

L E S B I A N / G A Y
LAW NOTES

March 2014

VIRGINIA AND
KENTUCKY
AND TEXAS,
OH MY

Windsor Continues to Ripple Across the American Map

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Virginia Marriage Equality Ruling Both a Big Deal and the New Normal

Since the U.S. Supreme Court ruled last year that Section 3 of the Defense of Marriage Act (DOMA), which denied federal recognition for same-sex marriages, was unconstitutional, a wave of litigation over marriage equality has descended on the federal (and some state) trial courts, and so far every judge who has ruled on a motion for summary judgment has concluded that bans on performing or recognizing same-sex marriages violate the 14th Amendment of the U.S. Constitution as a matter of law. In that sense, there is really nothing new about U.S. District Judge Arenda L. Wright Allen's decision in the case of *Bostic v. Rainey*, 2014 U.S. Dist. LEXIS 19080 (E.D. Va., Feb. 13, 2014, amended

whose maiden name was Mildred Jeter, and her husband Richard Loving, had been prosecuted by Virginia for going to the District of Columbia to marry and then returning home to Virginia, living there in open defiance of that state's law forbidding marriages between people of color and white people. The Supreme Court ruled in that case that Virginia's law was an unconstitutional interference in the right of individuals to marry the partner of their choice, not only because the statute enacted race discrimination, but also because of the fundamental role of marriage in our society.

Mrs. Loving said, in marking the 40th anniversary of her Supreme Court victory, "The older generation's fears and

women, and the children too, whose voices join in noble harmony with Plaintiffs today, also ask for fairness, and fairness only. This, so far as it is in this Court's power, they and all others shall have."

This lawsuit was initiated last summer by Timothy Bostic and Tony London, gay men who inquired about getting a marriage license from the Norfolk court clerk and were advised that Virginia law prohibited it. Although the ACLU and Lambda Legal had put out the word that they were planning a lawsuit in the wake of the DOMA decision, Bostic and London were not inclined to wait and filed their own lawsuit in the Eastern District of Virginia. The American

Judge Wright Allen prefaces her decision with a lengthy quotation from a public statement issued by Mildred Loving.

Feb. 14, 2014), holding Virginia's ban on same-sex marriage unconstitutional, since the opinion falls within what is now the mainstream of a growing body of trial court decisions issued by judges of just about every political stripe.

On the other hand, each of the decisions issued so far, by federal judges in Ohio, Utah, Oklahoma, Kentucky (see below), and now Virginia, presents its own particular perspective on the issue, and each of the judges has managed to inject his or her own brand of eloquence in explaining why the quest for equal marriage rights deserves to win.

Judge Wright Allen, who was appointed to the bench by President Barack Obama and unanimously confirmed by the Senate in 2011, prefaces her decision with a lengthy quotation from a public statement issued by Mildred Loving, one of the parties in the historic 1967 case of *Loving v. Virginia*, in which the Supreme Court laid the doctrinal foundations for Judge Write Allen's decision. Mildred Loving,

prejudices have given way, and today's young people realize that if someone loves someone they have a right to marry. . . I believe all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have that same freedom to marry. Government has no business imposing some people's religious beliefs over others. . . I support the freedom to marry for all. That's what Loving (the case), and loving, are all about."

And, to close out her opinion, Judge Wright Allen quoted remarks by Abraham Lincoln, from a letter he wrote in May 1860 while contemplating his bid for the Republican presidential nomination in the upcoming national election. Reflecting the coming struggle over slavery, Lincoln wrote, "It cannot have failed to strike you that these men ask for just the same thing – fairness, and fairness only. This, so far as in my power, they, and all others, shall have." Echoing Lincoln, the judge concluded her opinion by stating, "The men and

Foundation for Equal Rights (AFER), which had litigated the California Proposition 8 case, quickly offered them the opportunity to be represented at no charge by Ted Olson and David Boies, the prominent appellate litigators who presented that case to the federal courts, and Bostic and London quickly accepted the offer. The case was amended to add a second couple, Carol Schall and Mary Townley, who had married in California in 2008 but whose marriage was not recognized in Virginia. As a practical matter, this non-recognition had raised a barrier to Schall adopting their daughter, who was born in 1998 through donor insemination, since Virginia's adoption law does not permit second-parent adoptions for same-sex couples. The Virginia marriage and recognition bans are embodied both in statutes and in a state constitutional amendment adopted in 2006.

The lawsuit originally named as defendants then-Governor Bob McDonnell and then-Attorney General

Ken Cuccinelli, as well as George E. Schaefer III, the Norfolk Circuit Court Clerk whose office had denied the license to Bostic and London. As the case developed, McDonnell and Cuccinelli were dropped as defendants, Janet Rainey, the state's Registrar of Vital Records was added, and the Prince William County Circuit Court Clerk, Michele McQuigg, was allowed to intervene as a defendant. Perhaps equally significant for the direction of the lawsuit, soon after the newly-elected Democratic governor and attorney general, Terry McAuliffe and Mark Herring, took office, they announced that the executive branch of the state government was no longer interested in defending Virginia's marriage ban, and the state's Solicitor General was dispatched by Herring to join the plaintiffs during the summary judgment hearing a few weeks ago to argue that the ban is unconstitutional. Thus, the

equality rulings, Judge Wright Allen concluded that "doctrinal developments since 1971 compel the conclusion that Baker is no longer binding," and observed that the 2nd Circuit Court of Appeals, based in New York, had "recognized this explicitly" when it ruled against the constitutionality of DOMA in *U.S. v. Windsor*. The judge also referred to District Judge Robert Shelby's opinion in the Utah marriage case, *Kitchen v. Herbert*, holding that Baker "has little if any precedential effect today."

Judge Wright Allen considered both due process and equal protection arguments against the ban, and concluded that it was unconstitutional on both theories.

Focusing first on due process, she concluded that the Supreme Court had established in *Loving v. Virginia* and subsequent cases that the right to marry is a fundamental right, and as

asserted that the "strict scrutiny" standard of judicial review applied to this case, and rejected the defendants' arguments that the marriage ban could be justified by tradition, federalism, or the "responsible procreation" and "optimal child rearing" theories. Her analysis is by now quite familiar, following the lines of the recent decisions from Ohio, Utah, Oklahoma and Kentucky. Responding to the federalism point, she quoted from Justice Scalia's dissent in *Windsor*, where he wrote: "As I have said, the real rationale of [the *Windsor* opinion] is that DOMA is motivated by 'bare . . . desire to harm' couples in same-sex marriages. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status." The judge rejected the argument that on grounds of federalism the court should abstain from ruling on the merits in order to give the Virginia electorate and legislature a chance to reconsider their position, remarking that this "proposal disregards the gravity of the ongoing significant harm being inflicted upon Virginia's gay and lesbian citizens."

In addition to rejecting the argument that there was no logical connection between any state goal to channel procreation responsibly or provide an optimal setting for child rearing and forbidding same-sex couples from marrying, she also asserted that this "rationale misconstrues the dignity and values inherent in the fundamental right to marry as primarily a vehicle for 'responsibly' breeding 'natural' offspring," which "ignores the profound non-procreative elements of marriage, including 'expressions of emotional support and public commitment,' 'spiritual significance,' and 'expression of personal dedication.'" The quotations were from an opinion for the Supreme Court by Justice Sandra D. O'Connor, *Turner v. Safley*, striking down a state's ban on marriage for prison inmates.

Having found the Virginia marriage ban in violation of the Due Process Clause, Judge Allen Wright turned to the Equal Protection Clause. The standard of review for equal protection claims can vary depending upon whether the challenged discrimination involves a fundamental right or discriminates

Judge Wright Allen concluded the ban was unconstitutional under both due process and equal protection theories.

only defenders of the ban at this stage of the litigation are two county clerks, who are represented by their own counsel, including lawyers from Alliance Defending Freedom, a curiously-named group that has intervened in several marriage equality cases to oppose the freedom of same-sex couples to marry. ADF claims to be vindicating religious freedom as its main goal, but evidently just the religious freedom of those who share ADF's religious opposition to same-sex marriage.

In the first part of her opinion, the judge rejected defendants' argument that the plaintiffs in this case lacked standing to pursue a federal court challenge, and also rejected their argument that the Supreme Court's 1972 holding in *Baker v. Nelson* that same-sex marriage does not present a "substantial federal question" was binding on the court. In line with the other recent marriage

such could not be abridged by the state without a narrowly-tailored law that was justified by a compelling state interest. "The reality that marriage rights in states across the country have begun to be extended to more individuals fails to transform such a fundamental right into some 'new' creation," she wrote. "Plaintiffs ask for nothing more than to exercise a right that is enjoyed by the vast majority of Virginia's adult citizens." She continued, "Gay and lesbian individuals share the same capacity as heterosexual individuals to form, preserve and celebrate loving, intimate and lasting relationships. Such relationships are created through the exercise of sacred, personal choices — choices, like the choices made by every other citizen, that must be free from unwarranted government interference."

Having found that a fundamental right was at stake, Judge Wright Allen

because of a so-called “suspect classification.” As she had already found a due process violation based on the conclusion that the right to marry is fundamental, the judge concluded that the marriage ban also violated the Equal Protection Clause by discriminating concerning a fundamental right. But she also addressed the “suspect classification” issue, finding that same-sex and different-sex couples are “similarly situated” for purposes of an equality analysis. “Deference to Virginia’s judgment on this question is unwarranted,” she wrote, “because there are reasonable grounds to suspect ‘prejudice against discrete and insular minorities which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities,’” quoting a venerable Supreme Court precedent from 1938, *Carolene Products*, which is foundational in equal protection doctrine. She found plenty of evidence “manifest in Virginia in state-sanctioned activities” that showed animus against gay people, including, for example, Ken Cuccinelli’s action as attorney general directing colleges and universities to rescind their anti-discrimination policies on the ground that Virginia’s civil rights statutes provided no protection against discrimination to gay people.

However, she concluded that it was not necessary for her to determine an appropriate level of judicial review in this case. “Virginia’s Marriage Laws fail to display a rational relationship to a legitimate purpose,” she wrote, “and so must be viewed as constitutionally infirm under even the least onerous level of scrutiny. Accordingly, this Court need not address Plaintiffs’ compelling arguments that the Laws should be subjected to heightened scrutiny.”

“The goal and the result of this legislation is to deprive Virginia’s gay and lesbian citizens of the opportunity and right to choose to celebrate, in marriage, a loving, rewarding, monogamous relationship with a partner to whom they are committed for life. These results occur without furthering any legitimate state purpose.” Having reached this conclusion, the judge stated that the plaintiffs are entitled to injunctive relief commanding the

state to stop enforcing the marriage ban. However, acknowledging that the Supreme Court had stayed the Utah decision and thus signaled its view that district judges should not order states to allow same-sex marriage until any appeals to higher courts are exhausted, Judge Wright Allen “stayed execution of this injunction pending the final disposition of any appeal to the Fourth Circuit Court of Appeals.”

Presumably the two county clerks will quickly file their appeals with the 4th Circuit, which is based in Richmond, Virginia. The state, represented by Ms. Rainey, could also appeal, although in light of the governor and attorney general both stating their view that Virginia should allow and recognize same-sex marriages, that seems unlikely. In any event, unless the 4th Circuit handles the case with extraordinary speed, it is unlikely that it would be ruling before the 9th and 10th Circuits rule on the pending appeals from Nevada, Utah and Oklahoma. The 10th Circuit has already scheduled oral arguments on Utah and Oklahoma during April, and the 9th Circuit has granted a motion by Lambda Legal for an expedited hearing in the Nevada case, with the date to be set shortly. Final reply briefs are due in the Nevada case by February 25, and the court has granted a request by the state government to withdraw its brief, leaving the field in that case to an intervenor group that had supported the passage of the state’s anti-gay marriage amendment. Ted Olson and David Boies got involved in the *Bostic* case with the explicit goal of taking it to the Supreme Court, but as of now it seems more likely that the National Center for Lesbian Rights, which has become associated with the Utah case, or Lambda Legal, which represents plaintiffs in the Nevada case, may get there first. There is another Virginia marriage equality case, *Harris v. Rainey*, filed in the Western District by the ACLU and Lambda Legal, which is also pending. In that case, the trial judge certified the case as a class action, but arguments on summary judgment have yet to occur, so it is uncertain whether there might be a second Virginia ruling to present to the 4th Circuit before it decides any appeal in the *Bostic* case. ■



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Judicial Attention Shifts Back to Marriage Recognition as Federal Judge Nixes Kentucky Ban

One of the first federal court decisions to apply the Supreme Court's June 26 DOMA ruling to the question of state marriage recognition came quickly last July, when U.S. District Judge Timothy S. Black in Ohio ordered the state to recognize a Maryland same-sex marriage for purposes of a death certificate. That court order was followed up by a detailed opinion in December in *Obergefell v. Wymyslo*, 2013 WL 6726688 (S.D. Ohio, Dec. 23, 2013), finding that a refusal by a state whose laws ban same-sex marriage to recognize such marriages contracted in other states violates the 14th Amendment, which requires states to provide "equal protection of the laws" and protects the right of married couples to "stay married" when

mention a stay in his decision, and the *Louisville Courier-Journal* (Feb. 27) reported that Attorney General Jack Conway, a Democrat, had not requested a stay. Thus, once Heyburn entered a final Order on his ruling as anticipated on February 27, the state would have thirty days to comply. However, early on February 27, *Associated Press* reports, Conway filed a motion seeking a 90-day delay upon entry of the court's final order, to give him time to decide whether to appeal. Unlike Republican officials in other states, Conway did not have a knee-jerk reaction to the court's opinion, indicating that he hadn't made up his mind yet whether to appeal the ruling. Furthermore, as indicated in the discussion of the court's analysis, below,

2675 (2013), Judge Heyburn intimated how that might be resolved. "The Court was not presented with the particular question whether Kentucky's ban on same-sex marriage is constitutional," he observed. "However, there is no doubt that *Windsor* and this Court's analysis suggests a possible result to that question." Taking Judge Heyburn at his word, counsel for plaintiffs filed an "intervening complaint" on February 14th on behalf of two gay couples, Timothy Love and Lawrence Ysunza, and Maurice Blanchard and Dominique James, asserting, according to a report in the local newspaper, *Courier-Journal*, that they "should be allowed to join the earlier lawsuit in the interest of 'judicial economy' and because there are issues common to both cases." Judge Heyburn granted the motion to add these plaintiffs and expand the case on February 26, at the same time indicating that their complaint presented a somewhat different question from the recognition question, and that it wasn't a "foregone conclusion" that he would rule for plaintiffs. He set a briefing schedule that would conclude briefing and set the case up for a new summary judgment ruling by the end of May.

In *Bourke v. Beshear*, four married same-sex couples, two of which are raising children together, challenged a 1998 Kentucky statute and a 2004 Kentucky constitutional amendment, both providing that same-sex marriages would not be recognized in Kentucky. The constitutional amendment, part of a nationwide strategy by the Bush re-election campaign to pull conservative voters to the polls, passed with about 74% of the vote, although Judge Heyburn noted that only 53.6% of Kentucky's registered voters cast a vote on the amendment issue, so one could not argue that a majority of the state's voters had affirmatively voted for it. Nonetheless, it seems fair to say that the marriage amendment was overwhelmingly popular in Kentucky when it was passed almost ten years ago. Louisville attorneys Dawn Elliott and Shannon Fauver represent the plaintiffs.

These cases all have in common that the plaintiffs are challenging only their states' refusal to recognize their marriages.

they cross state lines. Now a second federal judge, John G. Heyburn II, of the Western District of Kentucky, has followed Judge Black's lead in *Bourke v. Beshear*, 2014 U.S. Dist. LEXIS 17457, 2014 WL 556729 (February 12, 2014), ordering that Kentucky recognize same-sex marriages contracted in other states and Canada. And, on the same day Heyburn ruled, married same-sex couples living in Missouri and Louisiana filed their own lawsuits, seeking rulings that their state governments also must recognize their marriages. These cases all have in common that the plaintiffs are already married and are challenging only their states' refusal to recognize their marriages. These original plaintiffs are not seeking a ruling that unmarried same-sex couples in their states have a right to marry.

Unlike judges in other states who have stayed their marriage equality decisions pending appeal, Judge Heyburn did not

the state had not presented many of the usual defenses in marriage equality cases, although, unlike his Democratic counterparts in some other states, Conway had not publicly declined to defend the state's laws in this case. After a brief hearing on February 28, during which the state argued that it needed some time to figure out how to comply with the order, Judge Heyburn agreed to stay his Order until March 20. A spokesperson for Conway indicated that he would decide soon whether to file an appeal to the 6th Circuit.

Despite the narrow focus of recognition-only cases, nobody should be fooled about their effect, because most of the same legal arguments would be relevant in a case seeking the right to marry. Reflecting the Supreme Court majority's treatment of the legal analysis in striking down the federal ban on same-sex marriage recognition in *United States v. Windsor*, 133 S. Ct.

To Judge Heyburn, the amendment's popularity was irrelevant, because the constitutional issue was clear and easily resolved in light of the trend in federal and state court rulings on marriage equality, especially since last June. Heyburn pointed out that his decision, which might have been considered on the cutting edge of judicial activism just a few years ago, is now very mainstream. "Nine state and federal courts have reached conclusions similar to those of this Court," he wrote. "After the Massachusetts Supreme Judicial Court led the way by allowing same-sex couples to marry, five years later the Connecticut Supreme Court reached a similar conclusion regarding its state constitution on equal protection grounds. Other courts soon began to follow. Over the last several months alone, three federal district courts have issued well-reasoned opinions supporting the rights of non-heterosexual persons to marriage equality in similar circumstances. Indeed, to date, all federal courts that have considered same-sex marriage rights post-*Windsor* have ruled in favor of same-sex marriage rights. This Court joins in general agreement with their analyses."

As to that analysis, Judge Heyburn took a conservative route to get to his conclusion. While conceding the possibility that this might be treated as a "heightened scrutiny" case, he was penned in by two facts: the 6th Circuit Court of Appeals, to which his decision would be appealed, has ruled as recently as 2012 that sexual orientation discrimination claims are not subject to heightened scrutiny, and the Supreme Court's opinion in *Windsor* did not clearly say that the Court was using "heightened scrutiny" to strike down DOMA. Heyburn acknowledged that sexual orientation claims would probably qualify for heightened scrutiny if his decision started with a clean slate, but a trial court is bound by precedent from higher courts. In any event, he said, it really didn't matter what level of scrutiny was used, because Kentucky's refusal to recognize same-sex marriages was not supported by any constitutionally acceptable justification.

Heyburn found that in *Windsor* the Supreme Court made clear that although states have the primary authority to

establish marriage laws, "those laws are subject to the guarantees of individual liberties contained within the United States Constitution." In *Windsor*, the Supreme Court found "that by treating same-sex married couples differently than opposite-sex married couples, Section 3 of DOMA 'violated basic due process and equal protection principles applicable to the federal government'" under the 5th Amendment. Since the same principles are applicable to state governments under the 14th Amendment, the *Windsor* court's "reasoning establishes certain principles that strongly suggest the result" in the Kentucky case.

In *Windsor*, the Supreme Court emphasized that the purpose of DOMA was to discriminate against same-sex couples who were married under state law. A purpose to discriminate, as such, cannot be the basis of a state law, and it was clear that the purpose of Kentucky's recognition ban was to discriminate. "Whether that purpose also demonstrates animus against same-sex couples may be debatable," wrote Heyburn, "but those two motivations are often different sides of the same coin." More significantly, the Supreme Court held that DOMA "demeans" same-sex couples by relegating their marriage to an inferior status. Heyburn found that the Supreme Court's "analysis would seem to command that a law refusing to recognize valid out-of-state same-sex marriages has only one effect: to impose inequality." "From this analysis," wrote Heyburn, "it is clear that Kentucky's laws treat gay and lesbian persons differently in a way that demeans them. Absent a clear showing of animus, however, the Court must still search for any rational relation to a legitimate government purpose." Undertaking that "search," Judge Heyburn turned up empty-handed.

The only justification presented by the state was "preserving the state's institution of traditional marriage," which Heyburn found totally insufficient in this context, pointing out that many traditional laws have been invalidated by the courts in the name of equal protection, citing as a prime example *Loving v. Virginia*, the 1967 Supreme Court ruling striking down laws against interracial marriage. "Over the past forty years," he wrote, "the Supreme Court

has refused to allow mere tradition to justify marriage statutes that violate individual liberties." He cited Justice Scalia's dissenting comment that bans on same-sex marriage were about "moral disapproval of homosexuality," which is not a permissible ground for discriminatory state policies in light of the Supreme Court's rulings in the cases of *Romer v. Evans*, *Lawrence v. Texas*, and *U.S. v. Windsor*.

Unusually for this kind of lawsuit, the state had not made any arguments about "responsible procreation" or the "best" families for "child-rearing," but an amicus brief from the Family Trust Foundation of Kentucky, Inc., made the usual arguments along these lines, which Heyburn also rejected. "The State, not surprisingly, declined to offer these justifications, as each has failed rational basis review in every court to consider them post-*Windsor*, and most courts pre-*Windsor*," Heyburn observed. Indeed, in the *Windsor* opinion itself, Supreme Court Justice Anthony Kennedy evidently thought so little of those arguments that he didn't even discuss them. "The Court fails to see how having a family could conceivably harm children," Heyburn wrote, noting that in the *Windsor* case the Supreme Court said that children of same-sex couples are "humiliated" by the government's denial of marriage rights to their parents. "As in other cases that have rejected the amicus's argument," Heyburn continued, "no one in this case has offered factual or rational reasons why Kentucky's laws are rationally related to any of these purposes," and he concluded, "the Court cannot conceive of any reasons for enacting the laws challenged here. Even if one were to conclude that Kentucky's laws do not show animus, they cannot withstand traditional rational basis review."

Heyburn concluded his opinion with what might be called "the civics lesson," in which he tried to help Kentuckians understand the role of the court and why he was doing what he was doing. He pointed out the distinctly separate realms of personal religious belief and state policies. "Assigning a religious or traditional rationale for a law, does not make it constitutional when that law discriminates against a class of people without other reasons," he wrote. "The

beauty of our Constitution is that it accommodates our individual faith's definition of marriage while preventing the government from unlawfully treating us differently. This is hardly surprising since it was written by people who came to America to find both freedom of religion and freedom from it." He also pointed out that nothing in his opinion would require churches or other religious institutions to marry any particular couple, because of the constitutional guarantee of freedom of religion, and that the court had received no evidence that extending recognition to same-sex marriages would "harm opposite-sex marriages, individually or collectively."

He also responded to the frequent criticism that such momentous issues should not be decided by a single judge, pointing out that actually in the end the decision as not being made by a single judge. Rather, the judge was applying principles that had been developed over decades by numerous judges and courts at all levels, including the Supreme Court in *Windsor*. Furthermore, the state could appeal his decision to the 6th Circuit and, if it does not win a reversal there, could petition the Supreme Court for review. Heyburn's decision mentioned nothing about a stay, but he scheduled a conference with the attorneys in the case to discuss the implementation of his opinion on February 26. As of then, the state had not indicated whether it would appeal or formally sought a stay. At that hearing, Heyburn approved plaintiffs' motion to add more plaintiffs to the case in order to expand its scope to the right to marry, and indicated he would issue his final order on the summary judgment decision on recognition the next day. That lit a fire under the Attorney General, who sought a 90 day stay in a motion filed February 27. Judge Heyburn issued his final Order without mentioning the motion, but subsequently scheduled a hearing for February 28 on the motion, at which time he granted a stay until March 20. The 6th Circuit is already considering Ohio's appeal of the prior marriage-recognition ruling. In that case, in light of the nature of the relief being sought (correctly identifying couples as married for purposes of a death certificate), the state had not sought a stay of the original order from last July. ■

As Goes Virginia, So Goes Texas: Marriage Equality Ruling Stayed Pending 5th Circuit Appeal

U.S. District Judge Orlando L. Garcia of the Western District of Texas, San Antonio, ruled on February 26 in *De Leon v. Perry*, 2014 WL 715741, that Texas has shown no rational basis for depriving same-sex couples of the right to marry or for refusing to recognize same-sex marriages performed elsewhere. Adding yet another brick to the solid wall of federal trial court decisions that has been mounting since last summer, when a judge in Ohio ordered that state to recognize an out-of-state same-sex marriage, Judge Garcia became the seventh consecutive federal trial judge

marriage licenses to same-sex couples and recognize the marriages of those who had gone out of state to marry. Over the course of 2013, the number of states in which the law embraced marriage equality, either through court rulings or legislative action, doubled, most dramatically at year's end as the New Mexico Supreme Court and the U.S. District Court in Salt Lake City ruled on consecutive days in favor of marriage equality.

Several lawsuits are pending in Texas on various aspects of this issue. The Texas Supreme Court has heard argument on whether same-sex couples

Judge Garcia became the seventh consecutive federal trial judge to rule in favor of marriage equality.

to rule in favor of marriage equality.

This was one of the rapidly-filed cases following upon last summer's ruling by the Supreme Court in *U.S. v. Windsor* that Section 3 of the Defense of Marriage Act violated the right of gay people to "equal liberty" under the Due Process Clause of the 5th Amendment. Although the Court did not rule directly that same-sex couples have a right to marry in that case, it did rule that the federal government could not discriminate between different-sex and same-sex marriages. On the same day, the Court dismissed an appeal by proponents of California Proposition 8 in *Hollingsworth v. Perry*, allowing same-sex marriage to become available in California, the nation's largest state. This double-header ruling set off a stampede to the courthouse by same-sex couples around the country, seeking rulings that states must issue

who live in Texas can get divorced in Texas courts from marriages contracted elsewhere, and Judge Garcia is not the only federal judge in Texas dealing with a marriage equality case, with another pending in Austin, but he is now the first to rule.

In light of prior post-*Windsor* decisions in Ohio, Utah, Oklahoma, Kentucky, Virginia, and Illinois (just a few days previously), it would have been astonishing had Judge Garcia ruled the other way, and at this point a ratchet effect has emerged, as a right has been repeatedly recognized and is becoming established. Of course, that right will not be fully secure until a definitive ruling comes from the Supreme Court, but every additional district court decision adds more weight to the growing body of precedent.

There was really nothing new that Judge Garcia could say unless he was

prepared to depart from what has become the familiar approach to the issue. As have several other district judges, he toyed with the question whether sexual orientation invokes heightened scrutiny in an equal protection case, but in common with most of the other judges found that he did not have to resort to heightened scrutiny to find the ban unconstitutional, because the arguments the state made — the same tired arguments that other states have made — don't stand up to the most deferential rationality analysis.

For example, he wrote, "There is no doubt that the welfare of children is a legitimate state interest; however, limiting marriage to opposite-sex couples fails to further this interest. Instead, Section 32 [the Texas constitutional ban] causes needless stigmatization and humiliation for children being raised by the loving same-sex couples being targeted." And, he continued, "Defendants have not provided any evidentiary support for their asserting that denying marriage to same-sex couples positively affects childrearing." Garcia was similarly dismissive of the "responsible procreation" argument. "In fact," he wrote, "rather than serving the interest of encouraging stable environments for procreation, Section 32 hinders the creation of such environments." He concluded that "Section 32 is not connected to any legitimate interest that justifies the denial of same-sex marriage or recognition of legal out-of-state same-sex marriages."

He ruled similarly on plaintiffs' due process argument, this time using strict scrutiny because he found that the right at issue — the right to marry — has been repeatedly recognized by the Supreme Court as a fundamental right that cannot be abridged by the state without some legitimate compelling interest. He rejected the state's argument that this case was about some new "right to same-sex marriage," finding that the right at issue was the same one now enjoyed by different-sex couples in Texas. "Defendants have failed to identify any rational, much less a compelling, reason that is served by denying same-sex couples the

fundamental right to marry," he wrote.

He also found that the state was not free to do what the constitution prohibits the federal government from doing: denying recognition to same-sex marriages that have been contracted in other states. He rejected the state's argument that Section 2 of DOMA, which the Supreme Court did not address in the *Windsor* decision, protects the state's right to deny recognition to such out-of-state marriages. "Whatever powers Congress may have under the Full Faith and Credit Clause," he wrote, "Congress does not have the power to authorize individual States to violate the Equal Protection Clause." He concluded that the state had not "provided any specific grounds that justify the refusal to recognize lawful, out-of-state same-sex marriages that is not related to the impermissible expression of disapproval of same-sex married couples."

As have all the federal judges who have ruled on marriage equality claims since *Windsor*, Judge Garcia found support for his conclusions in the dissenting opinions of Justice Antonin Scalia, most notably in his dissent in *Lawrence v. Texas*, the Supreme Court's 2003 decision striking down the Texas sodomy law. Justice Scalia argued that the reasoning of the Court would eliminate the ability of states to rely on tradition and moral disapproval as grounds for denying same-sex couples the right to marry, a conclusion with which Judge Garcia agreed in a section of his opinion rejecting the idea that Texas could justify its ban based on tradition.

This case has moved so quickly that Judge Garcia was ruling on a motion for a preliminary injunction by the plaintiffs. Preliminary injunctions are granted pending a full trial on the merits of a case, and normally stay in effect only until the court has given an ultimate ruling on the merits of the case. Thus, Judge Garcia's injunction is only preliminary, but it is based on a finding that the state of Texas is highly unlikely to win this case on the merits, and any delay in allowing same-sex couples to marry or have their out-of-state marriages recognized will cause them irreparable injury. On the other

hand, the U.S. Supreme Court ruled in January that a marriage equality decision had to be stayed while the state brought the case for review to the court of appeals. Since that ruling on the Utah case, every federal court that has issued a marriage equality ruling has stayed the ruling pending appeal, and Judge Garcia did the same, assuming correctly that Attorney General Greg Abbott, who is running for governor on a platform opposing same-sex marriage, would immediately appeal to the 5th Circuit Court of Appeals.

This will mean that marriage equality appeals are pending in the 4th, 5th, 6th, 9th and 10th Circuits, with arguments in the 10th Circuit in the Utah and Oklahoma cases scheduled for April and the 9th Circuit poised to announce the argument date for the Nevada case. The likelihood of a ruling by at least one court of appeals this summer means that the Supreme Court will most likely have at least one petition for review in a marriage equality case when it convenes in the fall, and probably more than one from several circuits. One may safely predict that the issue of marriage equality will be on the Supreme Court's argument calendar during the 2014-15 Term.

Judge Garcia, a veteran of more than twenty years on the federal bench, was appointed by President Bill Clinton in 1993. Texas attorneys Barry Chasoff and Neel Lane represent the plaintiff couples, Cleopatra De Leon and Nicole Dimetman, who seek recognition of their out-of-state marriage, and Victor Holmes and Mark Phariss, who were rebuffed when they sought a marriage license from the office of Bexar County Clerk Gerard Rickhoff. Rickhoff is a defendant in the case along with Governor Perry, Attorney General Abbott, and Texas Health Commissioner David Lakey. Abbott immediately released a statement vowing to appeal, arguing that in the *Windsor* case the Supreme Court recognized the authority of states to define marriage. Judge Garcia recognized that as well, but observed that the Supreme Court said that such authority was subject to the overriding requirements of the Constitution. ■

Nevada Officials Decline to Defend Marriage Ban in Pending 9th Circuit Appeal

In a sharp change of course, Nevada's governor and attorney general announced on February 10 that they would not defend the state's ban on same-sex marriage in *Sevcik v. Sandoval*, a case pending before the U.S. Court of Appeals for the 9th Circuit. The back-story to this development is interesting and a bit complicated

On January 21, Nevada's Attorney General, Catherine Cortez Masto, filed the state's brief in *Sevcik*, a lawsuit brought by Lambda Legal on behalf of eight same-sex couples who want to marry in Nevada. The district court had ruled in favor of the defendant, Governor Brian Sandoval, finding that the state had a "rational basis" for denying the right to marry to same-sex couples, and that a 1972 Supreme Court decision, *Baker v. Nelson*, precluded ruling for the plaintiffs because the Supreme Court had said that the issue of same-sex marriage did not raise a "substantial federal question." 911 F. Supp. 2d 996 (D. Nev., Nov 26, 2012). Lambda filed an appeal in the 9th Circuit. Masto's brief was tailored to support the district court's opinion, responding to the plaintiffs' argument on appeal that *Baker v. Nelson* was no longer a binding precedent in light of *U.S. v. Windsor*, last year's DOMA case, and that there is no rational basis for the law.

What Attorney General Masto did not anticipate when she filed that brief was that on the same day, January 21, a three-judge panel of the 9th Circuit ruled in *SmithKline Beecham v. Abbott Laboratories*, 2014 U.S. App. LEXIS 1128, 2014 WL 211807, that sexual orientation discrimination claims are subject to "heightened scrutiny," a standard that presumes such discrimination is unconstitutional and puts the burden on the state to show that its challenged policy substantially advances an important government interest. *SmithKline* is an antitrust case involving the pricing of

AIDS medications in which the issue of sexual orientation discrimination came up when Abbott's attorney used a peremptory challenge to keep a gay man off the jury. The court said that removal of a gay juror under circumstances raising the inference that his sexual orientation was the reason for removal required a showing of cause, because heightened scrutiny applies to sexual orientation discrimination claims, in light of the court's reading of *U.S. v. Windsor*. Heightened scrutiny is a test that most legal observers believe same-sex marriage bans cannot survive. The conclusion that heightened scrutiny applies to sexual orientation discrimination claims led Attorney General Eric Holder and President Barack Obama to conclude that Section 3 of DOMA was indefensible.

A few days after the 9th Circuit's ruling, Attorney General Masto announced that she was considering whether to withdraw her brief, because this development had rendered the brief inadequate to defend the marriage ban in the 9th Circuit. A few days of discussion between the attorney general, a Democrat, and Governor Sandoval, a Republican, then ensued, and the conclusion they reached was that the marriage ban was not defensible under this test in the 9th Circuit. On February 10, Masto filed a motion asking to rescind the state's brief and leaving the task of defending the ban to the Coalition for the Protection of Marriage, a conservative organization that had supported enactment of the state's constitutional amendment banning same-sex marriages and that had been allowed to intervene as a defendant. That organization filed its own brief, advancing the standard child-centered arguments and predicting, in effect, the collapse of civilization as we know it if same-sex couples are allowed to marry, as has already happened in many states. (Hear the sound of civilization collapsing throughout the northeastern United States, where same-sex couples

can marry throughout New England and New York.)

This left it up to the 9th Circuit to decide whether to let Nevada withdraw its brief, which it subsequently did. Although it is not clear that Masto will do the kind of turnabout that the Justice Department did in *U.S. v. Windsor*, the DOMA case, where DOJ attorneys actually argued in support of the plaintiff, Edith Windsor, that DOMA was unconstitutional, the state will not put up a fight before the 9th Circuit.

That leaves the tantalizing possibility that a ruling by the 9th Circuit in favor of the plaintiffs would not go any further, since the Coalition for the Protection of Marriage clearly would not have constitutional "standing" to seek Supreme Court review in light of the Court's ruling on standing in *Hollingsworth v. Perry*, holding that the Proposition 8 proponents from California did not have standing to appeal a ruling that Proposition 8 was unconstitutional. On the other hand, Nevada's determination that it can't win and so shouldn't try to do so in the 9th Circuit does not necessarily mean that they think they can't win in the Supreme Court. The 9th Circuit's conclusion that "heightened scrutiny" is the correct standard is based on a three-judge panel's interpretation of last year's DOMA ruling, and it is not an interpretation shared by all constitutional scholars. The Supreme Court itself did not say in *U.S. v. Windsor* that it was evaluating DOMA using "heightened scrutiny." However, it appeared to the 9th Circuit panel that this is what the Supreme Court was actually doing, as its approach to the case did not appear consistent with the normally deferential rational basis analysis. If the 9th Circuit rules against Nevada, Governor Sandoval might conclude that the state should petition the Supreme Court for review, and then argue that the 9th Circuit was wrong about heightened scrutiny. In order to preserve the ability to do this credibly,

the state might refrain from arguing either way before the 9th Circuit.

Meanwhile, the 9th Circuit gave the defendant in its January 21 case, *Abbott Laboratories*, ninety days to decide whether to petition for rehearing before a larger panel of the court. If such a petition is filed and granted, that would suspend the “heightened scrutiny” ruling by the three-judge panel, which then would theoretically not be binding on whichever three-judge panel (drawn from the two dozen judges of the 9th Circuit) hears the Nevada appeal. It’s all in the timing at this point, and could become quite complicated depending whether Abbott files a petition for rehearing or hearing en banc, whether the circuit acts quickly on it and grants or denies it, and also how quickly the circuit schedules oral argument in the Nevada case. The plaintiffs and various organizations who want to file briefs in support of the plaintiffs had until February 25 to file reply briefs responding to the defendants and their amici. After all those briefs are on file, the 9th Circuit will announce when oral arguments will be held.

Meanwhile, the 10th Circuit is hearing oral arguments in *Herbert v. Kitchen*, the Utah marriage case, on April 10 and *Smith v. Bishop*, the Oklahoma marriage case, on April 17, so the race will be on to see which circuit is first out of the box with a marriage equality ruling. A ruling by the federal district court in Norfolk, Virginia, on a summary judgment motion in *Bostic v. Rainey*, another marriage equality case, was imminent, so there may also be an appeal pending in the 4th Circuit before too long. There is already an appeal pending in the 6th Circuit in *Wymyslo v. Obergefell*, in which the district court ordered Ohio to recognize an out-of-state same-sex marriage for purposes of a death certificate. So it appears likely that sometime during 2014 we will have federal appeals court rulings on various aspects of marriage equality with disappointed parties knocking on the Supreme Court’s door, probably from several different circuits. The Supreme Court is likely to open the door and accept one or more marriage equality cases for review. ■

Reenacted Kansas Sodomy Law Found Invalid

On February 14, 2014, the Kansas Court of Appeals upheld the decision of a Finney County District Court jury, which had convicted Christopher Franco of aggravated criminal sodomy after he had anal intercourse with a man with a mental disability, rejecting his argument that the jury should have been charged with a lesser included offense of criminal sodomy under the 2010 reenactment of the state’s sodomy law. *State v. Franco*, 2014 Kan. App. Lexis 6, 2014 WL 585864.

The victim, TWK, is a man in his twenties with a slight mental disability. TWK lived in an apartment with his girlfriend, who mothered Franco’s child. TWK and Franco got to know one another during Franco’s visits to see his son. During these visits, Franco would usually demonstrate boxing and wrestling

County District Court jury convicted Franco of aggravated criminal sodomy and acquitted him of battery. Franco appealed to the Court of Appeals on multiple grounds, including instructional error, insufficiency of the evidence, and prosecutorial misconduct.

On appeal, Franco argued two jury instruction errors. First, Franco argues the jury should have received a Bunyard instruction. See *State v. Bunyard*, 281 Kan. 392, 414-15, 133 P.3d 14 (2006). A Bunyard instruction informs the jury that under Kansas law, rape occurs when the victim has initially consented to sexual intercourse with the perpetrator and then clearly withdraws that consent during the act, so long as the perpetrator then fails to stop within a reasonable time. Second, Franco argued that the

The Kansas statute on its face circumvented *Lawrence v. Texas*.

moves with TWK. Franco was larger and physically stronger than TWK. In April 2011, Franco visited the apartment while his son was out of town. Franco called ahead and asked if he could come over and TWK agreed. Franco showed up at the apartment with his current girlfriend; however, soon after Franco asked her to leave. Franco asked TWK to follow him into the bedroom because he had a surprise, at which time he allegedly forced himself onto TWK and performed anal intercourse. TWK stated that he begged Franco to stop, but Franco would not. When Franco’s girlfriend returned, the couple left.

As soon as they left, TWK called a social services agency that assisted him because he had a disability and he told them what happened. The local police were contacted at that time. Franco was charged with one count of aggravated criminal sodomy and with one count of misdemeanor battery. Franco contended that the sex was consensual. The Finney

jury should have been instructed on criminal sodomy as a lesser included offense. Franco did not object to the jury instructions during the trial.

When assessing a challenge to jury instructions, the Kansas Supreme Court analyzes the preservation of the issue at trial, the legal appropriateness of the instruction, the factual support in the evidence for the instruction, and the harmlessness of any actual error. *State v. Plummer*, 295 Kan. 156 (2012).

In this case, it would seem that the jurors did not need additional guidance on determining Franco’s guilt when he chose to continue engaging in anal intercourse after TWK failed to give consent, and in fact asked him to stop. There was no initial consent given, so Bunyard would not change the result in this case. On that basis, the Court of Appeals found that the district court did not err in omitting a Bunyard instruction.

Franco argued with regard to the second jury error that the jury should

have been instructed on criminal sodomy, a misdemeanor and lesser included offense of aggravated criminal sodomy. Criminal sodomy prohibits consensual anal intercourse between persons of the same sex who are 16 years of age or older. The Court of Appeals was challenged with deciding whether criminal sodomy can be constitutionally enforced post *Lawrence v. Texas*, 539 U.S. 558 (2003). In 2010, the Kansas Legislature had actually readopted the criminal sodomy statute after *Lawrence* as part of the recodification of the criminal code. The reenactment of the sodomy statute criminalized the same acts that were found to be constitutionally protected in *Lawrence*. The Court of Appeals reexamined the reenactment in this case.

In *Lawrence*, the Supreme Court decided that a Texas sodomy statute was unconstitutional in punishing private, consensual adult acts. The Court found that the conduct at issue came within the sphere of liberty protected by the 14th Amendment Due Process Clause. In turn, in this case the Kansas Court of Appeals held that the Kansas law as applied to private consensual conduct was unconstitutional, and thus could not be charged as a lesser included offense. The U.S. Supreme Court ruling is a binding precedent on the Kansas courts. Therefore, Franco failed to demonstrate that the lack of a criminal sodomy charge was an error in jury instruction that should result in reversing his conviction.

Franco's remaining two arguments, lack of legal sufficiency and prosecutorial misconduct, both failed to convince the Court of Appeals to overturn his conviction. The interesting part of this case is the action by the part of the Kansas Legislature to purposely reenact a criminal sodomy statute to punish those who engage in private, consensual same-sex anal intercourse. The Kansas statute passed in 2010 on its face circumvented the *Lawrence v. Texas* decision. Although the Kansas Court of Appeals might have held the entire statute to be facially invalid, as the 4th Circuit recently did in the case of the Virginia sodomy law, the court merely held that in this instance a criminal defendant could not be charged with a lesser included offense of criminal sodomy under the reenacted statute. — *Tara Scavo*

Tara Scavo is an attorney in Wash. D.C.

Idaho Supreme Court Says Co-Parent Can Adopt Partner's Children

The five-member Idaho Supreme Court ruled unanimously on February 10 that the state's adoption law would allow second-parent adoptions, reversing a decision by Ada County Magistrate Judge Cathleen MacGregor-Irby, who had dismissed an adoption petition on the ground that the petitioner's California marriage to the children's legal mother was not recognized in Idaho. The opinion in *In re Doe*, 2014 Ida. LEXIS 34, 2014 WL 527144, by Justice Jim Jones, gave a literal interpretation of the statute's provision stating that "any adult" who is at least fifteen years older than the person being adopted can petition to adopt somebody. Surprisingly, the court did not address a problem highlighted by Justice Joel D. Horton's concurring opinion: that the statute gives the court

which Rene provided written consent. They submitted a Pre-Placement Home Study performed by a certified professional. The Home Study reported that Darcy has been the boys' primary caregiver, while Rene's work has provided the main financial support for the family. The children told the professional that they regarded Darcy as their mother, and the Study support the adoption petition. However, Judge MacGregor-Irby dismissed the petition without holding a hearing, stating that "the petitioner must be in a lawfully recognized union, i.e. married to the prospective adoptee's parent, to have legal standing to file a petition to adopt that person's biological or adopted child." The judge rejected a motion to amend or reconsider her decision. The

The opinion gave a literal interpretation of the statute's provision stating that "any adult" can petition to adopt somebody.

discretion to terminate the parental rights of the parent who is consenting to the adoption of their child by somebody to whom they are not married.

Although the court assigned pseudonyms to all the parties in this case, the parents evidently decided to go public, because a news report about the decision published by the *Idaho Statesman* identifies Darcy Drake Simpson and Rene Simpson as the couple in question. Rene gave birth to their first son in 1998, and adopted a second boy as an infant in 2001. The women had a non-legal commitment ceremony in Boise in 1997, formed a Vermont Civil Union in 2002, and married in California last year. However, Idaho does not recognize any legal status for them as a couple, and has a state constitutional amendment banning marriages or civil unions for same-sex couples.

After the women's marriage, Darcy filed a petition to adopt the two boys, for

motion argued that the decision should not have been made without a hearing, and that the adoption statute of Idaho does not require the petitioner to be married to the children's legal parent.

The Supreme Court first ruled that Judge MacGregor-Irby violated Darcy's right to due process of law by dismissing her petition without holding a hearing to consider the jurisdictional question. "Jane Doe was given no opportunity to be heard," wrote Justice Jones. "Furthermore, she had no notice that her petition could potentially be dismissed because there was no opposition to it. Rather, the magistrate court acted unilaterally in dismissing it." The court concluded that this action "deprived Jane Doe of due process because she was not given notice and the opportunity to be heard in a meaningful manner." Even more to the point, the court found that the adoption statute itself provides that an adoption

petitioner is entitled to a hearing.

More importantly, the court found that MacGregor-Irby had misconstrued the adoption statute. The court agreed with Darcy's argument that the statute does not require her to be married to Rene in order to adopt the children. MacGregor-Irby had written that there was not any provision in the statute that allows for such adoptions, and concluded that allowing such adoptions would not be consistent with "legislative intent." But courts generally do not try to discern legislative intent if a statute is "unambiguous" and can be interpreted by resort to the "plain meaning" of the words used by the legislature. In this case, the court criticized MacGregor-Irby for failing to determine whether the statute was unambiguous in its description of who could petition to adopt a child.

The relevant provision states that "any minor child may be adopted by any adult person residing in and having residence in Idaho, in the cases and subject to the rules prescribed in this chapter." As far as the court was concerned, "'any adult person' is susceptible to only one interpretation — a human being over the age of 18," and thus is "unambiguous." Furthermore, the court found that the "cases" and "rules" referred to in that provision had nothing to do with the marital relation, if any, between the petitioner and the children's legal parent. Although the statute mentions "spouse" and "married" several times, those terms are never used in a way suggesting that the adoption petitioner must be married to the legal parent.

Justice Jones insisted that "this is not a case dealing with same-sex marriage. Rather, it is strictly a case dealing with Idaho's adoption laws. Those laws, including the issue of who may adopt, are set by the Idaho Legislature. The Legislature has imposed no restrictions that would disqualify Jane Doe from seeking to adopt Jane Doe I's children, and the Court will not imply any such restrictions based upon Idaho's marital statutes. We emphasize that Jane Doe's sexual orientation was wholly irrelevant to our analysis. Likewise, it is immaterial in determining whether Jane Doe satisfies the statutory requirements for adoption." The court sent the case back to Judge MacGregor-Irby for a

determination whether approving the adoption would be in the best interest of the children.

Justice Horton's concurring opinion sounded a cautionary note. The statute says that the legal parent or parents of a child must give consent for the child to be adopted, unless their parental rights have previously been terminated, and that parents consenting to an adoption must simultaneously consent to the termination of their parental rights. Upon granting of the adoption, those rights are terminated "unless the decree of adoption provides otherwise." "Thus," wrote Justice Horton, "the judge hearing the adoption petition may, but is not required to, terminate the parental rights of the parent or parents consenting to the adoption. The Legislature has not identified the standards, if any, by which judges are to exercise their discretion in determining whether to terminate the parental rights of natural parents when proceeding with adoptions."

"The takeaway is simply this," wrote Horton: "Parents wishing for a new spouse or domestic partner to adopt must offer to consent to the termination of their parental rights and hope that the judge doesn't accept the offer." Of course, for the judge to accept the offer would be absurd, since the adoption petition would specify that the petitioner does not seek to terminate the parental rights of his or her partner, especially where, as in this case, the couple are actually married — even though an Idaho court is required, as of now, to treat their marriage as invisible and unrecognized.

There is a lawsuit pending in federal court challenging Idaho's ban on same-sex marriages. Since Idaho is in the 9th Circuit, which recently held that sexual orientation discrimination claims are subject to "heightened scrutiny," chances are good that the federal court will rule in favor of the plaintiffs in that case. But, in the meantime, this ruling by the Idaho Supreme Court suggests that Idaho couples have a mechanism to solidify the legal status of their families through second-parent adoptions even though the marriage ban is still in effect.

The attorneys for the Simpsons include the Boise law firm of Mauk & Burgoyne, Nate Peterson Law PLLC, and Lisa Shultz. ■

1st Circuit Vacates Kosilek Ruling for En Banc Review

A majority of the five active judges of the U.S. Court of Appeals for the 1st Circuit has voted to withdraw and vacate the 2-1 panel decision in *Kosilek v. Spencer*, 2014 U.S. App. LEXIS 951, 2014 WL 185512 (1st Cir., Jan. 17, 2014), which had ruled that the Massachusetts Department of Corrections must provide gender reassignment surgery for Michelle Kosilek, who is serving a sentence of life imprisonment with no chance for parole upon conviction of the murder of her spouse. In its brief statement accompanying the order, 2014 U.S. App. LEXIS 2660 (Feb. 12, 2014), the court gave the parties until March 14 to file any supplemental briefs to those that are already on file in the case, and set the same deadline for prospective amici, who are required to seek prior leave of the court before filing. Reply briefs would have to be filed by March 21. The court set en banc hearing for May 8, 2014. Given the size of the circuit, things do not look good for Kosilek getting her gender reassignment surgery.

Assuming that the judges in the majority on the panel were not interested in rehearing the case, this could mean that the dissenter and the other two active members of the circuit all voted for rehearing. Although this does not necessarily mean that the other two judges are set upon supporting the dissenter on the merits, one suspects they would not have voted for rehearing if they agreed with the majority.

Among the various amicus parties that have already filed briefs in the case are a coalition of LGBT and transgender-specific groups represented by Gay & Lesbian Advocates & Defenders, the Boston-based LGBT public interest law firm for New England. ■

1st Circuit Finds Introduction of Evidence of Co-Defendants' Sexual Orientation in Criminal Trial Was Harmless Error

On February 11, 2014, a three-judge panel of the United States Court of Appeals for the First Circuit unanimously found that the introduction of evidence of two co-defendants' sexual orientation in their criminal trial for drug and gun charges was a harmless error. *United States v. Delgado-Marrero*, 2014 U.S. App. LEXIS 2587 (1st Cir., Feb. 11, 2014). Judge Juan R. Torruella wrote the opinion for the panel that also included Judges Jeffrey R. Howard and Ojetta Rogeriee Thompson.

The case arose in the context of "Operation Guard Shack," an FBI reverse sting operation meant to combat police corruption in Puerto Rico. In 2009, the FBI hired a Puerto Rican police officer, known as "Officer I"

all counts. They were each sentenced to concurrent terms of ten years on Counts One and Two, corresponding to the statutory minimum for possession with intent to distribute five kilograms or more of cocaine. On the gun counts, they each received a five-year sentence to run concurrently with their ten-year sentences, for a total of fifteen years of imprisonment each.

Both defendants raised a number of issues on appeal, but Rivera in particular argued that the evidence of the defendants' respective sexual orientations violated Federal Rules of Evidence 402 and 403 and violated his right to a fair trial.

His first objection on this front related to the introduction of his co-

didn't you tell the FBI if they wanted to know any details about Raquel Delgado's wife – or rather life, you would have to ask her girlfriend, San Juan Municipal female Sergeant Wanda Rivera?" At a sidebar on the objection, Judge Fusté explained why he overruled the objection, stating that this evidence contradicted Delgado's defense of a romantic relationship with Officer I because "[u]sually lesbians or gay people don't cross lines to the opposite sex." When defense counsel disagreed, he added that this was "what I've learned and seen in my 67 years of age."

The panel found the inadequacy of Judge Fusté's balancing analysis under Rule 403 to be "immediately obvious." First, "[w]hatever limited probative value this evidence might have had in isolation, however, was further undercut by the undisputed testimony of Delgado's ex-husband that the two had children together and maintained an eight-year heterosexual relationship." Furthermore, "[n]o evidence was presented that Delgado was not interested in sexual relationships with men, or even that she preferred women to men as sexual partners" and "evidence of one relationship with another woman had – at best – marginal relevance to the question whether she had a sexual relationship with Officer I."

The panel then focused on the well-established federal appellate court precedent for the proposition that "evidence of homosexuality has the potential to unfairly prejudice a defendant." With that in mind, the panel found it "patently obvious that [the evidence's] minimal probative value was substantially outweighed by the dangers of unfair prejudice, confusing the issues, and misleading the jury." The panel went on find that Judge Fusté "made a serious mistake in weighing the danger of unfair prejudice against the testimony's minimal probative value."

This conclusion, however, did not amount to very much of substance because of the harmless error rule, whereby appellate courts "may not

Judge Fusté explained that bisexuality contradicted what he had "learned and seen in [his] 67 years of age."

in the opinion, to pose undercover as a corrupt policeman with ties to a local drug dealer. He recruited San Juan Municipal Police Officers Raquel Delgado-Marrero and Ángel Rivera-Claudio to provide armed security for a staged drug transaction. The FBI placed hidden cameras and microphones in an apartment in order to record the events. There was also a duffle bag there containing seven packages resembling one-kilogram blocks of actual cocaine.

The FBI later arrested Delgado and Rivera on October 6, 2010 pursuant to a indictment alleging a knowing and intentional conspiracy to possess with intent to distribute cocaine, aiding and abetting each other in an attempt to possess with intent to distribute, and knowingly possessing a firearm in furtherance of the drug trafficking crimes. After a three-day trial, the jury found Delgado and Rivera guilty on

defendant's sexual orientation. Because counsel properly objected at trial, the panel reviewed its admission for abuse of discretion.

Importantly, Delgado's principal defense was one of entrapment; she argued that Officer I improperly induced her to participate in the sham transaction by appealing to a long-lasting friendship and romantic relationship between the two of them. Government prosecutors attempted to undercut this theory by evidence of a lesbian relationship between Delgado and a female sergeant in the San Juan Municipal Police Department. Although U.S. District Court Judge José Antonio Fusté sustained an objection to an earlier question about the relationship, the government pressed much harder on the point during cross-examination of Delgado's ex-husband.

The government asked, "In fact,

disturb the verdict if the error was harmless – that is, if it did not affect Rivera’s substantial rights.” The panel found this an easy question because “Delgado’s sexual orientation has little to do with whether the elements of the offenses were satisfied as to Rivera or whether Rivera had a viable defense.” The panel instead pointed to the “damning evidence that Rivera participated in the sham transaction and satisfied the elements of the offenses of conviction.”

Next, the panel similarly handled Rivera’s second and final sexual orientation evidence objection. Rivera also appealed the introduction of evidence pointing to his own homosexuality, including “homosexual banter” in the video of the sham transaction and his alleged sexual interest in another undercover officer. The panel reviewed this argument for plain error because Rivera’s counsel did not object at trial.

With a much briefer analysis, the panel found “that any error in allowing evidence of Rivera’s sexual orientation did not affect the verdict.” Critically, Rivera made “no argument that the government’s evidence was otherwise so weak that evidence of his homosexuality was likely to have tipped the scales against him.” Again relying on the “highly incriminating” video evidence and witness testimony, the panel concluded that “there is a high probability that the alleged error concerning Rivera’s homosexuality did not affect the verdict” and, therefore, “any such error was harmless.”

Luckily for Delgado and Rivera, other arguments they made on appeal were more successful. The panel agreed that Delgado was entitled to a new trial because of the exclusion of a defense witness. As for Rivera, the panel gave the government thirty days to decide whether it would prefer a remand for either resentencing or a new trial, in light of the failure of Judge Fusté to instruct the jury that the drug quantity question required a finding beyond a reasonable doubt. – *Matthew Skinner*

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

Another Window Opens for Early Marriages in Illinois

A federal judge who ruled in December that the Cook County (Illinois) Clerk could not delay issuing marriage licenses to same-sex couples when one of the intended spouses was critically ill has moved a step further, granting a summary judgment motion requiring the Cook County Clerk to implement the state’s new marriage equality law immediately. Consequently, on February 21 it became possible for same-sex couples to get married in Cook County (Chicago and inner suburbs). *Lee v. Orr*, 2014 U.S. Dist. LEXIS 21620. Soon the plaintiffs’ lawyers from Lambda Legal and the ACLU got to work persuading clerks in other counties to comply with the ruling.

On November 5, 2013, the Illinois legislature gave final approval to Senate Bill 10, which amends the Illinois marriage statute to authorize same-sex couples to marry. Under the Illinois Constitution, a bill passed after May 31 may not go into effect until the following June 1, unless it passes with at least 3/5 of the votes in each house of the legislature. S.B. 10 passed by a majority in each house, but not 3/5. But there were people with serious medical issues who might not make it to June 1 and who desperately wanted to marry their partners. This would have both emotional and practical consequences, especially in terms of inheritance taxes, possible intestacy rights, and benefits eligibility for a surviving spouse under pension plans and public benefit programs.

Lambda Legal and the ACLU, which had been collaborating on marriage equality litigation in the Illinois state courts that was pending when the bill passed, went into federal court in Chicago on behalf of a same-sex couple in that situation, suing to compel the Cook County Clerk to issue a license to this couple, and obtained such an order in November, resulting in a decision published on December 5 by District Judge Thomas M. Durkin (*Gray v. Orr*, 2013 WL 6355918 [N.D. Ill.]). They filed another case in federal court, this time

seeking to expand the relief beyond the original plaintiff couple to all those similarly situated, and won that order on December 10, from Judge Sharon Johnson Coleman (*Edwards v. Orr*, 2013 WL 6490577 [N.D. Ill.]).

Finally, having been successful in getting an order that the Cook County Clerk set up a procedure to issue licenses to same-sex couples presenting critical medical issues, Lambda Legal and the ACLU went one step further, asking Judge Coleman on December 24 on behalf of a new set of plaintiffs to order the Cook County Clerk to ignore the June 1 starting date and begin granting licenses to qualified same-sex couples immediately. Unlike the prior two orders, which got quick action because the plaintiffs were alleging medical emergencies (and at least one of those who benefited from early access to marriage has passed away already, shortly after marrying), this motion evidently gave the court some pause, since Judge Coleman took until February 21, almost two months, to issue her new Order.

“There is no dispute here that the ban on same-sex marriage violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and infringes on the plaintiffs’ fundamental right to marry,” she wrote, pointing out that Clerk David Orr and the state’s Attorney General, Lisa Madigan, both agree with this conclusion. “Since the parties agree that marriage is a fundamental right available to all individuals and should not be denied,” she continued, “the focus in this case shifts from the ‘we can’t wait’ for terminally ill individuals to ‘why should we wait’ for all gay and lesbian couples that want to marry.” Quoting from Dr. Martin Luther King, JR., she wrote: “The time is always ripe to do right.”

“This Court has no trepidation that marriage is a fundamental right to be equally enjoyed by all individuals of consenting age regardless of their race, religion, or sexual orientation, and the public policy of this State has been duly

amended to reflect that position,” wrote Judge Coleman. However, she pointed out, the only defendant in this particular law suit is Cook County Clerk David Orr, so “the complaint affects only one county and there is no opposition.” Even though the court found that the ban on same-sex marriage that exists until June 1 violates the 14th Amendment, “this finding can only apply to Cook County based upon the posture of the lawsuit.”

Finding no reason to delay further, the court declared that the existing statutory provisions banning same-sex marriages are unconstitutional, and ordered Clerk Orr to begin issuing marriage licenses. Governor Pat Quinn reacted to the ruling by urging other county clerks to fall into line, but the *Chicago Tribune* reported on February 25 that “officials from Chicago’s collar counties say they are bound by state law to wait until June 1 to follow suit.” Of course, residents of those counties adjacent to Cook County could go into Chicago to get their licenses, and some had already done according to the *Tribune* article. Meanwhile, by February 26 the Champagne County clerk had begun issuing licenses, and Lambda Legal sent an “open letter” to all the remaining county clerks setting out chapter, verse, and case law as to how they were all bound to apply the ruling, since the Attorney General had intervened and the ruling that the existing ban was facially unconstitutional was binding on the state. The McLean County clerk announced that their office would begin issuing licenses during the first week in March, and the Macon County Clerk wrote to Attorney General Lisa Madigan, asking for guidance. Some clerks expressed concern that if they issued licenses prematurely, the validity of the marriages might later be questioned. Since county clerks perform a ministerial function and have no authority to exercise discretion about whether to allow couples to marry, Lambda Legal argues, they were all bound to comply with the court’s order, but the court’s order, by its terms, applied only to Cook County.

Judge Coleman, formerly an Illinois state appellate judge, was appointed to the federal bench by President Barack Obama and has been serving since her confirmation in 2010. ■

Federal Court Refuses to Dismiss Lesbian’s Title VII Claim against Puerto Rican Municipality

U.S. District Judge Jay A. Garcia-Gregory denied a motion to dismiss a Title VII complaint in *Maldonado-Catala v. Municipality of Naranjito*, 2014 U.S. Dist. LEXIS 20737 (D. Puerto Rico, Feb. 15, 2014), even though the factual allegations suggest that the main reason the plaintiff suffered harassment and adverse treatment was due to her sexual orientation. The court found that plaintiff’s factual allegations, at least for purposes of the pleading stage of the litigation, provided sufficient indications that she was treated differently from male employees to

mainly of sexually explicit jokes and suggests that one “good sexual encounter with a male” who “rectify her sexual preference.” She was also the recipient of statements demeaning gay people, and she alleged that such statements by co-workers were made in the presence of her supervisor. She also received harassing emails from a computer that was in the sole control of the city’s Chief of Field Operations. She feared filing a formal complaint, but brought her “concerns” to the mayor, who instructed her to put her complaint in writing and deliver it to the Director of Human

The municipality premised its motion to dismiss on the argument that Title VII’s ban on sex discrimination does not reach sexual orientation discrimination.

preserve her sex discrimination claim for discovery.

The complaint alleges that “the defendants took discriminatory and retaliatory actions against her because she was ‘a woman, lesbian, and had complained of sexual harassment.’” Maribel Maldonado-Catala also asserted supplementary state law claims, which the court did not address, since the motion to dismiss was aimed at getting the case knocked out of federal court by winning dismissal of the Title VII claim.

According to her allegations, the plaintiff, an Emergency Management Technician with the municipality, is “openly lesbian” and “her sexual orientation is known by all the Defendants.” The harassment of which she complained was verbal, consisting

Resources. She did this and was told her complaint would be addressed, but “the promise never materialized.” Indeed, she alleges that after she made this complaint, she suffered various adverse actions, which form the basis of her retaliation claim.

The municipality premised its motion to dismiss on the argument that Title VII’s ban on sex discrimination does not reach sexual orientation discrimination. Under controlling precedent in the 1st Circuit, *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1999), although “it is a noxious practice, deserving of censure and opprobrium,” sexual orientation discrimination is not actionable as a form of sex discrimination under Title VII. However, wrote Judge Garcia-Gregory, “this does not win the day for

Defendants” if the complaint “contains sufficient factual allegations showing that ‘members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.’” “After careful consideration,” wrote the judge, he concluded that this complaint met that test.

“Surprisingly,” wrote the judge, “the parties do not discuss in any detail whether the comments and jokes hurled at Plaintiff were made, at least in part, ‘because of’ her sex.” He pointed out that in her complaint, the plaintiff said that this case involved “male employees harassing a female employee with sexually provocative and harassing language.” The judge also pointed out that in cases “such as this one, where the male-on-female harassment includes sexually inappropriate comments, ‘courts and juries have found the inference of discrimination easy to draw.’” Continued Judge Garcia-Gregory, “The inference is that the sexually inappropriate jokes and advances are related to the sex of the victim; or put differently, that the comments were made ‘because of’ the victim’s sex.” In addition to comments, the plaintiff had alleged on concrete instance of sex discrimination. An audit of the municipality concluded that employees did not have their licenses and certifications up to date. The municipality paid for male employees to remedy this problem, but denied payment to the plaintiff, who “has had to pay for licensure requirements herself.” Plaintiff alleged that the director of the Municipal Emergency Management Office, a man, told her directly “that she would not be reimbursed ‘despite her fellow employees being reimbursed,’” all those fellow employees happening to be male.

Thus, at least for purposes of a motion to dismiss, the court concluded that the plaintiff met the pleading requirements of stating a sex discrimination claim, and rejected the municipality’s attempt to get the case thrown out of federal court. ■

Virginia Sodomy Law Constitutional as Applied in Virginia’s State Courts

In two separate cases during February, the Court of Appeals of Virginia took a different view from the Fourth U.S. Circuit Court of Appeals on the constitutionality of the state’s sodomy law. Virginia’s sodomy law (Code § 18.2-361[A]) provides “[i]f any person ... carnally knows any male or female person by the anus or by or with the mouth, or voluntarily submits to such carnal knowledge, he or she shall be guilty of a [felony].” In *MacDonald v. Moose*, 710 F.3d 154 (March 2, 2013), the Fourth Circuit held, in a habeas corpus case, that the sodomy statute was facially unconstitutional, in part, because it “does not mention the word ‘minor,’ nor does it remotely suggest that the regulation of sexual relations between adults and children had anything to do with its enactment.” (The Supreme Court denied a certiorari petition filed by the state in *MacDonald v. Moose*.)

However, in both *Saunders v. Commonwealth*, 2014 WL 392913 (Feb. 4, 2014) and *Toghill v. Commonwealth*, 2014 WL 545728 (Feb. 11, 2014), two cases dealing with adults convicted of consensual sodomy with a minor, the Virginia Court of Appeals held that the statute was constitutional, at least as applied, denying appeals that relied on *MacDonald*.) Judge Glen A. Huff wrote the decision in *Saunders*, holding that the state courts remained bound by the Virginia Supreme Court’s opinion in *McDonald v. Commonwealth*, 630 S.E.2d 754 (2006), which had rejected a challenge to the sodomy law, because “[o]nly decisions of the United States Supreme Court can supersede binding precedent from the Virginia Supreme Court.” Therefore, Judge Huff concluded that “the Fourth Circuit’s holding in *MacDonald* is merely persuasive and does not bind this Court. This case involved actions between an adult and a minor; thus, it is removed from the ruling in *Lawrence*.”

(Ironically, despite variant spelling, the two *McDonald* cases involve the same defendant, whose conviction was affirmed by the Virginia Supreme Court, but who then won a petition for habeas corpus from the 4th Circuit on the finding that he was prosecuted under an unconstitutional statute!)

The *Saunders* opinion is relatively light on constitutional analysis. For example, Judge Huff does not address the concerns raised by the Fourth Circuit about the sodomy statute and its unqualified prohibition on sodomy between any two persons. However, the Virginia Court of Appeals decisions flow from 4th Circuit Judge Albert Diaz’s dissent in *MacDonald v. Moose*. Judge Diaz noted that “[r]easonable jurists could disagree on whether *Lawrence* represented a facial or an as-applied invalidation of the Texas sodomy statute” and, therefore, Judge Diaz did not agree with the majority’s conclusion that Virginia’s sodomy statute was facially unconstitutional.

A different panel of the court decided *Toghill*, in which an opinion by Judge Teresa M. Chafin followed Judge Huff’s reasoning and similarly rejected the constitutional challenge to the conviction.

The differences of opinion between these courts, and even judges within the same court, highlight at least one reason why courts prefer “to enjoin only the unconstitutional applications of a statute while leaving other applications in force, or to sever its problematic portions while leaving the remainder intact” (*MacDonald*, at 166). Of course, the disagreement could easily be resolved if the Virginia legislature wrote a better statute.

– Eric J. Wursthorn

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Transgender Inmate's Right to Treatment Survives PLRA Exhaustion Fight

An Ohio transsexual inmate, whose estrogen was stopped by correctional officials, successfully navigated the administrative exhaustion shoals of the Prison Litigation Reform Act in *Lee v. Eddy*, 2014 U.S. Dist. LEXIS 17920 (S.D. Ohio, February 12, 2014), per U.S. Magistrate Judge Marc R. Abel's Report & Recommendation [R & R]; but she is no closer to resumption of treatment. According to the R & R, plaintiff Antoine Lee began receiving estrogen hormones in 1997 at the age of 18. The opinion is short on describing her journey, except also to state that she identifies as female and has breast implants. Following her arrival in the Ohio State prison system in February of 2012, corrections medical staff

Although Lee sought restoration of her hormone treatment repeatedly, Ohio officials claimed that the Prison Litigation Reform Act, 42 U.S.C. § 1997(e)(a) ["PLRA"], entitled them to summary judgment, including dismissal of her case with prejudice, for failure to exhaust administrative remedies. Much of Judge Abel's R & R recites details of the parties' legal positions.

Lee filed at least four grievances after her estrogen was cut off in February of 2012. She received no decision on the first two prior to her transfer to the Belmont facility, where she remains. At Belmont, medical staff advised her that they "were working to reinstate her hormone therapy." Five months later, Lee filed two more grievances,

civil rights complaint because she did not file an appeal about her first grievance -- notwithstanding the facts that: (1) Corrections had taken no action on it before her transfer; and (2) the new institution assured her they were working to resume her treatment. The Attorney General further argued that she failed to exhaust against Defendant Medical Director Eddy when she did not name him in her grievances. Finally, the state argued that the grievance she did appeal was deficient because she included a three-page narrative about her history, when "only forms designated by the Office of the Chief Inspector may be used" to file grievances.

Judge Abel's R & R recognized that the PLRA required exhaustion, including adherence to Ohio's timeliness deadlines, citing *Woodford v. Ngo*, 548 U.S. 81, 83 (2006); and all administrative appeals, citing *Booth v. Churner*, 532 U.S. 731, 740-41 (2001). Judge Abel's application of these principles warrants quotation at some length:

"For an acute medical condition, like a heart attack or a diabetic coma, the time of the failure to treat (and therefore the time of the Eighth Amendment violation) can be determined with some precision, and therefore the time limit for filing a grievance can be readily established. Such is not the case for a chronic medical condition that is ignored, or for which treatment is delayed or inadequate. The seriousness of a chronic condition may not become obvious to prison officials until some time passes, and the indifference to that condition -- and the resulting pain suffered by the prisoner that equates to the infliction of punishment -- may not become manifest until then as well. Such a condition is properly identified as "ongoing," and a grievance that identifies the persistent failure to address that condition must be considered timely as long as the prison officials retain the power to do something about it... Only after the passage of several months did plaintiff recognize that her medication

Ohio correctional policy about transsexual inmates provides that "transition" will not be initiated during incarceration.

"abruptly discontinued" her estrogen hormone treatment. As a result, she experienced withdrawal symptoms and depression, underwent "the masculinization process" (the court's phrase), and suffered other severe physical and emotional consequences.

Insofar as it can be gleaned from the opinion, Ohio correctional policy about transsexual inmates provides that inmates receiving hormone therapy prior to incarceration can continue to receive it, but "transition" will not be initiated during incarceration. Decisions about prescribing hormone treatment for patients preparing for gender change surgery or modification or who have had surgery prior to incarceration will be evaluated on a case-by-case basis, with treatment requiring the concurrence of the Chief Medical Officer -- here, defendant Dr. Eddy.

appealing one of them through all three stages of Ohio's prisoner grievance system. The "Disposition of Grievance" in November of 2012 stated that her grievance was untimely and that she did not meet the criteria for hormone therapy. None of the grievances mentioned Dr. Eddy by name, but he was copied on the "Disposition."

The Ohio Attorney General, urging summary judgment, argued that the triggering event for exhaustion purposes was the February 2012 date on which hormone therapy stopped, that she failed to file a grievance appeal from that denial within the days allowed by the Ohio rules, and that the case should be dismissed with prejudice because she "cannot retroactively comply with the timeliness requirement." In short, PLRA exhaustion rules arguably precluded her from commencing a

would not be reinstated. At that point, Lee filed her [grievance]. Because she had continued to be denied hormone therapy for an ongoing condition, I conclude that her complaint was timely [citation omitted].”

The court’s application of “ongoing” violation theory to a PLRA exhaustion argument based on tolling has implications for many prisoners whose interruption of care for chronic conditions (such as HIV) has uncertain immediate consequences.

Judge Abel’s R & R found the argument that Dr. Eddy was not given “fair notice” of plaintiff Lee’s complaint to be “without merit.” Lee’s grievance cited the Ohio regulations on transgender treatment and the involvement of the Chief Medical Officer (Dr. Eddy) in its delivery. Her grievance documents disclosed: “Dr. Eddy, State Chief Medical Officer[,] denied hormonal treatment.” Judge Abel wrote: “Beginning with plaintiff’s informal complaint, any review of plaintiff’s grievance forms would have alerted Dr. Eddy that his conclusion that Lee did not meet the criteria for receiving hormone therapy was the subject of Lee’s grievance. Defendant was provided ample opportunity to address plaintiff’s complaint if he chose to do so.” He did not comment on the argument about using only state forms.

The state can appeal the R & R to the district court; but, nearly two years after her estrogen was stopped, Lee has perhaps finally won her right to be heard. One wonders if asthmatic or diabetic or cardiac patients would face such zealous obstacles if they challenged abrupt denial of a fifteen-year regimen of medication.

Lee was represented by Rickell LaShea Howard, of the Ohio Justice and Policy Center in Cincinnati.

– William J. Rold

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

Texas Court of Appeals Revives Transgender Woman’s Claim to Valid Marriage

The Texas Court of Appeals has reversed a trial court’s granting of summary judgment to a deceased man’s mother and ex-wife after they moved to declare his marriage to a transgender woman invalid in *In the Estate of Araguz*, 2014 Tex. App. LEXIS 1573 (February 11, 2014). In the course of his opinion for the court, Chief Justice Rogelio Valdez found that the legislature had effectively overruled a prior court of appeals case under which a gender reassignment would not be recognized for purposes of the marriage law. On remand, the trial court will have to determine a disputed issue of fact: whether Nikki Araguz was a woman when she married Thomas Araguz.

and Thomas’ marriage declared void as a same-sex marriage, which is banned under Texas law. Thomas’ ex-wife Heather sought to do the same, seeking also to ensure that Thomas’ assets would go to their minor children. Heather filed a motion for summary judgment, alleging that because Nikki was biologically a male at the time of the marriage, it was void under Texas Family Law, which forbids same-sex marriage. Nikki responded with a “no evidence motion,” alleging that she was entitled to judgment as a matter of law because Heather and Simona produced no evidence that the marriage was invalid. Nikki responded to the motions for summary judgment

On remand, the trial court will have to determine whether Nikki Araguz was a woman when she married Thomas Araguz.

Nikki Araguz, identified at birth in 1975 as male, began acting like a female as young as four years old, and was diagnosed with gender dysphoria at eighteen. She was born in California but grew up in Texas. She had her name changed in 1996 to reflect her female status, used the name change to get a new birth certificate from California showing her new name, as well as obtaining a driver’s license in her new name. She received a marriage license from Texas stating that she was female in August 2008. In October 2008, Nikki underwent gender reassignment surgery. Her husband, Thomas, died on July 3, 2010, and on July 15th, Nikki filed a petition in California to change the gender indication on her birth certificate from male to female, which was accomplished on August 30.

On July 12, 2010, Thomas’ mother Simona initiated the action to have Nikki

with facts leading back to her childhood, including medical records that stated she was female prior to her 2008 marriage, even though she had not yet undergone gender reassignment surgery.

On May 26, 2011, the trial court granted Simona and Heather’s motions for summary judgment, holding that “Thomas was not married on the day of his death and that any purported marriage between Thomas and Nikki was void as a matter of law.” The court of appeals reviewed the case de novo since both parties had filed motions for summary judgment and the trial court granted only one. Ultimately, the issue was whether or not Thomas and Nikki had a same-sex marriage. Heather and Simona sought to rely on *Littleton v. Prange*, 9 S.W.3d 223, 224 (Tex. App. –San Antonio 1999, pet. denied), in which the court ruled that a marriage between a transgender woman to a male was invalid as a matter of law

because the original birth certificate stated that she was male.

However, the court of appeals found that this 1999 decision has since been overturned by a 2009 amendment by the state legislature to allow a record of a “sex change” as acceptable proof of identity. Because of this fact and amendment, the court of appeals held that *Littleton* was no longer governing law in preventing Thomas and Nikki’s marriage from being valid, and therefore the trial court’s summary judgment on this fact was incorrect. The court of appeals relied as well on an affidavit from one of Nikki’s doctors (who said affirmatively that Nikki is a woman) to conclude that there was a fact issue regarding Nikki’s sex. Heather and Simona provided no expert testimony to contradict Nikki’s doctor. The court therefore concluded that despite the undisputed fact that Nikki was born a male, her history of gender dysphoria and sex change, explained by the expert testimony of her doctor, would allow a jury to find that Nikki is a woman.

Although the court determined that the trial court erred in its declaration of summary judgment in Heather and Simona’s favor, the court refused to give a judgment immediately in favor of Nikki. While the court’s opinion tended to lean in favor of Nikki’s arguments, because Nikki’s motions was for a no evidence motion for summary judgment, there was no claim on which to award immediate judgment in Nikki’s favor.

Ultimately the court concluded that granting Heather and Simona’s motion for summary judgment was improper, because there was a clear issue of fact presented and disputed by both sides. The court unfortunately refused to go beyond the issue of fact question and did not go into the merit of the claims. Regardless of the court’s refusal to issue a judgment on the merits, this ruling is a significant step in the right direction in transgender rights, particularly in a state as historically conservative as Texas. Of course, if the subsequent ruling by a federal district court striking down the state’s ban on same-sex marriage survives review, this issue will fade in significance because gender will be irrelevant to the right to marry. – *Parul Nanavati*

Nanavati studies at N.Y. Law School (15).

New Uganda Anti-Homosexuality Law Joins Wave of New Repressive Laws in Africa

After weeks of hemming and hawing, Uganda President Yoweri Museveni signed into law on February 24 the Anti-Homosexuality Act, which toughens the nation’s existing criminal penalties for homosexual sex by broadening the definition of the offense and arguably imposing a life prison sentence for any commission of homosexual acts. As originally introduced some years ago, the measure would have imposed the death penalty for “aggravated homosexuality,” earning it the nickname of “Kill the Gays Bill,” but more recent versions had significantly moderated the penalties, imposing a life sentence for “aggravated homosexuality” and substantial prison terms for ordinary homosexual acts,

which is so broadly defined that it would take in just about any activity that could be broadly characterized as supportive of gay people and gay rights, and also provides that any organization that engages in such activity would lose its legal status and find its officers subject to prison terms as well.

In other words, as the title suggests, the new law is intended to drive homosexuality in Uganda deeply underground and purge the country entirely of openly gay people and gay-supportive institutions. The measure also provides that foreigners present in Uganda who are charged with an offense under the Act can be extradited. After the law was signed, a tabloid newspaper

The new law is intended to drive homosexuality in Uganda deeply underground.

but a last minute amendment prior to enactment imposes life imprisonment across the board. For “Attempt to commit homosexuality,” the penalty is seven years, but an attempt to commit “aggravated homosexuality” earns a life sentence, even when the attempt does not result in the acts condemned by the statute. The statute also imposes substantial jail sentences for “aiding and abetting homosexuality,” “conspiracy to engage in homosexuality,” “procuring homosexuality by threats,” or detaining a person “with intent to commit homosexuality.”

In addition to these draconian penalties, the measure imposes a life prison sentence on any person “who purports to contract a marriage with another person of the same sex,” and up to seven years in prison for any person who conducts such a marriage ceremony. The bill authorizes prison sentences for anybody who “promotes” homosexuality,

in Uganda published a sensationalistic article purporting to identify the “top 200 homosexuals” in Uganda, thereby exposing numerous gay people to potential assault and harassment as well as prosecution under the new law.

A lawsuit pending in the U.S. District Court in Massachusetts (see below, *Civil Litigation Notes*), brought by a Uganda gay rights group, contends that Rev. Scott Lively and other U.S. Evangelical Christian Ministers played a role in inciting Ugandan legislators to introduce and push the measure to enactment. The plaintiff group’s status is undoubtedly now in danger because of the new law.

President Museveni had hesitated to sign the measure in the face of international pressure, despite its seeming great popularity with the public and his political party, and he called for a panel of scientists to advise him on whether homosexuality was “genetic,” in which case he would not sign the

bill. The scientists, construing their task narrowly, reported that a gay gene has not been found and thus it must be a learned, voluntary behavior. Their basis for so concluding is unknown, because their report was not in writing (although a written version was supposed to follow). After briefly flirting with the idea of seeking more scientific opinion from outside the country, Museveni bowed to local pressure and signed the measure, despite warnings that it would complicate his country's relations with major western funders. U.S. Secretary of State John Kerry announced that the U.S., a major financial supporter of Uganda, was reconsidering its relationship with the country. Norway put a hold on a substantial financial donation, the World Bank held up a \$90 million loan, and Canada and the U.K. raised loud protests, as did a group of 18 European Union ambassadors. In addition, some of the scientists on the panel convened by Museveni claimed that he had misrepresented their findings. *Sciencemag.org* reported that Paul Bangirana, a clinical psychologist at Makerere University in Kampala, stated, "The report does not state anywhere that homosexuality is not genetic, and we did not say that it could be unlearned." Some of the committee members resigned in protest about the use of their report to justify the legislation. Unfortunately, from Museveni's comments upon signing the bill it appeared that external opposition had only increased the internal pressure to sign and stand up against outside, Un-African influences.

According to one news report, Uganda was the eleventh African country to toughen its anti-gay laws in recent years, the others being Nigeria (which substantially increased criminal penalties in January, leading to vigilante attacks against gay people, especially in the northern part of the country which is under tight Islamic control), Cameroon, Gambia, Zambia, Senegal, Tunisia, Morocco, Algeria, Zimbabwe and Malawi. According to Amnesty International, 38 out of 54 countries in Africa have criminal laws against homosexual sex, in most cases a legacy of colonial rule dating from the 19th century. Many of the older laws are similar to those under recent litigation attack in India and Singapore, having been first passed when Britain was ruling those nations as colonies. ■

Mohawk-Sporting Flight Attendant Loses Discrimination Suit Upon Court's Reconsideration

We previously reported about a December 3, 2013, decision by U.S. District Judge Jose L. Linares, refusing to dismiss an employment discrimination claim by gay Continental flight attendant Ray Falcon, who showed up for work one day sporting what his supervisors called a "Mohawk" haircut that they found unacceptable. In order to meet his flight, Falcon got a co-worker to give him a quick clipping, and he claims to have suffered severe emotional distress as a result of the incident. Claiming that he had suffered discrimination because of his sexual orientation, he sued Continental under the New Jersey Law against Discrimination, which bans sexual orientation discrimination. In the December 4 ruling, Judge Linares partially denied Continental's motion for summary judgment, allowing Falcon to continue with the lawsuit. See *%Falcon v. Continental Airlines%*, 2013 U.S. Dist. LEXIS 171349, 2013 WL 6331103 (D. N.J., Dec. 4, 2013) (unpublished decision).

Continental filed a motion for reconsideration, leading Judge Linares to issue a new opinion on February 19, 2014. Continental continued to argue that at the time of this incident, the supervisors in question were not aware that Falcon was gay, so they couldn't have discriminated against him due to his sexual orientation. Continental also argued that Falcon had failed to show that he was treated any differently from non-gay flight attendants in this matter of personal grooming. In the new decision in *%Falcon v. Continental Airlines%*, 2014 U.S. Dist. LEXIS 20146 (D.N.J., Feb. 19, 2014) (unpublished decision), Linares continued to side with Falcon on the first issue, but concluded that Continental had the better argument on the second and granted summary judgment in favor of the airline.

Addressing the first issue, Linares said it was inappropriate for Continental

to re-litigate the issue, since the court had "thoroughly considered" Continental's arguments the first time around and rejected them. Linares pointed out that Falcon had specifically alleged in his complaint that he was openly gay at Continental and his supervisors knew that, and Continental had not explicitly denied this in its response to Falcon's opposition to the summary judgment motion. According to the court, any assertion by the plaintiff that the defendant does not expressly deny in such motion documents is deemed to be admitted.

However, the court found that Falcon failed to allege facts necessary to state a discrimination claim — in this case, a claim of hostile environment harassment because of Falcon's sexual orientation. The first element of such a claim is that "the defendant's conduct would not have occurred but for the employee's" sexual orientation. "In other words," wrote Linares, "Plaintiff must establish a causal connection between his sexual orientation and his supervisors' conduct on September 23, 2010. Although this Court held that there is a question of fact as to whether Plaintiff's supervisors knew about his sexual orientation, it never specifically addressed whether there is sufficient evidence in the record to support a finding that the supervisors discriminated against him on account of his sexual orientation, as neither party thoroughly briefed the issue in connection with Continental's [earlier] motion for summary judgment."

Now that the motion for reconsideration had pushed the judge to focus on this issue, he decided that Falcon's factual allegations fell short. "The Court fails to see how a reasonable jury may find by a preponderance of the evidence that Plaintiff suffered discrimination because of his sexual

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MARRIAGE EQUALITY

U.S. DEPARTMENT OF JUSTICE

– Attorney General Eric Holder announced on February 8, at Human Rights Campaign political dinner in New York, that he would be issuing a memorandum on February 10 directing that the Justice Department recognize lawfully contracted same-sex marriages, using a place of celebration rule wherever possible under federal law. The memorandum, addressed to “all department employees,” stated, “It is the Department’s policy, to the extent federal law permits, to recognize lawful same-sex marriages as broadly as possible, and to recognize all marriages valid in the jurisdiction where the marriage was celebrated.” Department prosecutors, for example, are instructed to recognize such marriages “prospectively for conduct that occurred on or after June 26, 2013, the date of the *Windsor* decision,” and “for conduct that occurred prior to June 26, 2013, prosecutors should consult with their Criminal Division, Appellate Section contacts and should exercise discretion in charging someone on the basis of this directive and criminal provisions that depend on marital status.” The Justice Department will recognize marital testimonial privileges in federal litigation and will adopt appropriate interpretations of the terms “spouse,” “marriage,” “widow,” “widower,” “husband,” and “wife” and “any other term related to family or marital status in statutes, regulations, and policies administered, enforced, or interpreted by the Department, to include same-sex spouses whenever allowable.” Holder articulated the Department’s goal as ensuring “equal treatment for all members of society regardless of sexual orientation.” We think several generations of prior Attorneys General of the U.S. are probably spinning in their graves over this development, but it follows logically from statements and positions that Holder has made since the *Windsor* decision was announced, and is consistent with the position argued

by the Solicitor General during the Supreme Court hearing of that case. The full text of the memorandum is available on the Justice Department website. *New York Times*, Feb. 8.

RELIGIOUS FREEDOM? – Bowing to the fact that the number of states allowing same-sex marriage is growing, and that federal courts have been unresponsive to the usual arguments in support of same-sex marriage bans in decisions issued since last year’s Supreme Court ruling in *U.S. v. Windsor*, marriage equality opponents have embraced a new strategy of seeking “religious freedom” laws that would protect individuals, businesses and other institutions if they refuse to provide services or goods to same-sex couples out of religious conviction. Such measures have been introduced in at least half a dozen states, but by the end of February only the Arizona legislature had gone so far as to pass such a measure through both houses. The Arizona bill, SB 1062, caused a firestorm of public protest, which focused on a campaign to get the state’s Republican Governor, Jan Brewer, who had vetoed an earlier version of the bill last year, to veto the new one. Business groups in the state lined up solidly against the measure, which was broadly worded to protect from discrimination liability anybody whose legally challenged action was motivated by sincere religious belief. Legislators made clear that what they wanted to do was to insulate Arizona businesses with religious objections from having to provide goods, services or other accommodations for same-sex weddings, but the broadly worded bill lent itself to much more expansive interpretations, essentially extending a “special right” to discriminate based on religious beliefs. Although Arizona itself does not ban sexual orientation or gender identity discrimination in public accommodations, several municipalities that are home to about 40% of the state’s population do so, and their

enforcement would be thwarted by such a state measure. However, on February 26 Gov. Brewer announced her veto, stating that the broadly-worded bill could have “unintended and negative consequences.” In the meantime, similar measures were rejected or withdrawn after introduction in Idaho, Kansas, South Dakota, Tennessee and Maine, but one was newly introduced in Georgia and another in Missouri, as there was an organized effort by religious groups to get their adherents in state legislatures to introduce copycat versions of the bill. The Georgia bill was withdrawn for modification after some major employers complained that it would be bad for business in Georgia. In Mississippi, a broadly worded religious belief defense bill was unanimously approved in the Senate, but a House committee narrowed it down to be coextensive with the federal Religious Freedom Restoration Act, which is concerned with burdens placed by government on religious practices. There was some concern, however, that even a bill of this reduced scope might be cited by courts to protect religiously-inspired anti-gay service denials by private businesses. In Kansas, the House passed a broadly worded bill by an overwhelming vote of 72-49 on February 12, but it was stalled in the Senate after House passage sparked loud protests. There was a press report on February 28 that the Kansas Senate Judiciary Committee would hold a hearing on March 6 at which legal experts would testify about the interpretation and effect of H.B. 2453, the bill that the House had approved. The committee chair suggested that not enough attention had been paid to the Kansas Preservation of Religious Freedom Act that had been passed by the Senate last year.

DIE-HARD SENATE OPPONENTS – Reacting to the Obama Administration’s approach of using the “place of

MARRIAGE EQUALITY

celebration rule” wherever possible to determine whether the federal government will recognize a same-sex marriage. Republicans in Congress introduced bills intended to dictate a “place of domicile rule” for purposes of federal law, thus “respecting” the decisions by states whether to allow same-sex marriages. The lead House sponsor, Rep. Randy Weber (R-Texas), calls his bill the “State Marriage Defense Act of 2014.” Evidently, Rep. Weber hasn’t bothered to read (or fully comprehend) Justice Anthony Kennedy’s decision in *U.S. v. Windsor*, where Justice Kennedy cited the name of the “Defense of Marriage Act” as part of the evidence that it was an expression of animus against same-sex couples and thus unconstitutional. In the Senate, lead proponents are Sen. Ted Cruz (R-Texas) and co-sponsor Sen. Mike Lee (R-Utah), ironically, both of whom represent states where federal district courts have declared bans on same-sex marriage to be unconstitutional. “The Obama Administration should not be trying to force gay marriage in all 50 states,” said a statement released by Cruz. In the inimitable ungrammatical style that has come to be his trademark, the statement goes on to say: “This bill will safeguard the ability of states to preserve traditional marriage for its residents.”

ALABAMA – The Southern Poverty Law Center filed a marriage recognition suit on behalf of Paul Hard, the surviving spouse of Charles David Fancher, who died in an auto accident on August 1, 2011, soon after the two men had been married in Massachusetts. *Hard v. Bentley*, Civil Action No. 2:13-cv-922-WKW-SFW (M.D. Ala., filed Dec. 16, 2013). Although the original complaint was filed in December, recent news reports indicated that the suit was filed on February 13; perhaps they were referring to a first amended complaint. In any event, Fancher left a will

designating Hard his sole beneficiary, but under Alabama’s wrongful death statute, Hard may not receive any proceeds of the pending wrongful death action, because state law limits the distribution of wrongful death damages to legal spouses and Alabama recorded Fancher as unmarried on his death certificate. Alabama law prohibits the recognition of same-sex marriages. Hard contends that this violates his 14th Amendment rights, and seeks an order that the death certificate be corrected to show Fancher’s correct marital status at the time of his death and that the marriage be recognized under Alabama law. The complaint also seeks an order to the representative of Fancher’s estate to distribute wrongful death proceeds to Hard, his surviving spouse. The suit also seeks a declaration that the provisions of Alabama’s constitution and statutes that prevent the recognition of this marriage are unconstitutional. *Montgomery Advertiser*, Feb. 14.

COLORADO – Colorado attorneys John M. McHugh, Marcus Lock and Ann Gushurst filed suit in the Denver District Court on February 19 on behalf of nine same-sex couples, challenging the constitutionality of Colorado’s state constitutional and statutory ban on the performance or recognition of same-sex marriages. *McDaniel-Miccio v. State of Colorado*. Some of the couples seek licenses to marry in Colorado, while others, already married in other jurisdictions, seek to have their marriages recognized in Colorado. They pursue theories of due process and equal protection, identifying both discrimination because of gender and discrimination because of sexual orientations, as grounds upon which to declare the Colorado same-sex marriage ban unconstitutional. Their complaint includes a “Request for Speedy Hearing,” and its substance will be familiar to anybody who has read the Supreme Court’s opinion in *United States v.*

Windsor or the subsequent marriage equality rulings from numerous states. * * * The legislature approved S.B. 14-019, which would allow same-sex couples resident in Colorado who are married in another state or joined in a civil union in Colorado to file joint state tax returns. The measure passed on February 17 on a largely-party line vote in the Democratic majority legislature. *ColoradoPols.com*, Feb. 18. Of course, this measure will be academic upon an ultimate victory in *McDaniel-Miccio v. State of Colorado* or an affirmative ruling by the U.S. Supreme Court in a marriage equality case.

HAWAII – A man who sought to get a federal court order against implementation of the state’s Marriage Equality Act suffered dismissal of his complaint on February 19 in *Amsterdam v. Abercrombie*, 2014 U.S. Dist. LEXIS 20761 (D. Hawaii). District Judge Susan Oki Mollway found that C. Kauai Jochanan Amsterdam, a Native Hawaiian who “claims to be an ‘officer of the Interim Government of the Kingdom of Hawaii’” and a “leader in the Native Hawaiian and Jewish communities,” lacked standing to seek injunctive relief. Amsterdam had argued that the new law allowing same-sex couples to marry violated various laws “that recognize ‘the unique political status of Native Hawaiians.’” His previous attempts to get the law blocked before it went into effect last year stumbled on the same issue of standing. Amsterdam had failed to allege any concrete harm that he suffered due to the implementation of the law. “Amsterdam does not even attempt to identify an injury unique to him; instead, quite to the contrary, Amsterdam styles himself as a representative of a Native Hawaiian community that he alleges disapproves of the State’s policy. There is no authority for the proposition that Native Hawaiians are exempt from

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the ordinary rules of party standing applicable to all litigants in federal court.”

IDAHO – The parties in *Latta v. Otter* (D. Idaho, filed November 8, 2013), have filed cross-motions for summary judgment, asking the judge to rule expeditiously on the question whether the state’s constitutional and statutory ban on same-sex marriage violates the U.S. Constitution’s 14th Amendment. The motions are scheduled to be heard by Chief United States Magistrate Judge Candy W. Dale on May 5, 2014, in Boise. Some of the plaintiff same-sex couples seek marriage licenses, while others were married in other jurisdictions and are seeking to compel the state to recognize their marriages. The couples are represented by Boise attorneys Deborah A. Ferguson and Craig Durham and the National Center for Lesbian Rights (NCLR).

INDIANA – An attempt to amend the Indiana Constitution to ban same-sex marriages was effectively pushed back by two years when both houses of the legislature approved a revised version of the proposed amendment during February. As originally passed two years ago, the measure would have also banned civil unions or other forms of legal status for same-sex couples. Mounting opposition, including from major business leaders and educational institutions, persuaded some proponents of the measure in the House to agree to strip out the second sentence, leaving only the different-sex definition of marriage, and both houses passed this revised version. Under Indiana’s amendment rules, a proposed amendment must be approved in identical form by two sessions of the legislature, an election intervening, so this measure could come before voters at the earliest in 2016 if it were to be passed in identical form by the next

elected legislature. By then it is possible that the Supreme Court will have ruled in one or more of the marriage equality cases now pending or bound for the federal circuit courts of appeals, which could make the issue moot depending how that court rules. Also, with the slow building in public support for same-sex marriage in Indiana, it is even possible that one or both houses of the legislature might not approve it two years down the road. *Indianapolis Star*, Feb. 18; *Lafayette Journal & Courier*, Feb. 18.

KENTUCKY – On February 25, Fayette County Circuit Court Judge Kathy Stein finalized a second-parent adoption of David Crossen, an adult who was raised by a same-sex couple who married in Massachusetts last October, Joan Callahan and Jennifer Leigh Crossen. Stein relied on a decision by U.S. District Judge John Heyburn II in *Bourke v. Beshear*, 2014 U.S. Dist. LEXIS 17457, 2014 WL 556729 (W.D. Ky.) (see above) on February 12, holding that Kentucky was constitutionally obligated to recognize same-sex marriages contracted out of state. Judge Heyburn did not issue his final Order on the summary judgment motion until February 27, after Stein had ruled, and on February 28 he issued a stay of the Order until March 20 to give the state time to work out compliance issues and/or decide whether to file an appeal of the Order in the 6th Circuit, which is already considering an appeal of a similar order by a federal district court in Cincinnati, Ohio. Reporting on Judge Stein’s ruling to allow Joan Callahan to adopt the son she raised together with Jennifer Leigh Crossen, the *Lexington Herald-Leader* (March 1) reported that family lawyers in Kentucky were poised to file more second-parent adoption petitions as soon as the stay was lifted.

LOUISIANA – A federal lawsuit filed last year seeking recognition of same-

sex marriages performed out of state was dismissed by the federal court because the plaintiffs named only the attorney general as defendant, and the judge determined that the attorney general was immune from suit on this issue because his office played no role in administering marriage recognition laws. In a new federal lawsuit filed during February, *Forum for Equality Louisiana v. Barfield*, the plaintiffs sued two state officials, Secretary Tim Barfield of the state’s Department of Revenue, and Devin George, the Louisiana State Registrar. They are clearly appropriate defendants, since Barfield’s office rejected joint tax returns from some of the plaintiffs and George’s office refused to record both members of a married same-sex couple as parents on a birth certificate for a child born to them. Four same-sex couples married elsewhere are the plaintiffs, alleging that the failure of Louisiana to recognize their marriages unconstitutionally denies them due process and equal protection in violation of the 14th Amendment. * *

* Attorney General Buddy Caldwell announced that his office had hired Kyle Duncan, a former Louisiana Solicitor General who has been most recently associated with the Becket Fund for Religious Liberty, to defend that state’s constitutional provisions banning same-sex marriages. “The Louisiana Constitution is a sober expression of the will of the citizens of Louisiana and I intend to defend every sentence of it,” said Caldwell. “To that end, I’ve retained Kyle Duncan, a nationally renowned expert in this area of the law, to assist this office in our defense of the Constitution of Louisiana.” We are unaware that Duncan has won any marriage equality cases, so we’re unsure of the basis for Caldwell’s characterization of his reputation. Duncan will serve as a “Special Attorney General,” but the amount of his payment was not announced. *New Orleans Times Picayune*, Feb. 27.

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MISSOURI - In *Barrier v. Vasterling*, which was filed in the Jackson County Circuit Court (Kansas City), the defendants include Gail Vasterling, the Director of the Missouri Department of Health and Senior Services, which administers birth certificates and marriage licenses, as well as the state's governor Jay Nixon (a marriage equality supporter), the attorney general, Chris Koster, and the municipality of Kansas City. The ACLU LGBT Rights Project and the ACLU of Missouri are collaborating on this case, representing eight same-sex couples, all legally married in other states, but considered "legal strangers" in their state of domicile. In common with other marriage equality cases, the complaint rests on the content that the state's marriage recognition ban violates due process by denying a fundamental rights and equal protection by unjustified discrimination on account of sex and sexual orientation.

OHIO - Cincinnati attorneys Alphonse Gerhardstein, Lisa Meeks, Ellen Essig and Jennifer L. Branch filed suit in the U.S. District Court for the Southern District of Ohio on February 10 in *Henry v. Wymyslo*, Case No. 1:14-cv-129, asserting that Ohio was violating the constitutional rights of their same-sex couples plaintiffs, all married in other jurisdictions, by failing to recognize their marriages for the purposes of placing the names of parents on birth certificates. The case was brought by the same legal team that recently won a federal district court ruling that Ohio must recognize same-sex marriages contracted elsewhere for purposes of recording marital status on death certificate., in *Obergefell v. Wymyslo*, 2013 WL 6726688 (S.D. Ohio, Dec. 23, 2013). The plaintiffs include three lesbian couples who are expecting the birth of children in June 2014, and want to ensure that both of the couples will be identified as parents

on their children's birth certificates. Another plaintiff couple have adopted a child and they, together with their child, are seeking to have both parents listed on the birth certificate. Another plaintiff is a non-profit adoption agency operating in Ohio, suing on behalf of out-of-state married same-sex couple clients who seek to complete adoptions of Ohio-born children and want to have both adoptive parents listed on the substitute birth certificates that Ohio would issue upon the completion of such an adoption proceeding. The principal claim of all the plaintiffs is that Ohio has violated their rights under the 1st and 14th Amendments to association, due process and equal protection, by failing, or prospectively failing, to list both spouses on a birth certificate, and that in the adoption cases Ohio fails in its duty under the Full Faith and Credit Clause to accord appropriate recognition to adoption orders by sister-state courts. Because of the impending births, the plaintiffs are seeking expedited hearing and preliminary relief. This case is really a mirror image of the *Obergefell* case, as to which the state's appeal is pending before the 6th Circuit.

OREGON - On February 20, Oregon Attorney General Ellen Rosenblum announced that her office had found that "there is no rational basis for Oregon to refuse to honor the commitments made by same-sex couples in the same way it honors the commitments of opposite-sex couples," so her office would not defend the existing marriage ban in the consolidated marriage equality cases pending before U.S. District Judge Michael McShane, *Geiger v. Kitzhaber*, Case No. 6:13-cv-01834-MC (D. Ore). Rosenblum had previously instructed state government offices that same-sex marriages contracted elsewhere should be recognized by the state, despite state constitutional and statutory policies to the contrary. Although the 9th Circuit's adoption of a "heightened

scrutiny" analysis for sexual orientation discrimination claims in *SmithKline Beecham v. Abbott Laboratories* seems to have sparked the decision by Nevada's Attorney General to abandon active defense of that state's ban in the pending appeal before the 9th Circuit, it does not seem to have been a significant factor in Rosenblum's analysis, since she was conceding that the state ban would violate the rationality test. "Because we cannot identify a valid reason for the state to prevent the couples who have filed these lawsuits from marrying in Oregon," she announced, "we find ourselves unable to stand before federal Judge McShane to defend the state's prohibition against marriages between two men or two women." Rosenblum's office had filed an initial answer to the complaint on December 13, punting on whether it would provide a substantive defense, stating: "Throughout this Answer, the State has declined to provide responses to statements that are conclusions of law. With respect to these statements of conclusions of law in the complaint, the State recognizes that significant and serious questions exist as to the legal defensibility of laws that deny same-sex couples the opportunity to enter into civil marriage in Oregon. These legal questions are ultimately for the Court to decide." Perhaps reflecting the striking sequence of rulings by other federal district courts in the interim, the new Answer to the amended complaint filed on February 20 states: "State Defendants will not defend the Oregon ban on same-sex marriage in this litigation. Rather, they will take the position in their summary judgment briefing that the ban cannot withstand a federal constitutional challenge under any standard of review. In the meantime, as the State Defendants are legally obligated to enforce the Oregon Constitution's ban on same-sex marriage, they will continue to do so unless and until this Court grants relief sought by the plaintiffs." Judge McShane was appointed by President

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Barack Obama and confirmed by the Senate less than a year ago, in May 2013.

UTAH – On February 24 Attorney General Sean Reyes sent a memo to state judges advising that same-sex couples who were married during the period between District Judge Shelby’s Order and the Supreme Court’s grant of a stay (or who were married out of state) should not be treated as married in court proceedings while the stay is in effect. The state’s position is that the stay freezes the status quo prior to Shelby’s Order, under which state law forbids recognition of same-sex marriages. Some judges had recently granted second-parent adoption petitions, prompting Reyes to send the memorandum. *Huffington Post*, March 1. * * *

WISCONSIN – Four same-sex couples filed suit in the U.S. District Court for the Western District of Wisconsin on February 4 challenging the constitutionality of Wisconsin’s constitutional and statutory ban on same-sex marriage. Three of the couples applied for and were denied marriage licenses in Wisconsin; the fourth couple was married in Minnesota and seeks recognition of their marriage in Wisconsin. As part of the suit, the plaintiffs are also challenging Wisconsin’s marriage evasion statute, which makes it a criminal offense punishable by a substantial fine and/or jail time for a Wisconsin couple to go out-of-state to get married. Under this statute, the plaintiff couple who married in Minnesota are subject to prosecution. *Wolf v. Walker* (W.D. Wis., filed 2/3/2014). The lawsuit raises both due process and equal protection (sexual orientation and sex discrimination) under the 14th Amendment. Among the defendants, all named in their official capacities, are the Governor, the Attorney

General, the Secretary of Revenue, the State Registrar, and two county clerks. Representing plaintiffs are the ACLU LGBT Rights Project, the ACLU of Wisconsin, and cooperating attorneys from Mayer Brown LLP in Chicago.

CIVIL LITIGATION NOTES

SECOND CIRCUIT COURT OF APPEALS – Finding that the employer had a legitimate, non-discriminatory reason to discharge a gay man, the 2nd Circuit affirmed the district court’s grant of summary judgment to the employer on an employment retaliation claim under Title VII and the New York State Human Rights Act in *Giudice v. Red Robin Int’l*, 2014 U.S. App. LEXIS 2688 (Feb. 13, 2014). In a per curiam opinion, the court said that “it is difficult to discern from Giudice’s submissions on appeal whether he argues that his protected activity consisted of complaining to Red Robin about discrimination based on his sexual orientation or his sex.” In an affidavit, he said that he was “harassed solely because of the fact that he is gay.” “The law is well-settled in this circuit and in all others that have reached the question that Title VII does not prohibit harassment or discrimination because of sexual orientation,” said the court, citing *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2nd Cir. 2005). “This Court has not yet ruled on the specific question of whether a plaintiff may, under Title VII, maintain a claim of retaliation based on adverse employment action resulting from his complaints about sexual orientation discrimination,” the court observed. “The NYSHRL, however, proscribes discrimination by an employer based on an employee’s sexual orientation, and makes it unlawful for an employer to retaliate against an employee because of the employee’s opposition to ‘any practices forbidden under’ the statute.” However, the court said that even if the 2nd Circuit were

willing to entertain such a claim under Title VII, Giudice fell short by failing to establish the “causation element” in his retaliation claim. He was terminated several weeks after complaining about harassment, but the court found that Red Robin began disciplining him “years before his formal complaint for harassment,” noting that he was issued a “final warning” for violating company pay policies two years earlier. The court said that “no reasonable factfinder could conclude that it was Giudice’s complaint that resulted in his termination, as opposed to Red Robin’s stated reason for firing him, which was his failure to properly pay employees after receiving a final warning requiring him to abide by the company’s policies concerning the payment of employees.” The court concluded that although some of the record “reveals that some of the treatment that Giudice experienced at work was disturbing and inappropriate,” he had failed to carry his burden on the retaliation claims.

THIRD CIRCUIT COURT OF APPEALS

– A gay man from China was unable to persuade the 3rd Circuit Court of Appeals to reverse a ruling by the Board of Immigration Appeals that had denied him asylum, withholding of removal or protection under the Convention Against Torture. *Lin v. Attorney General*, 2014 WL 185383, 2014 U.S. App. LEXIS 3372 (Feb. 24, 2014) (unpublished disposition). The court found that “there were omissions, or inconsistencies between Lin’s testimony and his written evidence, relating to each of the major underlying events in Lin’s story. These problems, highlighted in the agency, support the adverse credibility finding.” Lin had presented an account of harassment and discrimination from his family, school and employers, but, as noted, inconsistencies in his various accounts of what happened to him resulted in the adverse credibility determination. In addition, the court

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found, “Lin did not establish his claim of a pattern or practice of discrimination against homosexuals in China based on the evidence (including the statements from his aunt and boyfriend) in the record.” Part of the problem for a petitioner from China is undoubtedly the moderating view towards gay people that the Chinese government has taken in recent years, making it increasingly difficult to assert that gay people routinely suffer persecution in China to the level necessary to meet the standards for protected refugee status on account of their membership in a particular social group.

NINTH CIRCUIT COURT OF APPEALS

– The 9th Circuit ruled in *Pickup v. Brown*, 728 F.3d 1042 (August 29, 2013) that a California statute prohibiting licensed therapists from conducting a treatment called sexual orientation change efforts (SOCE) on minors did not violate the constitutional rights of the therapists, the minors or their parents, since it was a regulation of medical treatment, not a regulation of speech (even though SOCE primarily involves speech by the therapist). On January 29, the 9th Circuit denied rehearing and rehearing en banc, 740 F.3d 1208, but on February 3 it agreed to a request by the appellants to stay its ruling while they petitioned the Supreme Court for a writ of certiorari. The right-wing religious organization Liberty Counsel is represented the therapists and others who brought this challenge, as well as those who are challenging a New Jersey statute on the same subject in the 3rd Circuit.

BOARD OF IMMIGRATION APPEALS

– Although many married same-sex couples have been successful in winning relief from the Homeland Security Department since the Board of Immigration Appeals announced last summer that in light of *U.S. v.*

Windsor same-sex marriages would be recognized for immigration purposes (see *Matter of Zeleniak*, 26 I&N Dec. 158 (BIA 2013), there is no relaxation of the requirement that a petition for such relief be supported by evidence of a bona fide marriage. In *Matter of Lopez-Rivera*, File: A089 235 276, 2014 WL 347695 (BIA) (Jan. 3, 2014), the Board denied reopening of a petition where the respondent indicated that he had married his U.S. citizen husband since the *Windsor* decision. “While a fundamental change in law may constitute an ‘exceptional’ situation [that would justify reopening a case in which relief had been denied],” wrote the Board, “the respondent has not shown that reopening in his case is warranted. The respondent’s motion includes his marriage certificate, but no supporting evidence to show that his marriage is bona fide. Even with a timely motion to reopen, more needs to be shown to warrant reopening beyond a couple’s marriage certificate and a pending I-130 visa petition. There must also be clear and convincing evidence that their marriage is bona fide.”

CALIFORNIA

– U.S. District Judge Thomas J. Whelan granted summary judgment to a Portland, Oregon, law firm on malpractice and fraud claims brought by a gay man who had used the law firm to draft a domestic partnership agreement that was later invalidated in a California court proceeding. *Smith v. Jordan Ramis PC*, 2014 U.S. Dist. LEXIS 18552 (S.D. Cal., Feb. 11, 2014). Michael Smith, an architect, had retained Douglas Cushing, an attorney with Jordan Ramis, to handle some estate planning and real estate work. In 2006, Smith and his partner, Christopher Wixom, decided to buy a house together and move to San Diego. Smith asked Cushing if he could prepare a domestic partnership agreement for himself and Wixom. Cushing said yes, “they could do that.” However, after Smith and

Wixom broke up in 2009 and disputes arose between them, Wixom contested the validity of the DP agreement as “vague,” and it was ultimately declared invalid by the California family court due to deficiencies under California law. After the DP agreement was declared invalid, Smith sued Jordan Ramis and Cushing for legal malpractice and fraud, claiming they had misrepresented their capability to produce a valid DP agreement. Judge Whelan found the malpractice claim was time-barred under California’s one-year statute of limitations, rejecting Smith’s argument that his claim didn’t accrue until the California court found the DP to be invalid; instead, Whelan found that the claim accrued when Smith had to begin spending money to defend Wixom’s motion to have it declared invalid, which led Smith to write to Cushing effectively terminating any further representation by him. Whelan also found that the Jordan Ramis firm did not commit fraud, as they had not affirmatively represented that they had particular competence to draft a DP agreement. The underlying story here, never addressed by the court because it did not reach the merits of the malpractice claim, is the complexity of California law, which should serve as a cautionary note for attorneys drafting partnership agreements, especially attorneys from out of state!

DISTRICT OF COLUMBIA

– U.S. District Judge Rosemary M. Collyer granted summary judgment to the government in an employment discrimination case brought by Susan Morris, who alleged that she had been discriminatorily suspended without pay in a contretemps arising from her differences with other employees over the mission and name of a program at the Environmental Protection Agency concerning sexual minority employees. *Morris v. Jackson*, 2014 U.S. Dist. LEXIS 17425 (D. D.C., Feb. 12, 2014).

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Morris, a white woman, alleged sex and race discrimination. The court found that she “barely presents a prima facie case and ultimately fails to prove that EPA’s legitimate non-discriminatory reason for her suspension was a pretext for discrimination.” As Assistant Director for Affirmative Employment and Diversity, Morris was responsible for setting up and administering the EPA’s programs in this area, including implementing an executive order banning sexual orientation discrimination. She apparently balked at an attempt by the advisory council set up within EPA on LGBT issues to broaden the mission of her program to including bisexual and transgender people and to incorporate affirmative action principles, arguing that the enabling executive order did not extend this far. A heated telephone conference call convened to discuss the issue fueled controversy due to Morris’s remarks, provoking a critical response from members of the council, which Morris’s supervisor told her not to respond to. Morris waited a bit, then sent out a memo referencing the criticism, and was disciplined for insubordination in 2008. (All of the incidents involved in this case occurred during the Bush Administration.) She argued that the memo she sent out was not a direct response, so technically she had not violated her supervisor’s orders. The court found that while it was just possible for Morris to allege a prima facie race discrimination case, the agency’s articulated non-discriminatory reason for suspending her was adequate to support a summary judgment motion.

LOUISIANA -- Chief Judge Brian A. Jackson of the U.S. District Court for the Middle District of Louisiana signed a temporary restraining order on February 24 in *East v. Blue Cross and Blue Shield of Louisiana*, 2014 U.S. Dist. LEXIS 23916, in which Lambda Legal represents a putative class of HIV-positive residents who have received

notices from Blue Cross, Vantage Health Plan, and Louisiana Health Cooperative, indicating that these health insurers are changing their existing policies and no longer accepting money through the federal Ryan White HIV/AIDS Program to subsidize insurance premiums for HIV-positive individuals. Individuals participate in the Ryan White program because they cannot afford to pay the full cost of premiums to maintain their health insurance. Although under the Affordable Care Act health insurance companies will not be able to refuse them coverage due to their HIV-infection, they can require payment of premiums. Lead plaintiff John East alleged that due to loss of his insurance he would suffer an interruption of treatment that might lead to his death. Finding that East had alleged an irreparable injury, Jackson restrained the insurers from refusing to accept Ryan White money towards premium payments pending an immediate hearing on an application for a preliminary injunction during the pendency of the litigation.

LOUISIANA – An African-American professor at a state university who identifies as heterosexual can maintain an action under 42 U.S.C. sec. 1983 against his employer for sexual orientation discrimination, ruled U.S. Magistrate Judge Karen L. Hayes in *Strong v. Grambling State University*, 2014 U.S. Dist. LEXIS 15064 (W.D. La., Feb. 6, 2014). Having found that “liberally construed” the facts alleged in the complaint were “sufficient to support an equal protection claim,” she commented, “while the Supreme Court has not recognized sexual orientation as a protected class, a state violates the Equal Protection Clause if it disadvantages someone on the basis of sexual orientation for reasons lacking any rational relationship to legitimate government aims.” Also at issue in this ruling were plaintiff’s demands to discover information about the sexual

orientation and activities of certain potential “comparator” employees. “Here, Plaintiff has not shown that the different individuals identified in Requests for Admission Nos. 9-13 received preferential treatment under otherwise identical circumstances,” wrote Judge Hayes. “If, however, at a later date, Plaintiff is able to demonstrate that one or more of the individuals. . . otherwise meets the requirements for a ‘true comparator,’ then Defendants shall supplement their discovery response(s), with the need for further intervention by the court.” However, as to two individuals identified in the discovery requests as decision makers regarding the complained-of personnel actions, the court found that their “sexual orientation remains potentially relevant” and ordered defendants to respond to those questions.

LOUISIANA – U.S. District Judge Martin C. Feldman granted summary judgment to the Sewerage & Water Board of New Orleans, dismissing a claim by a former employee that he had been subjected to hostile environment harassment by a gay male supervisor that had caused him to quit. *Simpson v. Sewerage & Water Board of New Orleans*, 2014 U.S. Dist. LEXIS 243636 (E.D. La., Feb. 26, 2014). According to Simpson, his supervisor was a chatty openly-gay man who liked to talk about his sexual exploits and engage in unduly personal conversations with male employees. After putting up with this for a while, Simpson, a married man who says he is straight, complained to management, being transferred to another location without loss of pay as a result. Simpson did not complain about his new assignment, which took him away from the gay supervisor, but soon resigned about the same time that he was offered a job with another company. Simpson claimed he quit because he did not feel safe with the gay supervisor still working for the Board.

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Feldman noted that employer liability was avoided if an employer had an anti-harassment policy in place and took effective action to end harassment when an employee complained. An employer that was not aware of harassment during the extended period that Simpson took in deciding to complain would not be liable for that harassment, especially since it took effective steps to end it. He rejected Simpson's constructive discharge theory, noting that "he was not demoted, his job responsibilities were not reduced, he was not assigned degrading work or assigned to a younger supervisor; he was not offered early retirement; and he was not threatened; nor are his allegations of harassment sufficient to establish such a claim. He simply looked for and found another job." As to the employer's "appropriate response" defense, Feldman found: "Here, it is undisputed that, once Simpson reported the harassment and requested reassignment away from his harasser, the SWB called for an investigation by its EEO Officer (who conducted interviews and reviewed documents) and, within seven days, Simpson was reassigned so that he no longer reported to Wilson. It is also undisputed that the harassment stopped after Simpson's transfer to the finance department. The record supports a finding that the defendant took prompt, remedial action that was reasonably calculated to end, and did end, the harassment."

LOUISIANA – The long-running same-sex sexual harassment case of *EEOC v. Boh Brothers Construction Co.* has been settled, according to a press release from the EEOC on Feb. 27. The case resulted in an en banc ruling by the 5th Circuit upholding a jury verdict finding that Title VII was violated, with a remand for further findings on damages, *EEOC v. Bob Bros. Constr. Co.*, 731 F.3d 444 (5th Cir. en banc 2013). The jury found that a male

employee was subjected to severe or pervasive harassment based on gender stereotypes. The settlement amount is \$125,000 in compensatory damages, and will result in a non-appealable consent judgment against the company.

MASSACHUSETTS – In the ongoing lawsuit *Sexual Minorities Uganda v. Lively*, 2014 U.S. Dist. LEXIS 18977 (D. Mass., Feb. 14, 2014), U.S. Magistrate Neiman, assigned to oversee the discovery process, ruled on a proposed protective order whose import was subsequently magnified when Uganda's President, Yoweri Museveni, signed into law the draconian Anti-Homosexuality Act, which authorizes life imprisonment for private, consensual homosexual acts, and substantial prison terms for any identification with homosexuality. It is difficult to parse Judge Neiman's opinion, since it did not include a copy of the protective order as finally approved, subject to modification if enactment of the Anti-Homosexuality Act made that necessary. Perhaps the signing of the law on February 24 will result in reopening the negotiation about confidentiality. The case is an action by a gay rights group in Uganda (whose existence is now illegal under the new law and whose members are vulnerable to prosecution) to invoke international human rights law in the U.S. courts against Scott Lively, President of Abiding Truth Ministries, who is charged with having fomented anti-gay sentiment in Uganda to the extent of inciting enactment of the new statute and placing individuals in serious harm. District Judge Michael A. Ponsor refused to dismiss the complaint last August, and the parties have been haggling over discovery ever since. In his order, Judge Ponsor had found, "Plaintiff has set out plausibly that Defendant worked with associates within Uganda to coordinate, implement, and legitimate 'strategies to dehumanize, demonize, silence, and further criminalize the [Ugandan]

LGBTI community." Of course, wrote Ponsor, "all these allegations will need to be proved at trial to entitle Plaintiff to a verdict."

NEW YORK – Denying the employer's motion for summary judgment, U.S. District Judge Paul A. Crotty held that Elena Benussi could have a trial of her claims of retaliation, sex and sexual orientation discrimination against her former employer. *Benussi v. UBS Financial Services, Inc.*, 2014 U.S. Dist. LEXIS 18642 (S.D.N.Y., Feb. 13, 2014). Benussi began working for PaineWebber, which subsequently was absorbed by UBS, in 2001, and was terminated on November 23, 2010, just eleven days after she alleges she told her supervisor that she leads an "alternative lifestyle." Benussi, whose employment record included several strained relationships with supervisors and co-workers, had refused to move her office to a different floor during a renovation project, communicating that a male employee on that floor had made inappropriate remarks to her, including that "because I'm not married, I'm either a dyke or a slut." She alleged that after she reported this, she was pressed to reveal the identity of this person, and that her resistance to doing so led to her termination. UBS, on the other hand, asserted that it had decided to terminate Benussi for legitimate reasons well before these events occurred, and denied either that Benussi had revealed her sexual orientation to supervision or that it had played any role in her termination. She never actually used the words "gay" or "lesbian" about herself, instead saying "I don't date men. . . I'm not as protected as you are. . . [and] it's going to be very embarrassing for me to reveal myself, you know, because I don't date men. . . I don't want to go to another firm—I'm embarrassed. . . I'm really sorry I told you . . . I really hate myself." Judge Crotty concluded that Benussi had successfully alleged the necessary

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facts to support all her claims, and that there remained credibility and fact issues that would have to be resolved, including as to whether or when Benussi had informed her employer about her sexual orientation, when the termination decision was actually made, and whether the reasons for her termination stated by UBS were pretextual.

NEW YORK – The Appellate Division, 3rd Department, annulled a finding of unlawful same-sex sexual harassment by the State Division of Human Rights in *Arcuri v. Kirkland*, 978 N.Y.S.2d 439 (January 9, 2014), which was reported in the *New York Law Journal* on February 6. Two male employees of a construction company were assigned to share a motel room with their immediate supervisor, also male, during an out-of-town project. The supervisor “repeatedly brought a woman he had met locally into the motel room, engaging in sex while complainants were in the room. The woman also occasionally invited some of her female friends to the motel room, causing complainants concern about their privacy as well as the security of their personal belongings.” They complained to various supervisors and the proprietor of the company, “but to no avail.” After they had a disagreement with the supervisor’s woman friend, they were discharged. An Administrative Law Judge’s ruling in favor of their hostile environment sexual harassment claim was adopted by the State Division of Human Rights, but rejected by the court. “Here, neither the written complaints nor testimony [of the complainants] set forth any allegations or indication of how [the supervisor’s] conduct was motivated by their gender or that their grievances to petitioner were ignored because of their gender,” wrote the court. “The ALJ’s decision does not refer to any proof supporting a finding that complainants’ gender was relevant to, or a reason for, the conduct.” Thus, the court held, both

their discrimination claim and their retaliation claim had to be dismissed, even though the court agreed that the supervisor’s conduct “was crude, coarse and grossly unprofessional.”

PENNSYLVANIA – Gay Attorney Jeffrey Downs has expanded his discrimination suit pending in state court against the law firms Anapol Schwartz and Raynes McCarty to a federal lawsuit, filed in the Eastern District of Pennsylvania, according to a Feb. 10 article in *The Legal Intelligencer*, which provides a detailed summary of the allegations from Downs’ complaint against the two plaintiff personal injury firms. Downs claims to have suffered various kinds of disparate treatment and hostile environment issues at Anapol Schwartz, and alleges that his attempt to move with a partner to Raynes McCarty fell apart when the later firm heard about his complaints concerning the first firm, although he had not yet filed suit against the first firm. The article is unclear about the basis for starting a federal case, which is premised on Philadelphia’s ordinance banning sexual orientation discrimination, as neither federal nor Pennsylvania law bans such discrimination. Perhaps Downs now lives outside Pennsylvania and is relying on diversity jurisdiction.

RHODE ISLAND – A sexual orientation “reverse discrimination” claimed failed under Title VII and the Rhode Island Fair Employment Practices Act, as U.S. District Judge William E. Smith granted summary judgment to the employer in a “same-sex harassment” case brought by a heterosexual man. *Ferro v. State of Rhode Island Department of Transportation*, 2014 U.S. Dist. LEXIS 20471 (D. R.I., Feb. 19, 2014). Daniel Ferro, hired as an inspector by the Department of Transportation to begin working in July 2009, was discharged in May 2010. He

claims to have been subjected to hostile environment sexual harassment by co-worker Joseph Giglietti. “During his deposition,” wrote Judge Smith, “Ferro disclaimed a theory of discrimination based on his sex, instead stating that he was discriminated against because of his status as a heterosexual. Taking Ferro’s statements at face value, they are fatal to his Title VII action, since that statute protects heterosexuals no more than it does homosexuals.” However, Smith noted, this allegation would not be fatal to Ferro’s state law claim, since Rhode Island bans sexual orientation discrimination. Unfortunately for Ferro, however, Smith did not think that the conduct to which he was subjected was severe enough to constitute discrimination. “Taking the facts in the light most favorable to him, Ferro has succeeded in showing the lack of decorum at the DOT during his brief tenure; he has abjectly failed, however, to show that he was subject to unwelcome sexual harassment that was severe and pervasive – a shortcoming that is fatal to his claims.” “Here,” continued Smith, “there is no evidence of the harassment at issue being physically threatening or humiliating. Instead, Ferro dealt with mere inappropriate utterances” – like being “persistently” called “peckerhead” and “cocksucker” throughout his employment. “Ferro never alleges that he felt intimidated by these exchanges, and the undisputed record shows that Ferro’s co-workers were in fact physically afraid of him. Indeed, it was Giglietti who, when engaged in a confrontation with Ferro, backed down. Later, it was Ferro who hurled a cup of hot coffee at Giglietti from a moving car. In this case, common sense counsels that the harassment Ferro faced fails to meet the legal requirements.” Ferro was discharged when, apparently outraged by being transferred to a different location after formally complaining about harassment by Giglietti and

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his supervisor, he showed up at the old worksite and vandalized Giglietti's car in the parking lot.

WASHINGTON – U.S. District Judge John C. Coughenour granted in part and denied in part summary judgment motions filed by the defendant in *Price v. Equillon Enterprises LLC*, 2014 U.S. Dist. LEXIS 20611 (W.D. Wa., Feb. 18, 2014), a sex and sexual orientation employment discrimination case brought by two lesbian employees alleging discriminatory denial of promotions and hostile environment. The court granted summary judgment on the hostile environment claim, because uncontroverted evidence submitted in support of the motion showed that the company had responded effectively to complaints about harassment and thus could not be held liable for them. However, most of the failure to promote claims survived the motion, as the court found that there were contested issues of material fact about whether the company's explanations for its promotion decisions were pretextual. In all of the promotion decisions in question, the company selected heterosexual men over the two plaintiffs, even though, the court found, the company did not contest that the plaintiffs were qualified for the positions. The company's argument was that the men it had selected were better qualified, a contention sharply contested by the plaintiffs (who provided evidence of a pattern of promotion decisions favoring heterosexual men over other applicants) and viewed with some skepticism by the court. Attorneys from Breskin Johnson & Townsend PLLC of Seattle represent the plaintiffs.

WASHINGTON – U.S. District Judge Robert J. Bryan granted summary judgment to Washington State University, rejecting a claim by Tonda Liggett that she was denied academic tenure due to her sexual orientation

in violation of her equal protection rights and a state law banning sexual orientation discrimination. *Liggett v. Washington State University*, 2014 U.S. Dist. LEXIS 25418 (W.D. Wash., Feb. 26, 2014). Although the faculty in her department voted overwhelmingly to recommend tenure for Prof. Liggett, administrators recommended against it, relying on concerns about the quantity of her published scholarship and the relative lack of prestige of the article placements compared to other tenure applicants. Judge Bryan found, based on uncontested facts, that the highest level university officials who had the last word on whether to grant tenure could not be held liable because there was no evidence that they were aware of Liggett's sexual orientation. Furthermore, the court found that Liggett had failed to provide evidence that would substantiate the comparators she presented in attempting to prove discriminatory intent through circumstantial evidence, and that the University had shown that there were long-standing concerns about the quantity and depth of Liggett's scholarship that constituted non-discriminatory grounds for denying her tenure application. It certainly did not help her case that another gay tenure applicant up for consideration in the same year was awarded tenure, and although she alleged that in general gay tenure applicants had fared poorly, the court found a lack of evidentiary specificity to back up this contention.

CRIMINAL LITIGATION NOTES

U.S. AIR FORCE COURT OF CRIMINAL APPEALS – After the Court of Appeals for the Armed Forces remanded the case for reconsideration because the original appellate panel was improperly constituted, a new panel of the U.S. Air Force Court of Criminal Appeals reconsidered the case of Technical Sergeant David J.A. Gutierrez,

who was charged with disobeying a lawful order by engaging in unprotected group sex with his wife and others despite having tested positive for HIV and having been ordered by his superior officer to follow the preventive medicine requirements specified by an official Air Force Instruction for infected service members. The reconsideration did not produce a different result, as the court essentially reiterated its earlier opinion. *U.S. v. Gutierrez*, 2014 CCA LEXIS 110 (Feb. 25, 2014). For the earlier ruling, see *U.S. v. Gutierrez*, 2013 WL 1319443 (A.F. Ct. Crim. App. Mar. 21, 2013). As before, the court found that the constitutional right of privacy identified in *Lawrence v. Texas* did not extend to group sex situations, even when they occurred in a private setting, because the presence of more than one sexual partner forfeited a claim to privacy protection.

CALIFORNIA – In *People v. Replogle*, 2014 Cal. App. Unpub. LEXIS 1339 (Cal. App. 4th Dist., Feb. 25, 2014) (not officially published), the court affirmed convictions of several men for murdering and hiding the body of a gay man of means, Christopher Lambert of San Francisco, and then appropriating his identity to commit various economic crimes. The factual narrative in the lengthy opinion for the court by Judge Miller is too detailed and complex to summarize here. Suffice to say that it reads like a true crime novel, in which the sexual orientation of various actors played a role in making the crimes possible. (One of the conspirators had a sexual relationship with the victim, for example.) The court of appeals rejected virtually all the substantive objections to the trial process and verdict, finding that only minor clerical adjustments had to be made to the trial court's final order in the case.

INDIANA – A 16-year-old defendant who confronted, struck and injured a

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14-year-old who had called the 16-year-old and his friends “queers, fags, gay, whatever,” failed to establish his self-defense claim in *D.K. v. State of Indiana*, 2014 Ind. App. Unpub. LEXIS 298 (Feb. 28, 2014). The court entered a finding of juvenile delinquency and sentenced D.K. to supervised probation for 180 days. The court of appeals upheld the trial court’s determination, finding that the defendant did not have to strike the victim in self-defense; although the victim appeared poised to strike the defendant, there was testimony that the victim said he would strike the defendant if the defendant struck him first. Consequently, had the defendant retreated, there would have been on violence, and his striking of the victim was not in self-defense.

MICHIGAN – A man who was convicted by a jury on counts of first and third degree criminal sexual misconduct and HIV-positive sexual penetration with an uninformed partner lost his appeal on February 25. *People v. Kuzma*, 2014 Mich. App. LEXIS 351. The per curiam opinion does not mention the age of the defendant at the time of the crime, but describes the complainant as “then a 15-year-old boy.” One suspects that the defendant was not much older, since the issue of intergenerational sex is not specifically mentioned by the court. According to the court’s summary of the evidence, the defendant and the complainant were sleeping in the back of the defendant’s vehicle during a camping trip, “and during the night defendant anally penetrated him for a period of approximately 30 seconds.” Kuzma testified in his defense at trial that they two had gone camping, but “denied that he and the complainant slept together in his vehicle or had any sexual contact.” Defendant stipulated that he had contracted HIV in 1994 and was diagnosed with AIDS in 2009, a year before the events in question. “The complainant testified that he was

unaware that defendant was HIV-positive at the time of the alleged penetration.” The opinion does not say that the complainant contracted HIV. During the trial, the prosecution presented as a witness a man who had been housed together with Kuzma in the county jail, who testified that Kuzma had told him in graphic detail about “the sexual assault, combined with an admission that he sued alcohol and drugs to lower the complainant’s inhibitions.” Among his issues on appeal, Kuzma argued that the prosecution violated his rights by failing to disclose information about this witness’s criminal and parole records that could have been used to impeach his credibility, but the court pointed out that all this information came out during the testimony at trial, that the criminal record could have been discovered by defense counsel through the public database when the informant was listed by the prosecution, and that Kuzma failed to show that disclosure of these criminal records would have produced a different outcome in the case. The court rejected other arguments of ineffective assistance of counsel, and found that the state’s rape shield law would have prevented admission of evidence that Kuzma claims his counsel should have introduced in order to discredit the complainant. While affirming the conviction, the court remanded for resentencing, finding that the trial court had failed to comply with a statutory requirement to give defendant a copy of the presentence investigation report before the sentencing hearing, so the defendant was entitled to a new hearing on the sentence with the benefit of that report.

NEW YORK – Ruling on a post-trial motion in an identity theft case involving a lesbian defendant, U.S. District Judge Richard J. Arcara rejected an ineffective assistance of counsel claim that focused on questioning of witnesses about sexual orientation. *U.S. v. Thomas*, 2014

U.S. Dist. LEXIS 24067 (W.D. N.Y., Feb. 24, 2014). Judge Arcara disagreed with the defendant’s argument that her prior counsel’s “reference to her sexual orientation and personal relationships with some of the witnesses constituted a grave error that was highly prejudicial” to her case. “The Court has considered the trial record and finds that the testimony regarding defendant’s sexual orientation, nickname and personal relationships did not paint defendant in a bad light and constituted relevant and admissible background information as to how some of the witnesses and co-conspirators knew defendant as well as the nature of their relationships,” he wrote. “Thus, it was not wholly unreasonable for defense counsel to refrain from objecting to this line of questioning. Further, Humphrey [one of the witnesses who was so questioned] was called as a witness primarily to testify about defendant contacting her and asking her if she knew anyone who wanted to make some money by cashing checks. The Court finds that it was not unreasonable for defense counsel to fail to file a motion in limine to preclude this testimony. The testimony was relevant and admissible, despite the fact that it was hearsay, because it was a statement of a party opponent.” Arcara pointed out that the testimony about Humphrey’s past relationship with the defendant was very relevant to the question whether she had a motivation to lie or “implicate defendant in the crime.”

TEXAS – Daniel Hernandez argued that his sexual activities with the 19-year-old son of a longtime female friend were consensual, but a jury disagreed and convicted him of aggravate sexual assault, assessing a ten year sentence. *Hernandez v. State*, 2014 Tex. App. LEXIS 2245 (Tex. App., 11th Dist., Eastland, Feb. 27, 2014) (unpublished opinion). According to the opinion for the Court of Appeals by Judge John M. Bailey upholding the verdict, the

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victim “testified that he is paralyzed from the chest down as a result of a car accident in 2002. He also testified that he cannot stand or walk without crutches and that he is impotent.” He also testified that he is heterosexual, and that Hernandez “put [him] in a headlock, causing him to pass out” and that when he awakened he found Hernandez “on top of him penetrating his anus with [Hernandez]’s penis.” He testified that “he was sick the next day and that he eventually went to the hospital because of anal bleeding. He further testified that it took him two weeks to recover from the physical trauma he suffered as a result of the sexual assault.” Hernandez testified that he was gay, that the young man was aware of this, and that the young man propositioned him and put his hands on Hernandez the night the sexual encounter occurred. He testified that the man had been watching a porn film and had an erection at the time and that the ensuing sex was consensual. He also speculated that the man may have fabricated the allegation against him because Hernandez stopped having sex with him. The court of appeals concluded that the evidence was sufficient to support the verdict, as it came down to the jury’s credibility determination, “a decision that is within the jury’s sole province to make.” The court said that Hernandez’s testimony that the sex was consensual opened the issue for the prosecution to introduce evidence of past sexual misconduct by him. The court also rejected the argument that Hernandez suffered ineffective assistance of counsel, based on his attorney not presenting a defense witness suggested by Hernandez. The court pointed out that at the hearing on Hernandez’s motion for a new trial, this witness testified in a way that would not likely have helped Hernandez win acquittal at trial, since he kept changing his story in ways that both undermined his credibility and offered facts unhelpful to Hernandez.

TEXAS – The Kilgore Independent School District agreed to pay \$77,500 to settle a lawsuit by Skye Wyatt, now 21 years old, who sought to hold the district liable after some softball coaches (one of whom is lesbian) called Wyatt’s mother about her relationship with another girl. The 5th Circuit had previously found that the coaches enjoyed qualified immunity in the case, but a trial was scheduled on potential liability of the school district for an invasion of privacy. The school district expressed unhappiness with the settlement, which they claimed was forced on them by their liability insurer. Under the terms of the settlement, the district will provide training to employees on its discrimination policies, will put into place privacy protection policies for students, and will adopt a non-discrimination policy that includes sexual orientation, according to one of Wyatt’s lawyers, Jennifer Doan. *ABAJournal.com*, Feb. 26.

PRISONER LITIGATION NOTES

ILLINOIS -- U. S. District Judge Michael J. Reason adopted U. S. Magistrate Judge Donald G. Wilkerson’s Report & Recommendation that pro se inmate Vance White’s request for preliminary injunctive relief be denied with prejudice in *White v. Hodge*, 2014 U.S. Dist. LEXIS 18132 (S.D. Ill., February 13, 2014). White sued the Warden (Marc Hodge) and two officers (Baylor and Givens), asserting the officers harassed him by calling him names (such as “faggot” and “Ms. White”) and making sexually explicit comments and requests. He further alleged that the officers retaliated against him after he made a complaint on the complaint “Hotline” set up for inmates under the Prison Rape Elimination Act. The “Hotline” investigation “yielded unfavorable results,” and Warden Hodge told White to “drop” the matter. White claimed the harassment continued, including

loss of phone and shower privileges. He requested that either he or the officers be assigned to different housing units. White’s complaint survived threshold review. During the pendency of the matter, White was transferred to another prison temporarily on a court writ; but he has had no contact with either officer since his return. Defendant Officer Baylor was assigned to a different prison (for unstated reasons), and Officer Givens was rotated to other posts as part of routine re-deployment every 90 days. In light of Baylor’s transfer and Givens’ rotation, White failed to show risk of irreparable injury to justify the “extraordinary” remedy of preliminary relief, even if he had been the victim of “some retaliatory acts.” The court nevertheless retained jurisdiction, allowing White to proceed “to the extent [he] seeks general injunctive relief.” *William J. Rold*

MISSOURI – The U.S. Court of Appeals for the 8th Circuit has yet to decide whether prisoners have a privacy right to their medical information, so U. S. Magistrate Judge Lewis M. Blanton granted summary judgment against pro se inmate Ronald D. Burston, Jr., in *Burston v. Smith*, 2014 U.S. Dist. LEXIS 20121 (E.D. Mo., February 19, 2014). Burston sued Corrections Officer Daniel Smith under 42 U.S.C. § 1983 for violating his civil rights by repeatedly calling him various names, including “fag” and “snitch” (Count I); and by telling other inmates and officers that he was HIV-positive (Count II). There was no allegation of actual physical violence, but Burston claimed other inmates were prompted to join in the verbal abuse, and he sought damages for emotional distress. Judge Blanton ruled that verbal abuse and even threats, unaccompanied by actual violence, were insufficient to support an Eighth Amendment claim unless “so brutal or wantonly cruel as to shock the conscience” or so “coercive” that the plaintiff suffers deprivation of

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another constitutional right. Burston, who did not respond to the motion for summary judgment and had had no contact with the defendant since 2011, failed to meet this test. On Count II, Burston also failed to demonstrate a constitutional violation, because “[t]here is no clearly established constitutional right to non-disclosure of HIV status in the Eighth Circuit.” The judge quoted *Tokar v. Armontrout*, 97 F.3d 1078, 1084 (8th Cir.1996), which granted qualified immunity to prison officials in a civil rights case about HIV disclosure (as Judge Blanton also did here), because of the absence of such articulated right at the time of the disclosure. [Note: There is a circuit split on this point. In *Doe v. City of New York*, 15 F.3d 264, 267(2d Cir. 1994), the court wrote: “Individuals who are infected with the HIV virus clearly possess a constitutional right to privacy regarding their condition,” citing *Whalen v. Roe*, 429 U.S. 589, 599 (1977). It extended this right in a limited way to prisoners in *Powell v. Schriver*, 175 F.3d 107, 112 (2d Cir. 1999); as did the Third Circuit in *Doe v. Delie*, 257 F.3d 309, 315-16 (3d Cir. 2001). The Sixth and Seventh Circuits have declined to do so. See *Doe v. Wigginton*, 21 F.3d 733, 740 (6th Cir. 1994); and *Anderson v. Romero*, 72 F.3d 518, 522-4 (7th Cir. 1995). Until the Supreme Court resolves the question, prisoners in circuits that do not recognize such privacy face dismissal of cases for damages for inappropriate disclosure of medical information because qualified immunity bars monetary recovery unless the right is clearly established -- see *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The conflating of qualified immunity with the merits in damages cases, as was done here, stagnates constitutional evolution, since any attempt to persuade the Eighth Circuit to overrule *Tokar v. Armontrout* would also demonstrate that the right was not clearly established at the time of the errant conduct; so the case could be dismissed on that basis alone. See *Pearson v. Callahan*, 555 U.S. 223

(2009). Prisoners who seek to establish protection through injunctive cases often face other obstacles, as Burston did here, such as mootness resulting from transfer or cessation of contact with the defendant(s) to be enjoined.] Judge Blanton dismissed without prejudice Burston’s state law claim that disclosure of his HIV status violated the Missouri AIDS Confidentiality Act, declining his discretion to hear it under supplemental jurisdiction since the federal claims providing original jurisdiction were no longer in the case. *William J. Rold*

MISSOURI – Since a pro se HIV+ inmate failed to state a claim against any prison health care defendant, U. S. Magistrate Judge Lewis M. Blanton granted summary judgment to two doctors, two administrators, and five nurses in *Grace v. Hakala*, 2014 U.S. Dist. LEXIS 24228 (E.D. Mo., February 26, 2014). Plaintiff William Grace sued these defendants (and several more against whom claims were dismissed earlier in the proceedings), claiming they violated his right to be free of deliberate indifference to his serious health care needs in violation of the Eighth Amendment. Judge Blanton had little trouble finding that HIV treatment was a serious need, but Grace failed to show evidence that the defendants were indifferent. The “undisputed” facts showed that one defendant doctor provided “extensive” treatment and monitoring and that he consulted with the other defendant doctor, who is an HIV specialist. Lab work, with some “short-term” fluctuations, indicated general improvement over Grace’s years at the prison, with increasing CD4 count and CD4 percentage and viral load decreasing to “undetectable.” The seven “individual and isolated” instances over two years when the defendant nurses failed to administer his HIV medication (Raltegravir) did not support the required subjective intent for deliberate indifference, because

the drug was not readily “available” on four of the occasions and administrative reasons (such as Grace’s being late for medication) accounted for the other times. Grace failed to show that the two administrative defendants (nurse administrator and health services administrator) were responsible for any failures to deliver his medicine or to keep it in stock. While such supervisors are not vicariously liable for subordinates’ failures under 42 U.S.C. § 1983, there is no discussion of potential liability in this privatized prison arising from drug formulary (what medications are routinely kept in pharmacy inventory) or from unit dose rules (requiring inmates to appear in medication lines during fixed hours instead of keeping a prescription “on person”). Finally, in any event, Grace failed to prove any damages from the alleged failures, since his condition improved. This case again illustrates the nearly insurmountable burden on a pro se prisoner plaintiff who seeks to prove a civil rights violation on quality of care without a medical expert. *William J. Rold*

LEGISLATIVE NOTES

ARIZONA – The day after Governor Jan Brewer announced her veto of a measure intended to protect business owners with religious objections to homosexuality and same-sex marriage from discrimination claims, the City Council of Tempe took action on a pending measure, voting 7-0 to add sexual orientation and gender identity to the city law banning discrimination in employment, housing and public accommodations. Civil fines of up to \$2500 are authorized. Tempe is the fourth municipality in Arizona to ban such discrimination, joining Phoenix, Tucson and Flagstaff. *azcentral.com*, reporting on February 27, pointed out that Tempe is “known as a bastion for liberal attitudes,” having been one of the

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first cities in the U.S. to elect an openly-gay mayor, Neil Giuliano, who served for four terms, and was among the first places in the state to provide domestic partner benefits for same-sex couples. The anti-discrimination measure excludes from the definition of public accommodation religious organizations and social clubs.

CALIFORNIA – Opponents of the recently-enacted AB 1266, which went into effect on January 1, fell short in their efforts to put a repeal initiative on the ballot this year. According to news reports, although they submitted 619,000 signatures, the validation process left them 17,000 short. Supporters of the initiative, an organization calling itself “Privacy for All Students,” vowed to go into individual counties to contest invalidated signatures. The new law protects the rights of transgender public school students to equal access to facilities and programs consistent with their gender identity. It received little attention outside LGBT political circles until it was passed; then, all of a sudden, the forces of social conformity rose up and waged a fierce campaign to try to persuade the Governor Jerry Brown to veto it and, failing in that, to put a repeal measure on the ballot. *Los Angeles Times*, Feb. 25.

IDAHO – Despite an energetic lobbying campaign that included demonstrations and sit-ins at the state capitol, the Idaho legislature has refused to take up a proposal to add sexual orientation and gender identity to the state’s law against discrimination. Expressing disappointment in an op-ed article in the *Idaho Statesman* (Feb. 27), former governor Phil Batt related how his gay grandson, who felt “marginalized and troubled by some of the treatment he received from students and teachers” in the Boise public schools, dropped out, obtained a GED through correspondence

courses, and moved to San Francisco, where he earned bachelor’s and master’s degrees and is now employed in the computer design field. Batt said his granddaughter also moved to California and is a doctoral student at USC. Batt explained that these grandchildren had decided that an intolerant Idaho was not a place for them to live. * * * The Pocatello City Council has unanimously approved language for a referendum to be held May 20 to determine whether voters will allow a measure banning sexual orientation and gender identity discrimination to go into effect. The approved language states: “Should the city repeal Ordinance No. 2921, which prohibits discrimination against a person in the areas of housing, employment and public accommodations, based upon that person’s sexual orientation and gender identity/expression? A ‘yes’ vote would mean you want the city to repeal the ordinance. A ‘no’ vote would mean you want the city to keep the ordinance.” The Council voted 4-2 to approve the ordinance in June 2013, but opponents collected enough signatures to require the Council to repeal it or place it before the voters. *Idaho State Journal*, Feb. 7.

IOWA – The Iowa Senate voted 48-0 on February 27 to approve revisions of the state’s criminal laws concerning transmission of contagious and infectious diseases, in response to public criticism surround the prosecution of Nick Rhoades, who was taking medication that made his viral load undetectable when he had sex with another man without using a condom. His sexual partner was not infected, but upon later learning that Rhoades was HIV-positive, complained to the authorities, who pressed charges. Rhoades was convicted for failing to disclose his HIV status prior to the sex, thus vitiating consent and “exposing” his partner to the virus, and was initially sentenced to 25 years, later reduced on appeal. The legislation would change the law to focus on intent to transmit and

actually transmitting the virus, sharply reducing penalties for exposure, and providing an affirmative defense for those who are taking medication and following recommendations of public health officials concerning their sexual activities. It is not entirely clear from the news report about the bill in the *Des Moines Register* whether somebody in the position of Rhoades – HIV-positive but essentially not contagious due to successful treatment – would have a complete defense, but it appears that the legislature was responding to evidence that successful antiviral treatment can render an infected person virtually non-contagious.

LOUISIANA – State Rep. Austin Badon (D-New Orleans) introduced House Bill 199, seeking to add sexual orientation and gender identity and expression to Louisiana laws that prohibit discrimination. *New Orleans Times Picayune*, Feb. 23. Nobody was predicting legislative passage, and of course Gov. Bobby Jindal, an outspoken homophobe with presidential ambitions, would likely veto any such bill that came to his desk.

MASSACHUSETTS – The House of Representatives voted 145-4 to approve a bill imposing further requirements on public and private schools to develop and implement plans to prevent bullying from occurring and to discipline bullies. The handful of opponents criticized the bill as an “unfunded state mandate,” but did not propose amending it to appropriate additional funds to assist school districts with the expenses of complying. *Brockton Enterprise*, March 1.

MISSOURI – The Special Administrative Board of the Saint Louis Public School District voted 3-0 to add spousal benefits for married same-sex couples

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effective April 1, 2014, according to an online report by *lgbtqnation.com* posted on February 28. The same source reported that Boone County Treasurer Nicole Galloway announced that her office would treat all marriage licenses the same, so that legally married couples could claim money that is owed by the county to each other's spouse. Litigation is under way in Missouri over same-sex marriage, but the legislature is considering a so-called "religious freedom bill" that would allow businesses to refuse service based on their religious beliefs, with the general understanding that the measure is intended to insulate businesses from discrimination claims by gay people. Since Missouri has no state law banning sexual-orientation discrimination, this would only be significant in the few municipalities that ban such discrimination.

MONTANA – Butte-Silver Bow county commissioners voted 10-2 on February 19 to approve an ordinance that bans discrimination in housing, employment or public accommodations because of sexual orientation or gender identity. The ordinance was to take place thirty days later. Other Montana communities that have enacted such legislation include Missoula and Helena. The dissenting voters stated they would have supported the measure had it included a provision requiring that in restrooms or places like athletic club locker rooms people would be required to use facilities designated for their anatomical sex, responding to the pervasive fear that non-transsexual cross-dressing opportunists will seize upon such laws to invade and prey upon targets for sexual assault or robbery in such facilities, a widespread phenomenon that has been heavily documented in official sources – not!!! The measure authorizes Justice Court actions for enforcement, but limits fines (of \$500) to those who have violated the ordinance at least four times in any 12-month period. Only recidivists need

fear monetary pain, for reasons not explained in news reports. *Associated Press*, Feb. 20.

TEXAS – Bexar County Commissioners voted on February 4 to extend county employee benefits to include domestic partners, according to a blog posting by Human Rights Campaign. Any unmarried county employee can add "one qualifying adult" to his or her plan if they meet certain criteria.

WASHINGTON – The Washington House of Representatives voted 94-4 on February 13 to approve House Bill 2451, which would make it "an act of unprofessional conduct" for a licensed health care provider to engage in sexual orientation change efforts (SOCE). *The Spokesman-Review*, Feb. 16. The measure is modeled under legislation previously enacted in California whose constitutionality has been upheld by the 9th Circuit Court of Appeals, but which is the subject of a petition to the U.S. Supreme Court.

WEST VIRGINIA – The Morgantown City Council voted unanimously on February 4 to approve two resolutions proposed by the Morgantown Human Rights Commission. One calls on the state legislature to approve the Employment and Housing Non-Discrimination Act, which would add sexual orientation to the existing prohibited categories of such discrimination in state law. The other calls for introduction of a "marriage equality bill" in the state legislature. *Dominion Post in Morgantown*, Feb. 5.

WYOMING – Wyoming legislators voted to continue the state's contradictory approach to same sex marriage on February 13. First, the House of Representatives voted down a bill proposed by openly-lesbian

Representative Cathy Connolly, which would have adopted a gender-neutral definition in the marriage statute and allowed same-sex couples to marry in the state. Then, the House rejected a bill sponsored by Rep. Gerald Gay that would have provided that Wyoming does not recognize same-sex marriages performed elsewhere, thus overruling a court decision construing the existing marriage recognition law to require recognition of such marriages. Thus, Wyoming continues to be one of a handful of states that refuses to issue marriage licenses to same sex couples but recognizes same-sex marriages contracted elsewhere. *Associated Press*, Feb. 13.

LAW & SOCIETY NOTES

U.S. STATE DEPARTMENT – On February 27, the State Department issued its annual report on human rights and civil rights, providing a country-by-country rundown. The report includes a summary of the status and treatment of LGBT people for each country, and a spot check of several countries shows that in general the reports are factual and probing, summarizing existing legislation and actual social conditions as reported in local media and by local LGBT groups. The country reports are important documents in the context of immigration and asylum proceedings, and this vital resource is easily accessible on the State Department's website for anybody who is seeking documentation about country conditions. To access the current reports on the website, click on Policy Issues and then Democracy and Human Rights. In releasing the report, Secretary John Kerry singled out anti-LGBT violence as a significant issue, and certainly this would be relevant in asylum proceedings. Secretary Kerry's statement on release of the report is available on the website as well, in both video and printed formats.

LAW & SOCIETY / INTERNATIONAL

CALIFORNIA - The California Supreme Court's ethics advisory committee has proposed a rule change under which state judges would be prohibited from participating in the Boy Scouts of America because the organization discriminates against gay people who wish to serve in leadership roles. If approved by the court, the proposal would take effect in August after a public-comment period. Although California's ethical code for judges has a general ban on belonging to groups that discriminate on various grounds, including sexual orientation, it includes an exception for non-profit youth organizations; an exception, it seems clear, that was intended to allow judges to continue affiliation with the Boy Scouts. Although the BSA repealed a ban on participation by gay youths last year, it refused to repeal its ban on participation by gay adults, producing the anomalous result that a gay youth can advance to the highest ranks in Scouting and then be forced out of the organization upon reach age 18 and disqualified from serving as a troop leader. *Legal Monitor Worldwide*, 2014 WLNR 3479442 (Feb. 7, 2014).

DISTRICT OF COLUMBIA - Mayor Vincent Gray announced on February 27 that all health insurance policies provided or regulated by the District of Columbia would be required to cover medical services for gender transition. This includes the District's Medicaid program, health care policies covering District government employees, and policies purchased on the District's health insurance exchange under the Affordable Care Act. The District's insurance department issued a bulletin instructing insurers to include such coverage, and designating as a violation of the District's Human Rights Law any denial of coverage to qualified individuals. The District government is construing the Human Rights Law to cover gender identity discrimination, in

line with recent interpretations of Title VII of the Civil Rights Act of 1964. *Advocate.com*, Feb. 27.

DISTRICT OF COLUMBIA - The *Washington Post* (Feb. 27) reported that a task force appointed by D.C. Police Chief Cathy L. Lanier to investigate the relationship between the D.C. police and the LGBT community had documented many shortcomings in a 51-page report, and that Lanier had vowed to implement many of the Task Force's recommendations. Among other things, the Task Force recommended that the Department "revise and update training across the board" to improve the response of D.C. police to LGBT issues, and noted a documented rise in anti-gay hate crimes over recent years. Some of the problems noted by the Task Force were blamed on Lanier's decision to restructure the Gay and Lesbian Liaison Unit, ostensibly to improve outreach by decentralizing it rather than having one central unit. Evidently this backfired, as the community saw it as a weakening of the department's commitment to maintaining a good relationship with the community.

WASHINGTON - Surprise! You're married! Registered domestic partners in the state of Washington who have not been paying attention to the fine print in the state's marriage equality law enacted in 2012 have been advised by the press that if they have not dissolved their union by the end of June, it will be automatically converted by operation of law into a marriage. This would include same-sex couples who registered as partners in Washington but reside in other states, where their partnerships may not be recognized and could not be dissolved under current law. Washington has had a domestic partnership law since 2007, and about 10,000 couples are registered. *Seattle Times*, Feb. 15.

BOY SCOUTS OF AMERICA - Walt Disney World is terminating financial support for the Boy Scouts of America because of the organization's continued refusal to allow gay adults to participate as Scout leaders. Disney had been a leading sponsor of many local Scout units in Florida, but will terminate support by 2015 if the policy is not change. Other organizations that have ended funding of Boy Scout units over this issue in the past few years have included Lockheed Martin, Caterpillar, Major League Soccer, Merck, Intel, and United Parcel Service. *thinkprogress.org*, Feb. 27.

INTERNATIONAL NOTES

CANADA - The *National Post* (Feb. 11) reported that Della Wolf Kangro Wiley Richards, age three months, has become the first child in Canada to have three legal parents listed on her birth certificate, under a new British Columbia Law that allows up to four legal parents. She is the daughter of a lesbian couple and their male friend, who donated the sperm for her conception. The parties signed a formal agreement establishing the rules of their relationship, including that the women will be the primary caregivers, responsible for custody and finances, and that the man will be the child's guardian having a say in important decision on schooling and medical history, and will be a father figure for the child. B.C. is the first province to legislature for such flexibility, but the idea was already embraced by the Ontario Court of Appeal in 2008, in a case ruling that a boy could have a legal father and two legal mothers arising from similar circumstances. The newspaper article did not indicate whether the mothers are married to each other. One of the women was a university friend of the father.

CHINA - Hong Kong is reviewing its policies to determine whether a

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transgender person must complete sex reassignment surgery in order to have the same non-discrimination rights as post-operative transgender people, reported the *South China Morning Post* on March 2. On February 28, the Security Bureau published the text of a proposed bill to amend Hong Kong's marriage ordinance, in response to a Court of Final Appeal ruling last year that granted a male-to-female transgender person the right to marry her male partner. The bill would codify a pre-existing government policy against recognizing a change of gender in the absence of surgical alteration of the genitals. The lawyer for the plaintiff in last year's lawsuit, Michael Vidler, told the newspaper, "I am surprised they are doing this, because it flies in the face of indication's by the city's highest court as to how the matter should be dealt with." Vidler contended that under international human rights standards referenced by the court, gender identity is not determined by genitals, and the British Gender Recognition Act, which does not require surgical alteration, was set up as "a model." Some transgender individuals can't afford surgery or have medical conditions that make it too risky; others fear surgical errors or are opposed to the "forced sterilization" that goes with the surgical procedures. According to the newspaper report, "The Court of Final Appeal had expressed concern that using surgery as a basis for recognition might produce an 'undesirable coercive effect on persons who would not otherwise be inclined to undergo the surgery.'" The Legislative Council was expected to debate the issue on March 19.

EL SALVADOR – A proposed constitutional amendment to ban same-sex marriages was overwhelmingly defeated in the Legislative Assembly on February 7 by a vote of 65-19. The measure had been approved in 2012, but needed a second passage to be enacted. *ontopmag.com*, Feb. 9.

GEORGIA – The Constitutional Court of Georgia ruled on February 6 that the Minister of Labor, Healthcare and Social Protection had violated the constitutional rights of gay Georgians by adopting a ban on homosexuals donating blood. The Court pointed out that the Minister had a legitimate aim to keep the blood supply safe, but that this could be accomplished by excluding people who engage in activities presenting a high risk for sexually-transmitted infections. A ban based on sexual orientation was seen as being overbroad. *Application of Asatiani. identoba.com/2014/02/06/conscourt.*

IRELAND – A Department of Justice spokesperson announced on February 10 that Irish same-sex couples who travel overseas to marry will have their marriages recognized in Ireland if a referendum question scheduled for 2015 is approved. "A same-sex marriage contracted in England or Wales would be recognized as a marriage in Ireland, from the date on which same-sex marriage were to become available here, should the referendum to be held during the first half of 2015 pass."

MEXICO – The first legal same-sex marriage took place in Juarez on Feb. 13 after Eduardo Pinon and Julio Salazar won a court order from a federal court in December. Chihuahua state law prohibits same-sex marriages, but Mexican federal courts have been issuing orders in individual cases overriding local laws, relying on the anti-discrimination provision in the Mexican Constitution. The Supreme Court has already issued several same-sex marriage rulings, but under Mexican law such rulings in individual cases do not have nationwide precedential effect until the number of such cases reaches a certain level. At this point, same-

sex ceremonies have been performed in Mexico City, where the local government specifically authorizes them, and in the states of Coahuila, Colima and Jalisco as a result of court orders. *El Paso Times*, Feb. 14.

NIGERIA – A newly-enacted ban on gay sex that also places significant penalties on association and advocacy for gay rights has led to an effort by anti-gay militants in the country to "sanitize" Nigeria of gay people, reported the *New York Times* on Feb. 8. Although the legislation substantially increased jail terms for consensual gay sex, Shariah courts in the northern part of the country go further, enforcing Islamic law which prescribes execution by stoning. Angry mobs have surrounded the courts, threatening to stone defendants if the courts do not order their execution. Fear of unruly mobs led some courts to suspend their public sessions and plan to hold private trial at undisclosed locations and times.

RUSSIA – Russia has expanded its ban on foreign gays adopting Russian children. Existing law prohibits adoptions by same-sex couples. The new law bans adoptions by single parents from countries that allow same-sex marriages. The decree, signed by Prime Minister Dmitry Medvedev and posted on an official government website on February 12, specifies that "same-sex couples who are lawfully married in countries that have legal same-sex marriage, or unmarried nationals from these countries," will not be allowed to adopt Russian children, thus placing 14 or 15 countries out of bounds for adoptions. Adoptions by U.S. citizens have been banned since the start of 2013, in reaction to an incident where a Russian born child died of heat stroke after being left in a parked car by an adoptive parent in the U.S.) *Globe & Mail* (Toronto), Feb. 13.

INTERNATIONAL / PROFESSIONAL

SCOTLAND – The Marriage and Civil Partnership (Scotland) Bill was approved by the Scottish Parliament by a vote of 105-18, receiving some support from all political parties, although it was vigorously opposed by the Church of Scotland and the Scottish Catholic Church. As is customary with legislation in England and Scotland, the bill did not specify an effective date, leaving implementation up to the government. It was expected that same-sex marriages would begin sometime in the fall and no later than the end of 2014. Religious groups are not required to perform same-sex marriages, but may “opt-in” by signifying their willingness to do so. *Daily Telegraph* (UK), Feb. 5; *BuzzFeed*, Feb. 4.

UNITED KINGDOM – A transitional problem, as the U.K. prepares to begin allowing same-sex marriages in March, after having allowed civil partnerships for same-sex couples since 2005: what about retroactivity? Reversing an Employment Tribunal, the Employment Appeal Tribunal in London ruled on February 18 in *Innospec LTD v. Walker*, Appeal No. UKEAT/0232/13/LA, that where a man retired in 2003 and subsequently formed a civil partnership with his longtime partner, if the partner survived him the partner would not be entitled to retroactive credit toward a pension based on his partner’s years of work (even though, under U.K. law, a marriage to an opposite-sex partner would have enjoyed such retroactive credit). The court rejected the argument that its ruling conflicted with a recent ruling by the European Court of Justice, *Maruko (Tadao) v. Versorgungsanstalt der deutschen Bühnen*, [2008] All ER (EC) 977. While the court described the refusal to provide retroactive credit as discriminatory, it asserted that such discrimination was not unlawful, because it came under an exception specifically included in the 2003 U.K. same-sex marriage law. No word yet on

whether the plaintiff’s counsel will seek further review.

ZAMBIA – A Zambian court has acquitted a gay rights activist of charges of “encouraging homosexuality” that arose out of his appearance on a live television show in which he advocated for legal protection of gay rights as part of a strategy to address the HIV epidemic in the country. Paul Kasonkomona was acquitted, the magistrate having ruled that “public discussion is important, even on controversial issues that are repulsive to some members of the community,” said Anneke Meerkotter, a lawyer with the South African Litigation Centre, which had provided legal support to Kasonkomona. According to a press report in *The Mercury* (South Africa) on Feb. 27, “Homosexuality is outlawed in Zambia, as in most African countries, and discrimination against gays and lesbians is rife.”

PROFESSIONAL NOTES

President Barack Obama has nominated **DARRIN GAYLES**, an openly gay Miami-Dade Circuit Judge in Florida, to a seat on the U.S. District Court for the Southern District of Florida. This is the president’s second attempt to place an openly-gay African American judge on that bench. His 2012 nomination of William Thomas, also a Miami-Dade Circuit Judge, foundered when Senator Marco Rubio (R-FL), who had originally supported the nomination, changed his mind and refused to consent to having the nomination be considered by the Judiciary Committee. (By Senatorial custom, the Judiciary Committee will not consider district court nominations without the approval of the Senators from the state in question.) A spokesperson for Senator Rubio said that Judge Gayles was on a list of potential nominees that Senator

Rubio had told the White House would be acceptable; but that was also true of Thomas when the president sent his name to the Judiciary Committee. Florida’s other senator, Bill Nelson, had also deemed Gayles acceptable. Gayles, who earned his law degree from George Washington University and has served as an assistant U.S. Attorney, assistant district counsel at the Immigration Service, and assistant state attorney in Florida, became a county judge in 2004 and was subsequently elevated to the Circuit Court. If confirmed, he would become the first openly-gay African American man to serve in a U.S. District Court. The first openly-gay African American district judge is **DEBORAH BATTS**, who was nominated to the Southern District of New York by President Bill Clinton and recently took senior status on that court. President Obama has also nominated Staci Michelle Yandle, an openly gay African American, to the Southern District of Illinois. Her nomination is pending in the Judiciary Committee. *Washington Blade*, Feb. 5.

IMMIGRATION EQUALITY and the Immigration Equality Action Fund are accepting applications for the position of Senior Policy Counsel, based in Washington, D.C. The job involves writing and presenting policy recommendations, lobbying Congress and the Executive Branch of the federal government for policy changes, working with the organization’s legal team in advocacy and training. This is a JD-preferred job for somebody with experience in working with federal agencies. For full details, check their website: immigrationequality.org/jobs/senior-policy-counsel/. Applications should include a detailed cover letter and resume with Senior Policy Counsel in the subject line in an email addressed to: jobs@immigrationequality.org. Applications received by March 15, 2014, will receive priority consideration.

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“Mohawk” cont. from page 110

orientation,” he wrote. “The record is devoid of any evidence suggesting that anyone at Continental made any comments to Plaintiff about his sexual orientation. In fact, Plaintiff makes no other allegation of discrimination aside from the incident which is the subject of this litigation.”

In response to Continental’s motion for reconsideration, Falcon had submitted “five photographs of unidentified Continental employees whose hairstyles ‘have not been questioned by supervisors at Continental,’ yet are allegedly more extreme than Plaintiff’s hairstyle on September 23, 2010. These photographs are insufficient to raise a triable issue of fact as to whether Plaintiff was singled out because of his sexual orientation,” wrote Linares, “because nothing in the record suggests that the individuals in these photographs are similarly situated. Indeed, nothing in the record suggests that these employees whose extreme hairstyles Continental allegedly has never questioned are heterosexual. Additionally, the Court has no way of knowing whether these individuals even wore their allegedly extreme hairstyles during work hours, what positions these individuals occupied at Continental, or where the photographs were taken. Based on the record before it, this Court cannot conclude that these photographs are probative of any discriminatory animus on the part of Plaintiff’s supervisors, as they fail to suggest that Continental applied its grooming policy to Plaintiff in a discriminatory fashion because of his sexual orientation.”

Under the pleading standards established by the Supreme Court for civil litigation, the plaintiff’s complaint must allege facts that would support the elements of his case. The court found that Falcon’s complaint falls short by failing to allege facts from which a jury could conclude that what happened to him on September 23, 2010, happened because of his sexual orientation. Consequently, the court granted summary judgment to Continental. ■

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