorts to advertise for customers. Rentboy.com was very profitable for the owners, generating millions of dollars in revenue until it was shut down in a raid staged by agents of the Department of Homeland Security last year. Hurant and other employees were arrested at that time, but the prosecutors received several extensions of time to seek their indictments while negotiating with potential defendants, presumably attempting to get the employees to testify against Hurant. *U.S. v. Easy Rent Systems, Inc.*, Cr. No. CR 16-00045 (E.D.N.Y., Jan. 27, 2016). The indictment has three counts, alleging violation of a federal statute making it a federal crime to use instrumentalities of interstate commerce in order to violate certain state criminal laws – specifically, New York criminal laws against promoting prostitution – and violation of federal money-laundering statutes, which essentially charge that the crime committed under the first count involves financial transactions across state lines. In addition to criminal penalties against Hurant, the lawsuit seeks a big payday for the federal government in terms of confiscation of more than \$1.6 million from the accounts of Rentboy.com and Hurant. Ironically, the indictment seeks to bolster its claim that Rentboy.com was “promoting prostitution” by alleging that the website took pains to keep escorts from mentioning financial transactions in their advertising, cautioning that it was illegal to advertise sex for sale and that escorts must limit their advertising, consistent with the company’s statement on the website, that fees were for the escort’s time and not for the commission of specific sex acts. In addition, although neither

Rentboy.com nor Hurant are charged with the separate federal offense of sex trafficking (transporting people in interstate commerce for the purpose of prostitution), the indictment mentions allegations that persons unaffiliated with Rentboy.com had placed advertisements on the site for the services of men who were victims of sex-trafficking, capitalizing on recent news reports about a prosecution in Florida of some gay men who enticed young Eastern European men to come to the United States, where they were then held in confinement as “sex slaves” who were “pimped out” to customers through Rentboy.com advertisements. There is no allegation that Hurant or Rentboy.com were aware of this situation, its inclusion apparently for the purpose of strengthening the prosecutors’ argument that Rentboy.com enabled criminal activity by its users. The indictment also does not charge the defendants with illegal sexual exploitation of minors, but contains allegations concerning Rentboy.com advertisements for escorts in Southeast Asia whose ages were not confirmed and who appeared very youthful in their photographs. Rentboy.com claimed to be meticulous about verifying the age of escorts who advertised on its site. Inclusion of these details in the indictment drew adverse press comment, as did the original raids, which even provoked editorial comment critical of the prosecutors in the *New York Times*.

NEW YORK – Two men who were convicted of murdering John Laubach, a 57-year-old gay man, in his Chelsea apartment, have each been sentenced by N.Y. Supreme Court Justice Bonnie Wittner to at least 25 years in prison, according to a January 21, 2016, report in *Gay City News*. Edwin Faulkner, 33, and Juan Carlos Martinez-Herrera, 30, were homeless and earned money through sex work. According to the news report, Laubach had an ongoing

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relationship with the two men, who were a couple, paying them for sex and letting them shower in his apartment and store clothing and possessions there. When Laubach confronted them about stealing from him, they turned on him, binding and gagging him and taking things from his apartment. Laubach thus constrained appears to have choked to death, although the defense had argued that his death was an accidental result of rough bondage sex. On October 21, 2015, a jury convicted the two men on charges of felony murder and second-degree manslaughter. Both men received the maximum sentence of 25-year-to-life for felony murder, and the same sentence concurrently on other charges. In the sentencing hearing in N.Y. County Supreme Court, Wittner commented that the two men were “equally culpable,” and that “This is one of the most brutal crimes I’ve ever seen.” The prosecution took the position throughout that the death was not an accident, but “more akin to intentional murder,” but the two gay defendants were supported by activists who argued that they were being singled out because they were gay and that the death was an accident.

PRISONER LITIGATION NOTES

CALIFORNIA – In 2014, United States Magistrate Judge Gary S. Austin permitted *pro se* gay inmate Nicholas Christopher Pappas to proceed past initial screening on his claim against a correction officer for allegedly spraying mace in his face while uttering homophobic taunts. *Pappas v. North Kern State Prison*, 2014 U.S. Dist. LEXIS 119952 (E. D. Calif., August 27, 2014), reported in *Law Notes* (October 2014, pages 437-8). Now, in *Pappas v. N. Kern State Prison*, 2015 U.S. Dist. LEXIS 173169 (E.D. Calif., December 30, 2015), United States Magistrate Judge Erica P. Grosjean

grants the officer summary judgment because Pappas failed adequately to exhaust his administrative remedies under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) [“PLRA”]. Pappas had filed two grievances, both of which were rejected as procedurally defective by correctional officials, and then apparently not retained. Judge Grosjean accepted affidavits about them for summary judgment, however, finding Pappas’ first grievance insufficient to exhaust under the PLRA because it mentioned only his disciplinary proceeding and not the excessive force. The second grievance, which did refer to excessive force, was filed after the federal civil rights action was commenced, failing to meet the PLRA’s requirement of exhaustion prior to commencing suit, citing *Jones v. Bock*, 549 U.S. 199, 211 (2007), and *Woodford v. Ngo*, 548 U.S. 81, 90 (2006). It was immaterial that Pappas tried to assert excessive force in an administrative appeal of the second grievance, because it was done after federal filing, even if it were treated as retroactively timely under California’s thirty-day limitation on filing grievances. *William J. Rold*

ILLINOIS – United States District Judge Nancy J. Rosenstengel dismissed with prejudice *pro se* inmate Antoine Moore’s claim for violation of medical privacy under the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996) [“HIPAA”]. Although Moore claimed health staff revealed his HIV status in violation of HIPAA, causing teasing from other inmate and loss of his food services job, Judge Rosenstengel found no private cause of action under the statute, in *Moore v. Health Care Unit 6 Dietary Dept.*, 2016 WL 51408 (S.D. Ill., January 5, 2016), citing *Carpenter v. Phillips*, 419 F. App’x 658, 659 (7th Cir. 2011); and *Acara v. Banks*, 470 F.3d 569, 570-72 (5th Cir. 2006) –

“leaving [HIPAA] enforcement to the Department of Health and Human Services alone.” There is no discussion of constitutional privacy claims, although Moore filed under 42 U.S.C. § 1983. Judge Rosenstengel advised Moore that the dismissal “shall count as one of his three allotted ‘strikes’ under the provisions of 28 U.S.C. § 1915(g)” – the Prison Litigation Reform Act, which bars most subsequent prisoner filings after three strikes. *William J. Rold*

VERMONT – Chief United States District Judge Christina Reiss granted summary judgment against *pro se* inmate Shane Edward Casey on his claims of violation of his First Amendment rights and retaliation for exercising them in *Casey v. Pallito*, 2016 WL 96157 (D. Vt., January 7, 2016). Although the lengthy opinion addresses many issues, this report focuses on Casey’s alleged “suspect inappropriate relationship” with another inmate (Morales), who was “seriously functionally impaired.” Corrections officials determined that Casey was using the privileges of his prison job to “groom” Morales and to engage in “predatory” behavior that could lead to “sexually abusing” Morales. It was undisputed that the two men had a “relationship,” but both claimed it was non-sexual and faith- or “counseling”-based. Defendants first removed Casey from his job. When the men continued to have contact, they put Casey under “close supervision” and finally transferred him. Chief Judge Reiss analyzed this part of the case as presenting a First Amendment Free Exercise and Expression claim. She found that, even if Casey had a *prima facie* First Amendment claim, defendants met their burden (when it shifted to them) because the action they took against Casey was either not retaliatory or was based on a compelling interest, writing: “In deciding whether and how to limit contact between Plaintiff and Mr. Morales, Defendants

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were not required to choose the least restrictive means,” citing *Thornburgh v. Abbott*, 490 U.S. 401, 411 (1989) (holding that prison officials’ conduct, alleged to have violated the plaintiffs’ First Amendment rights, is not subject “to a strict ‘least restrictive means’ test”); and *Duamutef v. Hollins*, 297 F.3d 108, 112 (2d Cir. 2002) (holding that “prison restrictions that implicate prisoners’ constitutional rights may be upheld if they are reasonably related to legitimate penological interests”). “Defendants had legitimate, non-retaliatory reasons to terminate Plaintiff’s employment and transfer him,” under their “broad discretionary authority over the institutions they manage,” citing *Lowrance v. Achtyl*, 20 F.3d 529, 535 (2d Cir. 1994). Judge Reiss does not discuss residual associational rights of prisoners under the First Amendment – see *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003) – or whether the Religious Land Use and Institutionalized Persons Act (which Casey pleaded) requires a more exacting scrutiny. Defendants’ actions were “reasonably tailored” in light of Morales’ vulnerability and the need to protect him from “exploitation.” *William J. Rold*

LEGISLATIVE & ADMINISTRATIVE

U.S. CONGRESS – The Equality Act, introduced during the summer by Democrats in both houses to amend existing federal civil rights laws to add “sexual orientation” and “gender identity or expression” to the list of prohibited grounds for discrimination, has finally picked up its first Republican co-sponsors: Senator Mark Kirk (Illinois) in the Senate, and Representative Bob Dold (Illinois 10th District) in the house. Perhaps it is not so surprising that the first Republican co-sponsors would come from Illinois, a state that has banned such discrimination for many years and that moved affirmatively to enact

marriage equality before being ordered to do so by a court. Dold cited Illinois’s long history of “fighting for equal rights” and stated: “Congress must act to ensure that all Americans, including the LGBT community, are protected equally from discrimination under federal law, just as they already are in my home-state of Illinois.” Of course, as a Republican Dold felt compelled to add that although he was signing on to bill, he hoped it could be modified “to accommodate religious liberty.” Of course, to the extent that all federal civil rights laws include religious exemptions, there is no need for such modification unless Congress believes that religious objections to homosexuality or transgender identity deserves greater accommodation than religious objections focused at other aspects of federal civil rights laws.

U.S. DEPARTMENT OF DEFENSE

– The DoD has published new rules governing the military service academies that remove all language addressing homosexuality, homosexual acts, homosexual statements and homosexual marriage that had been incorporated in the rules in order to enforce the Don’t Ask, Don’t Tell policy that was enacted by Congress in 1993. With the repeal of that statute and the subsequent implementation by DoD of an end to its ban on military service by gay people, there is no longer any need for the rules governing the service academies to mention homosexuality. This is effective December 31, 2015. See 2015 WLNR 38766547.

U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES MEDICARE APPEALS COUNCIL

– The Medicare Appeals Council has upheld a transgender beneficiary’s claim that the insurance company providing coverage through the Medicare program must provide coverage for sex reassignment surgery. Charlene Lauderdale, a U.S. Air

Force Veteran, sought coverage for the surgery from United Healthcare/AARP Medicare Complete insurance plan and was turned down. An administrative law judge ruled in her favor last April and the insurer appealed. Lauderdale’s attorney, Ezra Young of New York, received the council’s decision on January 28. It was only in May 2014 that the Medicare program abandoned its longstanding exclusion of all sex reassignment surgery from coverage. Since then, coverage decisions have been made on a case by case basis. The insurer in this case sought to justify its decision by reference to Lauderdale’s mental health record, which includes four hospitalizations for psychiatric problems in 2014, but the council pointed out that untreated gender dysphoria can cause psychological distress. Thus, it was plausible to conclude that performance of sex reassignment surgery was an appropriate treatment for Lauderdale’s gender dysphoria. The ruling in Lauderdale’s case appears to be the first in which the Appeals Council has ruled that an insurer must cover the treatment in an appropriate case. The council ruling cites the standards of care of the World Professional Association of Transgender Health, the first version of which was published in 1979. If United Healthcare wants to challenge the decision further, it can file suit in federal court. A proposed regulation expressing prohibiting gender identity discrimination by private insurers is pending before the Department of Health and Human Services. *Reuters, BuzzFeed.com*, Jan. 29.

U.S. DEPARTMENT OF EDUCATION

– Responding to a letter from Senator Ron Wyden (D-Oregon) concerning the departments granting of exemptions from compliance with Title IX to educational institutions with religious concerns about homosexuality and gender identity issues, Assistant Secretary Catherine E. Lhamon announced in a letter released

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on January 20 that the department's Office of Civil Rights will make public on its website the list of educational institutions that have received such exemptions, which are routinely granted under statutory language in Title IX that includes an exemption for any educational institution that is controlled by a religious organization to the extent that application of Title IX would not be consistent with the religious tenets of the controlling organization. So blame Congress for the exemptions, but thank the department for agreeing that the exemptions should be made very public so the potential students and employees have easy access to information about whether a particular educational institution has affirmatively sought the right to discrimination against gay and transgender students and employees. Lhamon's letter indicated that the listing would be interactive and would make it easy for interested individuals to determine the identity of the schools in question. Due to the recent marriage equality decision, which had sparked a spate of new exemption requests, the department is struggling to keep up with the changing situation, but Lhamon indicated that the website would go live "sometime in the coming months."

ALASKA – Senator Peter Micciche (R-Soldotna) and Rep. Dave Talerico (R-Healy) have introduced identical bills in the two chambers of the Alaska legislature, SB 120 and HB 236, which would allow individuals and businesses to refuse "services, accommodations, facilities, goods, or privileges for a purpose related to the solemnization, formation, or celebration of a marriage." In other words, individuals and businesses that provide goods or services in connection with marriages would be excluded from the status of public accommodations with respect to such activities and would be free to discriminate on any basis that they desire, as the bill does not limit its

terms to religious objections. This bill undoubtedly responds to the flood of discrimination complaints clogging the dockets of state and local human rights agencies in Alaska because of the litigation happy gay couples who are busily seeking out florists, bakers, wedding singers (!), and catering halls to sue, creating a crisis that requires emergency measures. (OK, dear readers, calm down...) We are concerned, however, that it will be used to justify discrimination by hotels and similar establishments in determining who can rent a bridal suite. *alaskacommons.com*, Jan. 8.

ARKANSAS – The Texarkana Board of Directors is reported to have passed by unanimous vote an anti-discrimination ordinance that bans sexual orientation or gender identity discrimination in public employment and services. It also requires non-discrimination provisions in city contracts. By limiting the measure to the city's employment and service policies, the local legislators sought to avoid the prohibition enacted by the state on local governments extending discrimination protection beyond the categories covered by state law. The argument is that a municipality can voluntarily prohibit itself from discriminating without trenching on the state law. That will undoubtedly be tested in the courts eventually. *Arkansas Times*, Jan. 20.

CALIFORNIA – HRC announced in a January 23 news release that "Privacy for All," a group attempting to get a measure on the California ballot that would have prohibited transgender people from using restroom facilities in public buildings inconsistent with their genital sex identified at birth, has conceded that they fell short in gathering sufficient signatures from registered voters by the deadline necessary to get their measure on the ballot within the deadline established by law.

FLORIDA – Pine View school in Sarasota County has modified its policies to allow middle school and high school transgender students to use restroom facilities consistent with their gender identity. The school board's action came in reaction to protests after a 17-year-old transgender man was denied use of the men's restroom in January. *Sarasota Herald*, Jan. 21.

FLORIDA – On January 19 the Lake Worth City Commissioners unanimously voted to update city procurement policy to require contractors to ensure equal opportunity based on sexual orientation and gender identity. The measure also amended the city's merit services policy to prohibit discrimination on these grounds in municipal employment, and updated the local fair housing law to add those categories as well. (The city's Civil Rights Act, which covers employment generally, has included sexual orientation and gender identity since 2007.) The Palm Beach County Human Rights Council, headed by retired judge Rand Hoch, had recommended the measures, and described them in a press release circulated on-line.

FLORIDA – A state senate committee took a party line vote, 7-3, to approve a Pastor Protection Bill, intended to protect religious marriage officiants from the mythological danger of being sued for refusing to perform weddings that offend their religious beliefs. This presumably responds to a sudden outbreak of outraged Catholic couples suing Jewish rabbis for refusing them the privilege of the chuppah and the delight of smashing wine-glasses under foot if they are not willing to undergo ritual circumcisions for the men and conversions including naked immersion in the presence of.... Just a minute, we're getting carried away here. No same-sex couple, Jewish, Catholic or otherwise, is seriously contemplating suing a

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Catholic priest for refusing to perform their wedding, and any who might do so would be laughed out of court without any need for a “Pastor Protection” law. This is political posturing carried to disgusting lengths. *Orlando Sentinel*, Jan. 27.

GEORGIA – House Bill 756 has been introduced by Rep. Kevin Tanner (R-Dawsonville), under which businesses could refuse services to gay couples marrying in Georgia. Tanner has also introduced H.B. 757, the Pastor Protection Act, a totally unnecessary bill that would shield religious marriage officiants such as priests, ministers and rabbis, from having to perform weddings that are inconsistent with the tenets of their faith. This is unnecessary because under settled interpretation of the 1st Amendment to the U.S. Constitution and analogous state constitutional provisions no government official (including a judge) can compel a religious functionary to perform an action contrary to his or her religious beliefs. But that doesn’t stop anti-marriage-equality hysterics from introducing and pushing such bills in many states, mouthing the spurious justification that they are necessary to shield religious officiants from potential liability for refusing to perform such ceremonies. (We would question the sanity of any Civil Rights Agency or judge who would rule in favor of the plaintiffs in such a case.) Also pending is Senate Bill 129, a RFRA that was amended by moderate Republicans and Democrats to add anti-discrimination language that has made the bill non-viable in the conservative state legislature. *ajc.com*, Jan. 13.

HAWAII – A bill has been introduced in the legislature to ban conversion therapy (“sexual orientation change efforts”) performed by health care providers to minors. The bill proclaims that

homosexual orientation is not a disorder and the ban is needed to protect LGBT youth from serious harm caused by such “therapy.” The position articulated by Republican opponents of the bill is that it is an improper abridgement of the rights of parents to torture their children – although of course they phrased it more politely. *University Wire*, Jan. 26.

IDAHO – Hope springs eternal. Two Idaho state senators, Grant Burgoyne and Cherie Buckner-Webb, both Democrats who represent districts in the city of Boise, filed a new bill in the Senate on January 19 to add sexual orientation and gender identity to the state’s anti-discrimination law. Modifying the bill that was introduced in the last session, the new bill adds explicit definitions of the two terms. Prior to the start of this year’s session, Senate President Pro-Tem Brent Hill (R-Rexburg) announced that he was working on a “compromise measure” that could address both discrimination and religious liberties concerns. One suspects that this would be something like the Utah-compromise enacted last year, under which limited protection is given and broad exemptions from coverage for religious objectors is afforded. These features are not part of the Burgoyne-Buckner-Webb bill. *Eye on Boise Blog*, Jan. 19.

INDIANA – In his state-of-the-state address on January 12, Governor Mike Pence stated that he would not sign into law any bill that would diminish the religious liberties of Indiana residents, thus signaling opposition to any LGBT rights amendment to the state’s civil rights law adding protection for sexual minorities unless there was a very broad type of religious exemption, and not just limited to religious institutions. Pence did not reference specifically any of the half dozen pending bills, which ranged from a simple amendment adding “sexual orientation” and

“gender identity” to the state’s anti-discrimination law to a bill restoring the most objectionable parts of the state’s Religious Freedom Restoration Act that had been modified last year in response to furious opposition to say that the RFRA could not be raised as a defense to a discrimination charge. In between were various bills that would add protection for gay people (and, in some instances, transgender people) while at the same time broadening existing religious exemptions in the law. Human Rights Campaign and Lambda Legal issued press releases late in the month dissecting the pending bills and finding problems with almost all of them. As the Senate Judiciary Committee was considering various bills during the last week of January, the tourism group “Visit Indy” released a document on January 26 purporting to show that the state may have lost as much as \$60 million in business and tax revenue through the loss of about a dozen national conventions as a result of the uproar over last year’s RFRA enactment. Perhaps the resultant media buzz helped to block the worst of the bills, a measure that would re-enact the original RFRA on steroids, in committee on January 27. However, SB 344 was approved by a 7-5 vote and sent to the full Senate for consideration, most likely during the first week of February. An analysis circulated by Lambda Legal points out the flaws of this measure, which would add “sexual orientation” to prohibited grounds of discrimination but not “gender identity,” would widen the grounds for religiously-based refusals to provide goods and services to gay people, would intrude upon broader protections provided by local laws, would allow publicly funded social service agencies to deny services to same-sex couples, would provide a conscience defense for all wedding services or benefits and permit businesses to deny service to same-sex couples celebrating a wedding or anniversary. Furthermore, the bill includes a poison pill provision,

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a non-severability clause under which any judicial decision striking down a part of the law would invalidate the entire measure. Since conservative religious groups continued to oppose any protection against discrimination for gay people and civil rights activists and a growing progressive business lobby in the state condemned the bill as inadequately protective of civil rights, it is possible that pressures from both ends of the political spectrum will prevent it from advancing through the Senate and into the House, but nobody could make a confident prediction at the end of January about what would happen. * * * The Corrections and Criminal Law Committee of the Senate voted 9-0 to approve a proposal to establish the state's first hate crime law, which would include sexual orientation and gender identity together with race, religion, sex and disability. The measure, S.B. 220, would authorize sentence enhancements for bias-motivated crimes, where the offenders target victims because of one of the characteristics listed in the statute. Committee consideration of the measure quickly devolved into an argument about the inclusion of gays and lesbians. The Committee's Republican chair asked whether including gender identity was redundant and such protection was afforded by mentioning sex, but a Democrat member quickly countered that proposal, and "taking out transgender" would be a mistake in terms of accomplishing the bill's purpose. The bill will next be considered on the Senate floor. *Louisville Courier-Journal*, Jan. 27.

MISSOURI – Governor Jay Nixon's final State of the State address included a request that the legislature pass a bill adding sexual orientation and gender identity to the state's anti-discrimination law, but Republican legislative leaders said that would not happen before Nixon left office at the end of the year. Furthermore, even though Nixon would

most likely veto such a measure, the Republican leadership is interested in advancing bills that would strengthen Missouri's version of the Religious Freedom Restoration Act to allow individuals and businesses to act in accordance with their religious beliefs, even if that means discriminating against LGBT people, according to a January 23 *Associated Press* report.

MONTANA – Montana Governor Steve Bullock, a Democrat, signed an executive order on January 18 to prohibit discrimination because of sexual orientation and gender identity for state employees, state contractors and their subcontractors. The measure, E.O. No. 04-2016, "supersedes and rescinds Executive Order No. 21-2008 issued by Governor Brian Schweitzer on November 14, 2008."

NEBRASKA – The Omaha Public School Board voted on January 20 to adopt updated health and sex education standards that will establish a curriculum that addresses sexual orientation and gender identity for the first time in the 30 years that the district has had a curriculum addressing sex education. *Omaha World-Herald*, Jan. 21. * * * But, contrarily, the Nebraska School Activities Association district representing the Omaha region voted on January 13 to approve a proposal governing student participation in sports, under which student participation will be based on gender identified at birth. That proposal was rejected by the district in the Lincoln area, but so was one based on birth certificates, which can be changed under state law to reflect completed transitions. Several other districts have approved the "at birth" rule, which is being strongly advocated by the Nebraska Catholic Bishops seeking to enforce the aggressive anti-transgender views articulated by the Founder of their religion in his famous "Sermon on the

Mount" – NOT! The WWJD crowd has a problem here, although one supposes they rest their case on the Old Testament ban against cross-dressing. (Of course, a person dressing in a way consistent with social expectations of their gender identity is not cross-dressing, so there!) *Star-Herald*, Scottsbluff, Nebraska, Jan. 13. * * * The Nebraska Family Alliance and the Nebraska Catholic Conference announced opposition to bills that would update state laws to reflect last year's marriage equality decision by the Supreme Court. They opposed a proposed constitutional amendment that would remove the state's anti-gay marriage amendment from the Nebraska Constitution and voiced concerns about a legislative proposal to replace the words "mother" and "father" with "spouse" in state statutes. They are apparently hopeful that if the Supreme Court of the U.S. should change its mind in the future, Nebraska would be in a position to immediately re-impose the anti-marriage-equality regime without the need to pass a new constitutional amendment or amend existing laws. *journalstar.com*, Jan. 27.

MICHIGAN – A movement to put a constitutional amendment on the ballot to ban sexual orientation and gender identity discrimination has collapsed because its proponents were unable to raise enough money to put together a credible campaign. The attempt to enact such a proposal had been opposed by most of the organized LGBT movement, on the ground that the public should not be voting on civil rights protections, and money should not be expended on this effort, but rather focused on legislative reform.

NEW JERSEY – Governor Chris Christie vetoed legislation that would have required diversity training for law enforcement officers throughout the state. The bill, A-4343, would have

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required each county and municipal law enforcement department to undertake cultural diversity training that would cover, among other things, interaction with the lesbian, gay, bisexual and transgender community. All officers would be required to participate as part of in-service training. The governor exercised his power to let the bill die without signing it – the so-called pocket veto – so no statement of justification for his actions was made. One hesitates to suggest.... Could it be.... That the governor's campaign for the Republican nomination for the presidency had anything to do with this??

NEW YORK – On January 20 Governor Andrew Cuomo announced that regulations proposed last year by the Division of Human Rights to interpret the state's Human Rights Act to ban discrimination because of gender identity or expression had been published in final form and would go into effect immediately. The regulation is published at 9 New York Code of Rules and Regulations (NYCRR) Sec. 466.13. Of course there is now plenty of case law at the federal level to support the argument that existing statutory bans on sex discrimination encompass claims of gender identity discrimination as well. These regulations signify the governor's frustration with the failure of the State Senate to bring the Gender Identity Non-Discrimination Act (GENDA) to a vote. The measure, which would have amended the statute to add gender identity or expression to the list of prohibited grounds for discrimination, has been approved multiple times by the Democrat-controlled Assembly, but the Republican majority in the Senate (sometimes ruling in collaboration with a handful of renegade Democrats) has refused to allow committee hearings or bring the measure to the floor. Whether these regulations will be effective will ultimately depend on the state courts. Story to be continued...

NEW YORK – The Cheektowaga Central School Board in western New York approved on January 12 a student gender identity policy and training for student mental health. The policy covers pronoun usage, name changes, and use of restrooms and locker rooms consistent with a student's gender identity. Student participation in physical education classes will be consistent with student gender identity at their request. In any sex-segregated activities, such as overnight field trip housing, students may participate in accordance with the gender identity they consistently assert at school, and the schools will not enforce a gender-specific dress code. *Buffalo News*, Jan. 14. One aspect of the policy that seems slightly out of step with the rest is that the district will not alter student names in official records unless the student obtains an official name change, presumably from a court.

NEW YORK – New York City has amended its local human rights ordinance to extend protection against discrimination to caregivers. Mayor Bill De Blasio signed the measure into law on January 5. It was passed unanimously by the City Council on December 16. It provides that an employee or a job candidate who is caring for a minor child or an individual with a disability cannot be terminated, demoted or denied a promotion because of the status or the perceived status as a caregiver. *BNABloomberg Daily Labor Report*, Jan. 5.

OKLAHOMA – The Oklahoma City Council voted 5-4 to approve an ordinance that will forbid sexual orientation and gender identity discrimination in housing. Two members of the council expressed interest in creating a Human Rights Commission. There used to be an agency by that name, but the Council voted to abolish it in January 1996, presumably because

such Commissions have the annoying habit of enforcing anti-discrimination laws, sometimes against entities with political power. So best to leave victims of discrimination on their own to seek redress in local courts without representation. *kfor.com*, Jan. 5.

OREGON – The Oregon Commission on Judicial Fitness and Disability released a decision to the state's courts on January 25 calling for the removal from the bench of Judge Vance D. Day of Marion County Circuit Court. *Inquiry Concerning a Judge: Honorable Vance D. Day*, Case No. 12-139 and 14-86. Among the varied and sundry charges against Judge Day, many of which were found to be substantiated by the Commission, were those related to his conduct in reaction to a decision by U.S. District Judge Michael McShane that the state's ban on same-sex marriage was unconstitutional and the subsequent decision by the state not to appeal. In November 2014, "Judge Day implemented a system directing his staff to discriminate against any same-sex couple that may seek out Judge Day to perform their marriage," wrote the Commission. "He directed his staff to research inquiring couples and, if their research revealed a same-sex couple, he instructed his staff to lie to the couple about his availability and direct the couple to another judge." In his defense, Judge Day argued that this procedure was intended to "accommodate" same-sex couples by directing them to a judge who was willing to conduct their wedding ceremony. This, said the Commission, violated his oath of office. "In keeping with the oath of office, Rule 3.3(B) prohibits a judge from manifesting prejudice against anyone based upon sexual orientation in the performance of their judicial duties. The discriminatory practice implemented by Judge Day violates Rule 3.3(B). Furthermore, the idea that a discriminatory practice is a positive 'accommodate' to those

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being discriminated against shows a deplorable lack of understanding of the most basic concepts of impartiality,” said the Commission, which also noted other rules that were violated. The Commission concluded that this constituted “willful misconduct in his judicial office.” It was the 12th count against the judge in this decision, out of thirteen that were made, of which eight were found to be substantiated. The Commission concluded that Judge Day’s conduct showed a lack of understanding of the boundaries of appropriate conduct by a judge and substantial and repeated dishonesty, and expressed lack of confidence that he would “make the required effort to change or modify his behavior;” so recommended he be removed from the bench. Press reports in Oregon emphasized the refusal to perform same-sex weddings as a key factor in the decision, but the Commission’s decision emphasizes the cumulative nature of a variety of violations of the rules of judicial conduct. Press reports consulted in preparing this summary include *Associated Press*, *Reuters*, and the *Portland Oregonian*, which made the full text of the Commission decision available on its website.

SOUTH DAKOTA – On January 25 the House State Affairs Committee of the South Dakota legislature voted 10-3 to advance HB 1008 to the House floor, where it was approved by a vote of 58-10 on January 27. The measure is intended to prevent transgender public school students from using restroom and locker-room facilities consistent with their gender identity, and to require the state to defend school districts that might be sued by transgender students or staff who are denied access to facilities under this policy, with the state bearing the expenses of litigation and any damage awards. The bill as presented to the committee would have provided that transgender students should be

accommodated by being given access to single-occupancy restrooms, locker rooms, and shower facilities, and would have had the state assume all burdens and costs of defending school districts sued for implementing this policy. But in the committee hearing the language on accommodations and assumption of costs was removed by amendment before the measure was approved. Of course, since this bill directly clashes with the position of the U.S. Department of Education, which has issued guidance instructing that transgender students must be allowed access to facilities consistent with their gender identity by educational institutions that receive federal money, under Title IX’s ban on sex discrimination by such institutions, the ground will be set for a litigation clash if this measure is enacted and any transgender students are actually denied access to appropriate facilities.

TENNESSEE – A bizarre bill called the Tennessee Natural Marriage Defense Act (HB 1412), which would have called the *Obergefell* decision by the Supreme Court “null and void” in Tennessee, died a natural death in the House Civil Justice Subcommittee on an unrecorded voice vote taken on January 20. The sponsor of the bill, Rep. Mark Pody (R-Lebanon), pronounced the measure dead. Former State Senator David Fowler, who testified during the session, asserted that a lawsuit might be a more effective way to achieve the same result, and subsequently filed one. (See above in Civil Litigation Notes.) *Commercial Appeal*, Jan. 20.

UTAH – Following up on last year’s “Utah-Compromise” that resulted in enactment of a limited-effect anti-discrimination measure for LGBT people, a Republican legislator, Sen. Steve Urquhart, has proposed a penalty enhancement bill for crimes committed against people or property due to the

victim’s sexual orientation, gender identity, race, disability, gender or other traits protected in the state’s anti-discrimination law. Utah has a hate crime law, but it does not include sexual orientation or gender identity. Urquhart was also one of the sponsors of the “Utah-compromise” bill last year. The measure would focus on motive rather than identity. Prosecutors would have to prove that the offender committed a crime because they believed the victim was gay or transgender; the actual sexuality of the victim would be irrelevant, so it would not be necessary for victims to “out” themselves in testimony in order for prosecutors to seek the sentence enhancement. *University Wire*, Jan. 28.

VIRGINIA – Carrying out the mandate of the Republican Party in Virginia to make life as complicated and difficult as possible for transgender individuals, State Delegate Dave LaRock (R-Loudoun County) introduced House Bill 431, which would ban any changes on birth certificates except those necessary to correct a typographical error. So, for example, if a clerk recording a new birth mistakenly indicates that the child is male rather than female or vice versa, this scrivener’s error can be changed. But, says LaRock’s bill, no changes can be made on account of gender transition. *Washington Blade*, Jan. 9. Advocates for transgender rights are seeking the opposite of course: to change the current law, which is silent on the matter, so as to authorize changes on birth certificates to account for gender transition.

VIRGINIA – On January 25 the Senate Committee on General Laws and Technology voted to report bills that would ban sexual orientation or gender identity discrimination in public employment and in housing. *Press Release from Virginia Senate Democratic Caucus*, Jan. 25.

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WASHINGTON – The state’s Human Rights Commission published a rule providing that bathroom, shower and locker room use in public accommodations be based on “gender identity,” not on anatomical sex. All hell then broke loose in the legislature and the media, and in January legislative proposals were introduced to overrule the Commission’s rules. On January 27, the Senate Commerce and Labor Committee voted 4-3 to override the Commission’s rule. A more limited measure is pending in the House. It would allow operators of facilities with restrooms and locker rooms to limit transgender peoples’ access when they are “preoperative, nonoperative” or doesn’t have the appropriate genitals to go with the sex-segregated facility. How this would be enforced, short of requiring strip searches at the entrance to restroom facilities and the alike, is not explained.

WISCONSIN – The city council in Stevens Point has approved a policy banning sexual orientation and gender identity discrimination by the city government in its employment policies. The action was reportedly achieved in a unanimous affirmance of a proposal from a council committee. *Stevens Point Journal*, Jan. 21, 2016.

LAW & SOCIETY NOTES

A trip to the United States by former Australia Prime Minister Tony Abbott, a staunch opponent of marriage equality, to address an event arranged by Alliance Defending Freedom, has caused Australian media to shine a light on that anti-gay organization. The *Sydney Morning Herald* reported Jan. 27 that the organization, which jumps in at the drop of a hat to challenge marriage equality and gay affirmative legislation and to defend discriminatory businesses

and employers, was founded in 1994 by 30 religious leaders, according to the article, and has stated in its literature that it is seeking to “recover the robust Christendom theology of the 3rd, 4th, and 5th centuries.” Back to the past for them! The organization claims an annual budget of \$30 million with 44 in-house staff and a network of 2,200 allied lawyers who are poised to take on cases selected by the organizations. The Southern Poverty Law Center, which monitors the activities of hate groups and considers ADF to be one, has stated: “Their work is fanning the flames of anti-gay hatred that already exists in many of the countries where they are injecting themselves. In Uganda, American groups have been propagandizing about the ‘recruitment’ of young schoolchildren, the allegedly depraved and diseased lives of LGBT people, the pedophilia that is supposedly common among gay men, and the destruction of Christianity and the institution of marriage that they seem certain ending anti-LGBT laws will lead to.”

The Anglican Church is sanctioning the Episcopal Church in the United States for supporting marriage equality and authorizing its ministers to perform same-sex marriages. The heads of the 38 Anglican provinces decreed that the U.S. church be barred for three years from taking part in decision-making on doctrine or governance, their representatives being reduced, in effect, to observer status at international events. The Presiding Bishop of the U.S. church, Michael Curry, stated that the church would not back down from its position affirming the rights of its LGBT members.

The International Soccer Federation fined Argentina, Chile, Mexico, Peru and Uruguay on January 13 for anti-gay chants perpetrated by their

national teams’ fans at the 2018 World Cup competition. FIFA has imposed fines in connection with other kinds of fan misbehavior in the past, so this is not unprecedented. *Associated Press*, Jan. 13.

The American Bar Association, which performs an accreditation function for the nation’s law schools, is investigating discrimination claims against Brigham Young University School of Law, on charges that the school improperly discriminates against students who decide to drop their affiliation with the Mormon Church or to be open about being gay, lesbian, bisexual or transgender. A petition with almost 3,000 signatures was directed to the ABA asserting that BYU Law School violates the ABA’s non-discrimination standards.

The International Olympic Committee has approved a change in its guidelines concerning participation in Olympic competition by transgender athletes. Under the new rules, athletes can compete based on their gender identity, without any requirement to undergo sex reassignment surgery. The IOC guidelines are merely recommended for international sports federations, but will be governing rules for the actual Olympic Games in Rio de Janeiro this year. Under previous rules approved in 2003, sex reassignment surgery followed by at least two years of hormone therapy were prerequisites for transitioning athletes to perform in competition consistent with their gender identity.

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AUSTRALIA – Sometimes government officials are so embarrassed when they are caught out acting badly that they actually take constructive action to

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reduce the embarrassment. In this case, a gay male couple married last year in Britain were on their honeymoon in Adelaide, Australia, when one died in an accident. Local officials refused to record the deceased as married on his death certificate, since Australia does not recognize same-sex marriages. The resultant media hubbub and criticism of the South Australian government for gross insensitivity to the wishes of a grieving widower led the state's Prime Minister, Jay Weatherill, to extend apologies to Marco Bulmer-Rizzi, condolences on the death of his husband, David Bulmer-Rizzi, and a personal guarantee that the state would reissue the death certificate with the correct marital status. Weatherill also pledged to seek legislation in South Australia to recognize overseas same-sex marriages. (By federal constitutional ruling, the states do not have authority in Australia to adopt marriage equality legislation, since the Supreme Court has ruled that this issue can be legislated only at the federal level.) Weatherill told the press: "I was obviously very ashamed that he'd had this experience in South Australia, my home state." Polling shows a majority of the Australian public supports allowing same-sex couples to marry, and a recent nose-count concluded that there may even be a federal parliamentary majority for marriage equality if the party leaders allow their members a free vote on the issue without party discipline, but the government is committed to putting off the question until after the next parliamentary election, and then to address it through a non-binding plebiscite to give the politicians the "cover" of public approval before they have to take a final vote on the merits to amend the marriage law. Talk about profiles in courage – NOT!

BOTSWANA – The High Court ruled in November 2014 that the government violated the constitution by refusing

registration as a sanctioned organization to LEGABIBO (Lesbians, Gays and Bisexuals of Botswana), an advocacy organization. The government was not quick to comply, dragging its feet and then finally during January 2016 lodging an appeal with the Court of Appeal, in which it argues that requiring the government to register the organization would violate public policy and the constitution, in light of Botswana's criminal law against gay sex. The organization's attorney responded that its objectives involved lobbying for decriminalization of consensual adult sex and achievement of equal civil rights for sexual minorities, neither of which is a criminal activity. It seems obvious that the government will go to the greatest lengths possible to avoid registering the group. *Xinhua Nes Bulletin*, Jan. 15.

CANADA – New guidelines for the public schools in Alberta advise school boards to revise regulations and establish new policies to protect sexual orientation, gender identity and gender expression, including allowing restroom and locker room facility access to students based on their gender identity. The guidelines emanate from the Education Ministry of the province. *Postmedia News*, Jan. 13. * * * The Manitoba government has announced that it will allow change of sex designation on marriage registrations. The government noted that it had last year eliminated the requirement to show proof of surgery for changes on birth certificates. The government asserted that these changes were in line with the Manitoba Human Rights Code. *Plus Media Premium Official News*, Jan. 12.

CHILE – The national government is calling on doctors to refrain from performing surgery to "normalize" the sex of intersex children, reported the *Washington Blade* on January 11.

A document released by the Chilean Ministry of Health expressed opposition to "unnecessary 'normalization' treatments of intersex children" that include "irreversible genital surgeries until they are of a sufficient age to make decisions about their bodies."

CHINA – Achieving a breakthrough that caught international press attention, two Chinese gay men are suing the government for denying them the right to marry, and a local district court has, for the first time, accepted their case for a ruling on the merits. (District courts evidently have a screening function and will turn down a case that does not appear to them to assert a plausible claim.) The *New York Times*, reporting on this development on January 27, reported that Sun Wenlin and Hu Minglian attempted to register at a local civil affair bureau in Changsha, in southern China, but were turned away. They then filed suit against the civil affairs bureau. Proceedings were expected to start on January 28. The *Times* article provided extensive background about the two men and their relationships with their families, an unusual degree of openness for Chinese people suing their government.

CZECH REPUBLIC – The Prague Sanitary Office has filed a criminal complaint against 30 men who are charged with having unprotected sex even though they know they are HIV-positive. They face up to ten years in prison. The police are being close-lipped about details of the case, refusing to go beyond confirming reports that such a case is under way. They did mention one person, Zdenek Pfeifer, who is claimed to have infected 17 people by eschewing condoms when having sex. This case came to light when a boy tested HIV positive and his family determined that he had repeated sexual contact with Pfeifer. *Czech News Agency*, Jan. 26.

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INDIA – On February 2 a panel of Supreme Court justices will conduct a hearing on petitions seeking reconsideration by the Court of its December 2013 decision reviving the country’s colonial-era anti-sodomy law, which had been declared unconstitutional years earlier by the High Court in Delhi. English-language Indian newspaper articles discussing the procedural status of this case are impenetrable to this reader, but from what we can figure out, a bench of five justices will begin hearing what are called “curative petitions” and if all five agree that the case merits reconsideration, a new hearing on the merits will be held at some unspecified time in the future. *Hindustan Times*, January 29. However, at least one source speculates that the hearing could produce a ruling from the bench, although that seems unlikely. The original decision reversing the Delhi High Court was rendered by a two-judge panel, with one judge retiring shortly after the ruling was announced. The nation’s Supreme Court is huge, delegating its authority to hear and decide cases to small panels of judges and providing a variety of procedural ways to seek further consideration of a case. The wheels of judicial process in India seem to grind extremely slowly...

INDONESIA – The Minister of Research Technology and Higher Education, M. Nasir, responded vituperatively to reports that a Support Group and Resource Center on Sexuality Studies had been formed on the campus of the University of Indonesia, and that the Group was offering counseling for LGBT individuals. Nasir said such a group should not be allowed on the campus, asserting: “There are standard values and moral standards that must be maintained. The campus is a moral guardian. LGBT is not in accordance with the values and morals of Indonesia. I forbid them.” Nasir contacted the University to protest, and the

University’s rector responded that the university had not given permission for formation of this group and it was not officially affiliated with the university. *Jakarta.coconuts.co*, Jan. 24.

LEBANON – In an important breakthrough for transgender rights in Lebanon, the Court of Appeals of Beirut reversed a lower court ruling and held that a transgender man could change the record of his gender in the nation’s civil registry from female to male. The court recognized that the applicant suffered from a gender identity disorder and said that the “operation was a medical necessity to relieve him from his suffering that had been present throughout his life,” according to a report by the Beirut newspaper, *The Daily Star*. The appellate decision was issued in September but only made public in January 2016. The court said that a person’s right “to receive necessary treatment for any physical or psychological illness is a fundamental and natural one.” *Reuters*, Jan. 15.

MALAWI – The United Nations Office of the High Commissioner for Human Rights expressed concern on January 22 about statements made by Malawi People’s Party spokesperson Kenneth Msonda, calling for the slaughter of gay and lesbian people and describing them as “worse than dogs.” A criminal complaint had been lodged against Msonda as a result of his statements, but the director of public prosecutions decided to discontinue the case, presumably on grounds of “freedom of speech.” The OHCHR spokesperson, Rupert Colville, said, “We are concerned that the failure to prosecute this case sends a dangerous message that inciting others to kill gay people is legitimate and will be tolerated by the authorities – in effect encouraging violent threats and attacks on the gay and lesbian community in Malawi.” Last May, the

government accepted a recommendation to “take effective measures to protect lesbian, gay, bisexual, transgender and intersex persons from violence, and prosecute the perpetrators of violent attacks,” which resulted from the Universal Period Review undertaken by the Human Rights Council in Geneva, according to a U.N. center press release issued on January 22.

MEXICO – Mexico continues its steady march towards nationwide marriage equality. During January marriage equality came to a sixth state, Jalisco, as a result of an 11-0 Supreme Court ruling that is jurisprudential (meaning it applies beyond the immediate parties in the case). In addition, Mexico City (a federal district) and the city of Santiago de Queretaro, capital of Queretaro State, authorize same-sex marriages. Years ago the Supreme Court ruled that legally performed same-sex marriages must be recognized by governmental authorities nationwide. Recent Supreme Court rulings have sparked proposals for legislative reform in several states. There are 26 states in all, the ones with marriage equality include several of the nation’s major urban population centers. In states where same-sex marriage is not yet freely available, judges are under orders by the national Supreme Court to issue “amparos” (directives to local officials) upon the application of same-sex couples seeking to marry, so marriage is really available everywhere in Mexico, provided the couple is willing to undergo the bother and expense (and delay) of obtaining an amparo to force the local authorities to allow the marriage.

PHILIPPINES – The Philippine unit of US-based IBM has announced it will offer benefits, including health coverage, to non-marital partners of its employees, both same-sex and different-sex. Other multinationals

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with operations in the Philippines began doing this in 2013, beginning with Thomson-Reuters-Manila. IBM-Philippines is the first operation of the multinational corporation to take this action in Southeast Asia. IBM Japan extended benefits a few months earlier. IBM has offered partner benefits in the United States since 1996. *Phil. Daily Enquirer*, Jan. 14.

PORTUGAL – When Portugal legislated to allow same-sex marriages in 2010, the measure specifically excluded the right of same-sex spouses to adopt the legal children of their partners. On December 18 the Parliament gave final approval to a measure that would allow gay couples to adopt children, but the measure was vetoed on January 25 by President Anibal Cavaco Silva, whose term was about to expire. Silva criticized the measure, stating that the deputies in Parliament should consider “the child’s best interest” rather than equality “between different and same-sex couples,” according to a *yahoo.com* news account. Silva also said, “It is important that such a big change on a sensitive social topic is not entered into force without a broad public debate.” Evidently a debate in Parliament isn’t good enough for him; only a public referendum would do.

RUSSIA – The Russian State Duma Committee on Constitutional Legislation and State-Building rejected a legislative proposal that would have imposed fines and arrests for people who publicly expressed their homosexual identity through words or actions. The measure, intended to drive all Russian gays deep into the closet, brought international condemnation from governments and human rights organizations, and would of course be inconsistent with Russia’s international treaty obligations and U.N. membership duties. On January 18 the parliamentary committee majority

urged a unanimous vote against the bill should it actually be presented on the floor of the Duma, the national legislature. *Radio Free Europe*, Jan. 18.

RUSSIA – The nation’s official count of diagnosed HIV infection cases has surpassed one million, which is widely believed to be an undercount. 205,000 HIV-infected persons have died in Russia since 1987, according to Vadim Pokrovsky, head of the Federal Scientific and Methodological Center for AIDS Prevention and Control. Experts estimate that up to 1.5 million Russians are living with HIV. *Interfax Russia*, Jan. 20.

RUSSIA – Sergei Alekseyenko has been fined 100,000 rubles (approximately \$1200.00) in response to a statement released by his organization, Maximum, supportive of gay rights. Alekseyenko is charged with violating a law prohibiting the propagation of “nontraditional sexual relations” among minors. The statement was not directed to minors, of course, but that doesn’t matter, because any pro-gay statement is construed by Russian authorities as being directed to minors for purposes of enforcing the ban. Alekseyenko announced that he would appeal. *Radio Free Europe*, Jan. 21.

TAIWAN (REPUBLIC OF CHINA) – Tsai Ing-wen has been elected Taiwan’s first female president. She is an open supporter of marriage equality, having stated her public support on many occasions. There have been large popular demonstration in support of marriage equality in Taiwan, and public opinion polls show widespread support for allowing same-sex couples to marry, but so far the courts have not been amenable to ordering the government to take action, and legislative efforts have stalled. Perhaps the newly-elected

president will be able to move things forward. The main issue surrounding her election was disaffection of voters – especially younger voters – from the traditionalist party that has governed the island for many years and was seen by many as having become too chummy with the leaders of the People’s Republic of China. Tsai Ing-wen is a strong advocate of independence for Taiwan and denial of the PRC’s claim that Taiwan is by rights a province of China.

TUNISIA – In May 2015, a group working on lesbian, gay, bisexual and transgender rights, called SHAMS, was allowed to register with the secretary general and attain the status of a publicly sanctioned organization. But on January 4, 2016, a tribunal in Tunis notified the group that the court was suspending its active status for 30 days as a result of a complaint by the secretary general, who sent the group a warning to cease “alleged violations of the association law” in December, reported *State News Service* (Jan. 16). The nature of the complaint was that SHAMS had publicly announced purposes that went beyond those it had specified when it applied for registration. The controversial statement was that SHAMS would “defend homosexuals.” A spokesperson for the organization challenged the view that this was a departure from its original statement of purpose. This complicated story in the news report sounds like bureaucracy infected with homophobia run amuck.

UNITED KINGDOM – The *Washington Post* reported on Jan. 13 that David Mundell, a member of Parliament who is also a member of Prime Minister David Cameron’s cabinet, “came out” as gay in a blog post. Mundell is the most senior politician in charge of Scottish affairs for the government, the

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newspaper reported. But this “coming out” was seen as no big deal, because it made Mundell the 34th openly gay member of the current session of the House of Commons, over 5% of all members. Of all national legislative bodies, reported the *Post*, only the relatively small Dutch legislature has a higher percentage of openly gay members, although it was interesting to note that 8 of the 59 members of the UK Parliament representing Scottish districts are openly gay, a total of more than 13%. These kinds of numbers put U.S. legislative bodies in the shade. * * * Stonewall, the British gay rights lobbying and advocacy group, annually prepares a list of the 100 best workplaces for LGBT people based on an evaluation of official workplace policies. To the astonishment of many, topping the new list released in January is MI5, the nation’s spy agency! We always knew that the spying business is crowded with gays, we just didn’t appreciate how gay-friendly the British agency has become. After the list was released, news databases were packed with press releases from employers that had scored high on the list and were now asserting bragging rights. This is, of course, an extraordinary change from the days when a British court could sentence the genius inventor of the modern computing, Alan Turing, to chemical castration for having sexual relations with another man. Turing was recently honored with an official posthumous apology from the Queen and his picture on a Royal Mail postage stamp! * * * A parliamentary inquiry into discrimination faced by transgender people in the U.K. resulted in a “landmark report,” according to *Independent Online* (Jan. 14), in which the House of Commons Equalities Committee has called for “root and branch” reform of the way public institutions deal with transgender people, and called on the government to formulate a “comprehensive strategy” within six months.

UNITED KINGDOM – A heterosexual couple, Rebecca Steinfeld and Charles Keidan, suing for the right to enter into a civil partnership rather than marry struck out at the High Court in London. The Civil Partnership Act 2004 allows only same-sex couples to register civil partnerships, which carry virtually all the rights of marriage. Mrs. Justice Andrews, rejecting the complaint in this case, acknowledged the inequality and unfairness, but, she wrote, “just as the U.K. was under no obligation to extend marriage to same-sex couples, it has never been under an obligation to extend civil partnership to heterosexual couples. The denial of a further means of formal recognition which is open to same-sex couples, does not amount to unlawful state interference with the claimants’ right to family life or private life, any more than the denial of marriage to same-sex couples did prior to the enactment of the 2013 Marriage Act.” She pointed out that they can achieve state recognition for their relationship by marrying, and the state is not required to give them a different alternative. They vowed to bring the issue of the court of appeal. *Guardian*, Jan. 29.

PROFESSIONAL NOTES

DURING THE NEW YORK STATE BAR ASSOCIATION’S mid-winter meeting in New York, the **NEW YORK STATE CONFERENCE OF BAR LEADERS** presented a Bar Leaders Innovation Award to the **LGBT BAR ASSOCIATION OF GREATER NEW YORK**, to acknowledge LeGal’s hiring of a full-time Legal Director in 2015 to coordinate its pro bono and free legal clinic program. Brett Figlewski is LeGal’s first Legal Director. In its citation, the Conference of Bar Leaders noted the “transformational developments in the law” affecting LGBT people in recent years, and

pointed out that while there were many LGBT organizations to handle impact litigation and the like, “there are few examples of LGBT-specific organizations devoted to serving the varied civil legal needs of the LGBT community in a holistic fashion and an insufficient coordination of currently available local legal resources. With a Legal Director to better manage resources, LeGal can more fully assess the local LGBT public-interest legal landscape and harness the resources of the hundreds of LGBT attorney members in the New York City Area who want to help other members of the community.” In its categorization of bar associations by size, the Conference labels LeGal a “medium bar association” with 500-1,999 members.

At its 2016 Annual Dinner, the **LGBT BAR ASSOCIATION FOUNDATION OF GREATER NEW YORK** will present its Community Vision Awards to **KEVIN M. CATHCART**, the retiring long-time Executive Director of Lambda Legal Defense and Education Fund, and to Commissioner **CHAI R. FELDBLUM** of the Equal Employment Opportunity Commission. Cathcart is the longest-serving executive director of a national LGBT organization, coming to Lambda after several years as executive director of Gay & Lesbian Advocates & Defenders in Boston; under his watch at Lambda since 1992, the organization expanded to become a national organization with several regional offices; Lambda worked with local counsel and cooperating attorneys to achieve one of the signature accomplishments of the LGBT legal movement, the Supreme Court’s 2003 decision striking down criminal laws against consensual adult gay sex, and participated in a co-counsel or amicus capacity in the other major LGBT rights cases before the Supreme Court, including the Colorado Amendment 2 case, the Boy Scouts case, and the marriage equality cases of

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the past few years. During the lengthy struggle for marriage equality, Lambda directly represented plaintiffs in several key lawsuits, including planning and executing the successful strategy leading to the first unanimous ruling by a state supreme court for marriage equality, in Iowa. Lambda also played a leading role in challenging anti-gay military policies, and in achieving legal protection for people living with HIV/AIDS. Feldblum is serving her second term as an EEOC commissioner after a distinguished career as legal clinician and academic and a stint at the ACLU, during which she was one of the key participants in drafting what became the Americans with Disabilities Act. During her service on the EEOC, she has worked within the Commission to achieve acceptance within the agency of the proposition that its jurisdiction over claims of sex discrimination under Title VII of the Civil Rights Act of 1964 extends to discrimination because of sexual orientation or gender identity, reversing the opposite position that the agency had maintained since the 1960s. **ROBBIE KAPLAN** will also offer a tribute to the late New York State Chief Judge **JUDITH S. KAYE**, focusing on the incredible legacy she left to the LGBT community. The Annual Dinner will be held at Capitale in Manhattan on Thursday, March 24.

Minnesota Governor Mark Dayton has appointed the first openly LGBT judge to the Minnesota Supreme Court, Minnesota Appeals Court Judge **MARGARET CHUTICH**. Dayton had previously appointed Judge Chutich to the Court of Appeals in 2011. She has a background as a federal prosecutor, staff attorney in the state attorney general's office, and is a former assistant dean of the University of Minnesota's Humphrey School of Public Affairs. During the announcement of her appointment, Judge Chutich recognized Penny Wheeler, her partner of 20 years, the

last two as her legal spouse. The other state high courts that have had openly gay or lesbian justices include Oregon, Colorado, Hawaii, Massachusetts and Vermont. *mprnews.org*, Jan. 22.

At the **AMERICAN BAR ASSOCIATION's** Midyear Meeting in San Diego early in February, the Individual Rights and Responsibilities Section will present its Stonewall Awards to honorees who have advanced LGBT individuals in the profession and successfully championed LGBT legal causes. The 2016 honorees are **THOMAS FITZPATRICK**, name partner at Talmadge Fitzpatrick Tribe in Seattle, **ABBY RUBENFELD**, a Nashville (TN) practitioner who served during the 1980s as legal director at Lambda Legal and has continued to litigate many LGBT-related cases in private practice, and **EVAN WOLFSON**, former Lambda staff attorney who is founder and president of Freedom to Marry, which achieved its goal with the *Obergefell* decision and announced recently that it would wind up its affairs shortly as Evan moves on to new projects.

The ABA's Standing Committee on Ethics and Professional Responsibility is working on a proposed amendment to Rule 8.4(g) of the **MODEL RULES OF PROFESSIONAL RESPONSIBILITY**, which deals with discrimination by lawyers in the course of their practice of law. The proposed rule would add gender identity to the prohibited grounds of discrimination, and would make explicit that harassment and discrimination are both considered unprofessional conduct, but would note that the rule does not apply to conduct "unrelated to the practice of law or conduct protected by the First Amendment." However, there are proposal pending to make the rule narrower, a point of debate being whether the ethical rules should be restricted to lawyers' conduct in representing clients

or more broadly to the conduct of their businesses, such as the employment practices of law firms. The committee is holding a hearing on February 7, and accepted written comments about the proposed rule (the text of which is available on the Association's website) until March 11. The Committee hopes to have a proposal finished for consideration by the House of Delegates at the annual meeting in August.

The White House announced that **ADITI HARDIKAR**, the Obama Administration's primary liaison to the LGBT, Asian American and Pacific Islander communities, was leaving to join the presidential campaign of former Secretary of State Hillary Clinton. Hardikar, who had been the LGBT liaison for more than a year, was credited, among other things, with the establishment of all-gender restrooms in the White House and with the decision to light the White House in rainbow colors to celebrate the Supreme Court's marriage equality decision. *Washington Post*, Jan. 12.

GAY & LESBIAN ADVOCATES & DEFENDERS is accepting applications for a senior staff attorney position to lead GLAD's Youth Initiative and to handle matters in the full range of GLAD's core litigation priorities, including racial justice matters, throughout the six New England states. 4-5 years of litigation experience and past activities in youth-specific or LGBTQ work are prerequisites for the position, and bar admission in one of the New England states is preferred. Resume, cover letter and writing sample should be sent to Gary Buseck, GLAD, 30 Winter Street, Suite 800, Boston MA 02108 or emailed to gbuseck@glad.org. Applications will be considered on a rolling basis until March 1 or until the position is filled. More details are available on GLAD's website.

THE AMERICAN BAR ASSOCIATION

will present a CLE webinar live on February 23 titled “Sexual Orientation: The Legal Case for Coverage Under Title VII,” at 1-2:30 pm ET. Co-sponsors include the ABA’s Commission on Sexual Orientation and Gender Identity, Center for Human Rights, Center for Professional Development, and Section of Civil Rights and Social Justice. Among the speakers will be Adam Romero of the Williams Institute UCLA Law School, EEOC Commissioner Chai Feldblum, Edward Reeves of Stoel Rives LLP (Portland, Oregon), and Gregory Nevins, Counsel and Workplace Fairness Program Strategist at Lambda Legal’s Atlanta Office. The program will be moderated by Teresa Renaker of Lee, Renaker & Jackson PC (Oakland, CA). Information about participating can be found on the ABA’s website under CLE programs and there are options for purchasing a recording of the webinar for those who cannot participate during the live broadcast.

As previously announced, the advocacy organization “Freedom to Marry” is going out of business, having achieved its goal of attaining constitutional protection for marriage equality in all 50 states. Although the office is closed and the staff dispersed, arrangements have been made to maintain a permanent website with an archive of materials that may be useful to advocates, scholars, and members of the public, providing access to the essential documentary record of the long fight to attain marriage equality. The website can be accessed at FreedomtoMarry.org. In an email announcing the website, **FREEDOM TO MARRY** Founder and President Evan Wolfson said: “While the work of the LGBT movement, and so many important causes, is far from over, the Freedom to Marry campaign is over and we are now shutting our doors. We hope that by sharing our experience and the lessons learned, we will help those working the U.S. and around the globe to advance human rights and make a better world.”

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