

L G B T  
LAW NOTES

June 2017

**ANOTHER  
BREAKTHROUGH  
FROM THE 7TH CIRCUIT**

*First Federal Appellate Court to Hold That Transgender Students  
Have a Right to Use Bathroom Consistent With Their Gender  
Identity Under Title IX and the Constitution*

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# 7th Circuit Says Federal Law Protects Transgender Students

A unanimous three-judge panel of the Chicago-based U.S. Court of Appeals for the 7th Circuit upheld a trial court's preliminary injunction that requires a Wisconsin school district to allow Ashton Whitaker, a transgender boy, to use the boys' restroom facilities at his high school during his senior year. *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 2017 U.S. App. LEXIS 9362, 2017 WL 2331751. Circuit Judge Ann Claire Williams wrote the court's opinion, joined by Circuit Judges Diane Pamela Wood and Ilana Rovner. This May 30 decision is a landmark ruling: For the first time, a federal appeals court has ruled that Title IX of the Education Amendments Act

decision. Gavin Grimm's appeal from a district court's denial of his Title IX claim is still pending before the 4th Circuit, although the case may be mooted by his graduation.

Judges Williams and Wood were appointed to the court by President Bill Clinton. Judge Rovner was appointed by President George H. W. Bush. Throughout the opinion, Williams refers to the plaintiff as "Ash," using the name he prefers and used throughout the papers filed in this lawsuit.

Judge Williams succinctly summarized what the case is about in her matter-of-fact opening sentence: "Ashton ('Ash') Whitaker is a 17 year-old high school senior boy who has what would seem like a simple request: to use

a boy." When he entered Tremper High School as a freshman in the fall of 2013, he identified himself as a boy, cutting his hair short, wearing masculine clothing, and using the name Ashton and male pronouns to refer to himself. "In the fall of 2014, the beginning of his sophomore year, he told his teachers and his classmates that he is a boy and asked them to refer to him as Ashton or Ash and to use male pronouns," wrote Williams. He also began to see a therapist, who formally diagnosed him with gender dysphoria. After his junior year, he began hormone replacement therapy under the supervision of an endocrinologist and petitioned a local court for a legal name change, which was granted in September 2016.

**Judge Williams wrote a powerful opening sentence: "Ashton ('Ash') Whitaker is a 17 year-old high school senior boy who has what would seem like a simple request: to use the boys' restroom while at school."**

of 1972, which bans sex discrimination by educational institutions that get federal money, prohibits discrimination against transgender students. The court also ruled that a transgender student subjected to discriminatory treatment by a public school could sue under the Constitution's Equal Protection Clause.

In a prior ruling involving Gavin Grimm, a transgender boy who is about to graduate from a Virginia high school, the Richmond-based 4th Circuit Court of Appeals ruled that the federal courts should defer to the Obama Administration's "reasonable" interpretation of Title IX providing protection to transgender students. That ruling, however, was vacated by the U.S. Supreme Court in March after the Trump Administration withdrew the Obama Administration's interpretation, only weeks before the Court was to hear argument about the 4th Circuit's

the boys' restroom while at school." The request did not seem simple to Kenosha school authorities, however, because Whitaker is a transgender boy and, as far as the school district is concerned, should be treated as a girl unless or until Ash presents documentation of a completed surgical gender transition resulting in a new birth certificate designating him as male. However, under the recognized standard of care for gender dysphoria, genital surgery may not be performed until the individual reaches age 18, and his birth state of Wisconsin will not issue such a birth certificate without proof of surgical sex reassignment, so there is no way that Ash Whitaker can satisfy the district's unwritten policy for being treated as a boy while he is a student there.

According to the court's opinion, Ash was in the 8th grade when he told his parents that "he is transgender and

Ash and his mother began to meet with school authorities in the spring of his sophomore year to request that he be permitted to use the boys' restrooms at school, but the authorities were resistant. Although the school district has no written policy on the matter, the administration informed him that he was not allowed to use the boys' restroom, and that they would make an exception to the usual rules and allow him to use a gender-neutral restroom in the school's main office. This was not particularly helpful to him, since the main office was "quite a distance from his classrooms." Using that restroom between classes would make him late for class. And, explained Judge Williams, "because Ash had publicly transitioned, he believed that using the girls' restrooms would undermine his transition." And since he was the only student authorized to use the gender-

neutral bathroom in the office, “he feared that using it would draw further attention to his transition and status as a transgender student at Tremper.”

There was also a medical complication. Ash has been diagnosed with vasovagal syncope, a condition that makes him susceptible to fainting or seizures if he becomes dehydrated, so he has to drink liquids frequently, which means he needs those bathroom breaks between classes and he can’t easily get by with “holding his water” throughout the day. In an attempt to avoid having to use bathrooms during the day, he did attempt to restrict his water intake, but with predictable results: fainting and dizziness. In addition, the restrictions placed on him led him to suffer stress-related migraines, depression, and anxiety. “He even began to contemplate suicide,” wrote Williams.

birth certificate before they would make any change.

Despite this incident, Ash continued to use the boys’ restrooms, causing him anxiousness and depression. From the court’s description, it sounds like a “cat and mouse game” was going on at the high school, as security guards were “instructed to monitor Ash’s restroom use” and he sought to evade their gaze. He was caught a few times and removed from classes to get dressed down by administrators, however, leading classmates and teachers to ask about what was going on. In April 2016, the school expanded Ash’s restroom access to include two single-user, gender-neutral locked restrooms on the opposite side of the campus from where his classes were held. He was the only student issued a key to these restrooms. But again, due to their location they were

he withdrew the complaint and filed his lawsuit, seeking a preliminary injunction that would get him restroom access for his senior year.

The school district filed a motion to dismiss the lawsuit, claiming that neither Title IX nor the Constitution provided a legal cause of action for Ash. District Judge Pamela Pepper denied the motion to dismiss and granted Ash’s motion for a preliminary injunction that would allow him to use the boys’ restrooms at school while the case was pending. A prerequisite for issuing the injunction was Judge Pepper’s determination that Title IX and the Equal Protection Clause both gave Ash legal claims on which he had a “better than negligible” chance of succeeding and that he would suffer irreparable injury, greater than any injury suffered by the school district, if he was denied this relief.

## The court easily rejected the school district’s argument that Ash would not suffer irreparable harm because the district had made available to him gender-neutral restrooms.

The school district attempted to appeal Judge Pepper’s denial of its motion to dismiss, but the 7th Circuit refused to consider that appeal last year. A denial of a motion to dismiss a lawsuit is not a final judgment, because it just means that the lawsuit will continue, and if the defendant loses, then the defendant can appeal the final judgment. Although there is a narrow set of circumstances in which a court of appeals will consider an appeal by a defendant whose motion to dismiss has been denied, this case did not fit within them, a point the court reiterated in its May 30 ruling. The school district also appealed from Judge Pepper’s preliminary injunction, but the 7th Circuit panel unanimously affirmed Judge Pepper.

When he began his junior year in the fall of 2015, he decided to take a risk and use the boys’ restrooms, hoping not to be caught or disciplined. “For six months, he exclusively used the boys’ restrooms at school without incident,” wrote Williams, “but, in February 2016, a teacher saw him washing his hands at a sink in the boys’ restroom and reported it to the school’s administration.” A guidance counselor contacted his mother and reiterated the restrictive restroom policy. Ash and his mother met with the assistant principal, who stood firm, pointing out that Ash was listed on the school’s official records as female and any change would require “legal or medical documentation.” Subsequent correspondence eventually clarified that written certification of his gender dysphoria and of his name change would not be sufficient for the school. They wanted a male-designated

of little use to him if he wanted to avoid being late for classes, and he felt further stigmatized, avoiding these restrooms entirely. “In addition,” wrote Williams, “Ash began to fear for his safety as more attention was drawn to his restroom use and transgender status.” He also began to suffer various other kinds of discrimination connected with the school’s insistence on treating him as a girl, but when he decided to take legal action, he restricted his complaint to the bathroom issue.

Ash found a lawyer who sent a demand letter to the school district which declined to change its position. Then, Ash filed a complaint with the U.S. Education Department’s Office of Civil Rights, alleging a violation of Title IX. But when it became clear that the administrative process would take too much time to provide relief for him before his senior year began,

The court easily rejected the school district’s argument that Ash would not suffer irreparable harm because the district had made available to him gender-neutral restrooms. The school district also contested the expert testimony offered by a psychologist about the harm that its policies were inflicting on Ash. Judge Williams quoted Dr. Stephanie Budge’s testimony that the district’s treatment of Ash “significantly and negatively impacted his mental health and overall well-being.” Clearly, such an effect could not be compensated by an award of monetary damages at a later date, and was thus “irreparable”

as that term is used by the courts. Dr. Budge testified that the school district's actions, including its bathroom policy, which identified Ash as transgender and therefore, "different," were "directly causing significant psychological distress and place him at risk for experiencing life-long diminished well-being and life-functioning." The court of appeals found no clear error in Judge Pepper's reliance on this expert testimony, which was not effectively rebutted by the school district. Furthermore, his experience of using the boys' restrooms for six months without any incident or complaints from students or teachers belied the school district's argument that it would suffer serious injury if he were allowed to use those restrooms.

As to the likelihood that Ash would prevail on the merits of his claim at trial, the court did not have to strain much to reach that conclusion. Judge Williams noted that the 7th Circuit, like other courts of appeals, has looked to cases decided under Title VII of the Civil Rights Act of 1964 to determine the scope of the ban on sex discrimination. On April 4, the 7th Circuit ruled in *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339, an employment discrimination case, that a lesbian who was denied a faculty position because of her sexual orientation could bring a sex discrimination claim under Title VII. That ruling was heavily based on a line of federal cases under Title VII that had adopted a broad interpretation of "discrimination because of sex," and Judge Williams found that the logic of those cases had clearly overruled the 7th Circuit's decision in *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984), in which it had denied a Title VII claim by a transgender airline pilot. The *Ulane* case predated the Supreme Court's ruling in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), where the Court found that discrimination against a person because of their failure to conform to sex stereotypes could be found to violate Title VII. In effect, the Court said that Title VII applied to discrimination because of gender, not just because of biological sex.

"By definition," wrote Williams, "a transgender individual does not

conform to the sex-based stereotypes of the sex that he or she was assigned at birth." The judge cited a long list of federal court rulings that have reached this conclusion and applied Title VII to cases of gender identity discrimination. The court rejected the school district's argument that Congress's failure to amend Title IX or Title VII to expressly protect people based on their transgender status required a different conclusion, and held that "Ash can demonstrate a likelihood of success on the merits of his claim because he has alleged that the School District has denied him access to the boys' restroom because he is transgender." She also pointed out that the school district was misrepresenting Ash's claim when it argued that he may not "unilaterally declare" his gender, ignoring the medical diagnosis of gender dysphoria.

"Since his diagnosis," wrote Judge Williams, "he has consistently lived in accordance with his gender identity. This lawsuit demonstrates that the decision to do so was not without cost or pain. Therefore, we find that Ash has sufficiently established a probability of success on the merits of his Title IX claim."

The court held similarly regarding Ash's alternative constitutional equal protection claim, rejecting the school district's argument that because it has a "rational basis" for adopting its restroom access rule—protecting the privacy of male students who did not want to use a restroom with a girl—it could prevail over Ash on the constitutional claim. Ash presented an argument that transgender people could, by virtue of a history of discrimination and lack of political power, be deemed a "suspect class," but the court found it unnecessary to go down that route. Because the court had concluded that a gender identity discrimination claim under Title VII is in actuality a sex discrimination claim, it followed that the level of judicial review for a constitutional gender identity discrimination claim would be the same that courts use for sex discrimination claims: heightened scrutiny. Under this standard, the discriminatory policy is presumed to be unconstitutional and the school district has the burden to show

that it has an "exceedingly persuasive" justification for adopting the policy.

Such a justification cannot rely on "sheer conjecture and abstraction," but that's all the school district had. Judge Williams observed that the administration had never received any complaint from other students about Ash using the boys' restrooms. "This policy does nothing to protect the privacy rights of each individual student vis-à-vis students who share similar anatomy and it ignores the practical reality of how Ash, as a transgender boy, uses the bathroom: by entering a stall and closing the door." Indeed, Williams might have gone on to write, it would be ludicrous to suggest that a transgender boy is going to expose himself at a urinal, or stand at a urinal and glance over at other boys using the adjacent facilities.

"A transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions," wrote the judge. "Or for that matter, any other student who uses the bathroom at the same time. Common sense tells us that the communal restroom is a place where individuals act in a discreet manner to protect their privacy and those who have true privacy concerns are able to utilize a stall."

In an interesting excursion into the hotly contested science of sexual identity, Williams added that the school administration's insistence on treating people in accord with sex markers on birth certificates would not necessarily address their concerns. "The marker does not take into account an individual's chromosomal makeup, which is also a key component of one's biological sex," she wrote. "Therefore, one's birth certificate could reflect a male sex, while the individual's chromosomal makeup reflects another. It is also unclear what would happen if an individual is born with the external genitalia of two sexes, or genitalia that are ambiguous in nature. In those cases, it is clear that the marker on the birth certificate would not adequately account for or reflect one's biological sex, which would have to be

determined by considering more than what was listed on the paper.”

She also noted the lack of consistency among the various states in what they require to change birth certificates. Depending where a transgender student was born, they might be able to get a new certificate without a surgical sex reassignment procedure, thus defeating the school’s underlying purpose in relying on the birth certificate. She also pointed out that the school district did not have a policy requiring newly registering students to present birth certificates, allowing them to present passports as identification as an alternative. The U.S. State Department no longer requires proof of sex-reassignment surgery for a transgender man to get a passport correctly identifying his gender, so a transgender boy who had obtained an appropriate passport could register in the Kenosha School District as a boy.

Thus, having found that Ash’s allegations fulfilled all the tests required for obtaining a preliminary injunction, the court denied the school district’s appeal and affirmed the injunctive relief. There were no immediate indications that the school district would seek *en banc* review or petition the Supreme Court for a stay.

Ash is represented by Robert Theine Pledl of Pledl & Cohn, Milwaukee; Joseph John Wardenski and Sasha M. Samberg-Champion, of Relman, Dane & Colfax PLLC, Washington D.C.; and Shawn Thomas Meerkamper, Alison Pennington, and Ilona M. Turner, with the Transgender Law Center of Oakland, California. Amicus briefs in support of Ash’s case were received from a variety of groups representing school administrators, parents, students, and LGBT rights organizations. Among those joining in were Lambda Legal, PFLAG, Gay-Straight Alliances, and women’s rights groups, with several major law firms stepping up to author the amicus briefs. The only amicus support for the school district came from Alliance Defending Freedom (ADF), the anti-gay religious litigation group that has championed lawsuits attacking school districts for allowing transgender students to use facilities consistent with their gender identity. ■

## Sexual Orientation Discrimination under Title VII in the 2nd Circuit: A Work in Progress

The 2nd Circuit Court of Appeals announced on May 25 that it will hear argument *en banc* in *Zarda v. Altitude Express, Inc.*, on September 26. The court’s Order directed the parties to brief only the following question: “Does Title VII of the Civil Rights Act of 1964 prohibit discrimination on the basis of sexual orientation through its prohibition of discrimination ‘because of . . . sex’?”

A 2nd Circuit panel had ruled against the appeal from an adverse summary judgment on the plaintiff’s Title VII claim; *see* 855 F.3d 76, finding the sexual orientation discrimination

Given his role in the *Christiansen* case (see below), it seems possible that Chief Judge Robert Katzmann was the judge who initiated the internal suggestion for *en banc* review, but it might also have been the one active circuit judge on the *Zarda* panel, former Chief Judge Dennis Jacobs, who wrote for the 2nd Circuit panel in *United States v. Windsor*, 699 F.3d 169 (2nd Cir. 2012), striking down Section 3 of the Defense of Marriage Act and incidentally opining that sexual orientation discrimination claims under the 5th Amendment merit heightened scrutiny, an important breakthrough in 2nd Circuit jurisprudence.

**The main item of suspense during May was whether the court would grant all three and combine the cases for argument, grant two, or just grant one and hold the other cases while deciding the one.**

claim to be barred by Circuit precedent. Counsel for the Zarda Estate executors, Gregory Antollino and Stephen Bergstein, filed a petition seeking rehearing *en banc* on May 2, but the 2nd Circuit’s Order implies that the wheels had already been put in motion for this *en banc* rehearing by the court itself, relating that “a judge of the Court requested a poll on whether to rehear the case *en banc*” following disposition of the appeal by a three-judge panel on April 18, and that a majority of the active judges voted in favor of rehearing. The court also indicated that the two senior judges who sat on the three-judge panel, Robert Sack and Gerard Lynch, would participate in the *en banc* rehearing. Mr. Antollino, who argued before the three-judge panel, will argue for the appellants in the *en banc* hearing.

The court had actually received petitions for *en banc* review of this question in three separate cases, appealing rulings by three district judges within the circuit, and the main item of suspense during May was whether the court would grant all three and combine the cases for argument, grant two, or just grant one and hold the other cases while deciding the one.

As the court was considering whether to address this issue *en banc*, a federal trial judge in Manhattan ruled that “in light of the evolving state of the law,” it would be “improper” for the court to grant a motion to dismiss a gay plaintiff’s sexual orientation discrimination claim. Senior District Judge Alvin K. Hellerstein, appointed by Bill Clinton in 1998, issued his ruling in *Philpott v. New York*, 2017 U.S. Dist. LEXIS 67591, 2017 WL

1750398 (S.D.N.Y.), which is reported in a separate article below, on May 3, the day after the *Zarda* petition was filed.

An *en banc* hearing in the 2nd Circuit involves participation by all eleven active judges in the circuit, plus any senior judges who participated in a three-judge panel decision that is being reheard. Appeals from trial court decisions are normally heard by three-judge panels, which are bound to follow existing circuit precedents. Only *en banc* panels (or the Supreme Court) can reconsider and reverse such precedents.

The 2nd Circuit ruled in 2000, in the case of *Simonton v. Runyon*, 232 F.3d 33, that Title VII could not be interpreted to forbid sexual orientation discrimination. This holding was reiterated by a second panel in 2005, in *Dawson v. Bumble & Bumble*, 398 F.3d 211, and yet again this year on March 27 in *Christiansen v. Omnicom Group*, 852 F.3d 195 and, of course, in *Zarda*. However, the 2nd Circuit's Chief Judge, Robert Katzmann, who was sitting as a member of the panel in *Christiansen*, wrote a concurring opinion joined by a district judge sitting by designation on the panel, arguing that the issue should be reconsidered *en banc* in "an appropriate case." Katzmann's discussion embraced the arguments articulated by the Equal Employment Opportunity Commission in its 2015 decision holding that David Baldwin, a gay air traffic controller, could bring a sexual orientation discrimination claim under Title VII against the U.S. Department of Transportation, and was followed by the 7th Circuit's recent *en banc* decision in *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339.

The first of the *en banc* petitions was filed on April 19 in *Cargian v. Breitling USA, Inc.*, in which another Manhattan trial judge, George B. Daniels, dismissed a gay watch salesman's Title VII sexual orientation discrimination claim, finding that 2nd Circuit appellate precedents binding on the court rejected sexual orientation claims as a form of sex discrimination. Judge Daniels ruled on September 29, 2016, 2016 U.S. Dist. LEXIS 139206 (S.D.N.Y.), and Frederick Cargian filed an appeal to the 2nd Circuit. When the

*Christiansen* decision was issued on March 27, it became clear that Cargian's appeal to a three-judge panel would be a waste of time and judicial resources, and the American Civil Liberties Union, representing Cargian along with the New York Civil Liberties Union and solo plaintiff attorney Janice Goodman, decided to petition the Circuit to take the case up directly *en banc*, bypassing the usual three-judge panel.

The second petition was filed on April 28 by Matthew Christiansen's attorney, Susan Chana Lask. The three-judge panel in Christiansen's case had refused to allow the case to continue on a sexual orientation discrimination theory, but had concluded that it was possible that Christiansen would be able to proceed under a gender stereotyping theory. The panel clarified the 2nd Circuit's approach in such cases, rejecting District Judge Failla's conclusion that if the factual allegations suggest that sexual orientation played a role in the discrimination suffered by the plaintiff, he would be not be allowed to proceed under Title VII. The trial court's approach overlooked an important element of Title VII, an amendment adopted in 1991 providing that a plaintiff is entitled to judgment if sex is a "motivating factor" in his or her case, even if other factors contributed to the employer's discriminatory conduct. The Supreme Court ruled in 1989 that discriminating against an employee because the employee fails to conform to gender stereotypes is evidence of discrimination because of sex. In such a case, the sexual orientation of the plaintiff would be irrelevant, so long as the plaintiff could show that gender stereotyping was a motivating factor in their mistreatment.

At first it appeared that Christiansen would not seek *en banc* review, despite Judge Katzmann's suggestion in his concurring opinion that the issue should be considered *en banc* in an appropriate case, as the panel had unanimously voted to send the case back to the district court for consideration as a gender stereotyping case. Attorney Lask was quoted in newspaper reports as preparing to proceed to trial on the stereotyping theory. The ACLU's *en banc* petition changed the game plan,

evidently, and Christiansen's *en banc* petition was filed on April 28.

Meanwhile, on April 18, a different panel, including two senior circuit judges, ruled in *Zarda* that 2nd Circuit precedent barred the plaintiff's Title VII sexual orientation discrimination claim. The Title VII claim was the only issue on appeal. This case, litigated in the Eastern District of New York, had not received as much attention as the Christiansen case, which was litigated in Manhattan. The plaintiff, Donald Zarda, a skydiving instructor, had subsequently died in a skydiving incident, and the executors of his estate were substituted as plaintiffs. The trial judge, Thomas M. Bianco, granted summary judgment against Zarda on the Title VII sex discrimination claim, but had allowed the case to go to trial under New York Human Rights Law, which expressly forbids sexual orientation discrimination. The jury ruled against Zarda. The charge to the jury was arguably incorrect, apparently requiring the jury to decide that Zarda's sexual orientation was the "but for" cause of his discharge, a determination that would not be required under Title VII and probably not even under the state law. The 2nd Circuit panel disclaimed any view as to the correctness of that jury charge, pointing out that because it differed from the Title VII requirements, Zarda would still have a viable claim under Title VII, despite the jury verdict, *if* Title VII was construed to cover sexual orientation discrimination claims. The *en banc* petition in *Zarda* was filed on May 2, but, as noted above, it seems that a judge of the Circuit may have already called for a possible *en banc* rehearing soon after the *per curiam* panel decision was released.

Interestingly, at trial the plaintiffs sought to raise a gender stereotype theory in support of their Title VII claim, but in granting summary judgment, the judge had found that the proof on that point was insufficient to sustain the Title VII cause of action. In *Christiansen*, by contrast, the trial judge, Katherine Polk Failla, had rejected the gender stereotype claim on the ground that there was evidence that Christiansen's sexual orientation was a motivating factor for the employer's

action and that was enough, under her understanding of Circuit precedent, to kill his Title VII claim, a point that the panel decision refuted.

In deciding which of the three petitions to grant, the Circuit's attention most likely focused on *Zarda* as presenting the central question most directly without complications. *Cargian* was an attempt to leapfrog the usual panel step, which was unnecessary to get the issue before the court in the light of the two other petitions. The *Christiansen* panel included a district judge, who would not be able to participate in the *en banc* review, and had left open the possibility of continuing the case on gender stereotyping grounds. *Zarda*, as presented in the petition, could focus solely on the sexual orientation question without distractions, and would also allow all the judges from the panel to participate in the *en banc* rehearing.

The court set an expeditious schedule for briefing and oral argument. Petitioner's brief is due June 26, Respondent's and amicus briefs by July 26, Petitioner's reply brief by August 9, and oral argument on September 26. The court specifically stated: "We invite amicus curiae briefs from interested parties."

For those who are concerned about the political balance of the 2nd Circuit *en banc* these days, of the eleven active judges, three were appointed by Bill Clinton and four by Barack Obama, meaning 7 out of the 11 were appointed by Democratic presidents. The two senior judges who will sit with the *en banc* panel include one more appointed by Clinton and one more appointed by Obama, so there is a clear majority of Democratic appointees—9 out of the 13—on the *en banc* panel. But it would be hasty to draw conclusions just from the identity of appointing presidents. President George H.W. Bush appointed Judge Jacobs, who wrote the 2nd Circuit's opinion striking down the Defense of Marriage Act, and a Clinton appointee on that panel dissented, finding that DOMA was constitutional under a rational basis analysis. The political party of the appointing president does not always predict how a circuit judge will vote on a politically charged issue. ■

## Taiwan Constitutional Court Rules for Marriage Equality

The Constitutional Court of the Republic of China (Taiwan) voted overwhelmingly that same-sex couples are entitled to marry, and that anti-gay discrimination violates the Republic's Constitution. The May 24 ruling was greeted with relative equanimity by legislative leaders, who were ordered by the court to approve legislation to implement this decision by May 24, 2019. Otherwise, the court said, the decision would go into effect automatically, and same-sex couples would be entitled to marry. Only two justices dissented, and one abstained. Press reports we saw differed as

The opinion, Interpretation No. 748, was released only in Chinese, but the court simultaneously issued an English-language press release summarizing the ruling in detail.

The court was responding to petitions from LGBT rights activist Chia-Wei Chi and the Taipei City Government, seeking a definitive ruling on whether the freedom to marry, protected by Article 22 of the Constitution, was limited by the provisions of Chapter 2 on Marriage of Part IV on Family of the Civil Code, which defines marriage as exclusively a different-sex institution. The court also had to confront the

**This was the first ruling by an Asian high court to accept marriage equality as a constitutional right, although there might be political and ideological arguments about its significance in relation to the rest of Asia due to the unusual status of Taiwan.**

to whether the court has 14 or 15 members. Either way, the majority was overwhelming.

This was the first ruling by an Asian high court to accept marriage equality as a constitutional right, although there might be political and ideological arguments about its significance in relation to the rest of Asia due to the unusual status of Taiwan. The Peoples' Republic of China (Mainland China) considers Taiwan to be part of its country that is just temporarily self-governing and most countries do not recognize it as an independent nation. However, there is no disputing that when this ruling goes into effect, Taiwan will be the first place where same-sex marriages can be performed in Asia with the imprimatur of legally-recognized status.

question whether excluding same-sex couples from marriage violated the "people's right to equality" guaranteed in Article 7 of the constitution.

The court found that both constitutional guarantees – the right to marry and the right to equality – were violated by the ban on same-sex marriage.

The court observed that the petitioner, Chia-Wei Chi, has been waging a campaign for same-sex marriage for more than thirty years. Although some progress had been made in getting the legislature to consider the issue, after more than ten years of bills being introduced and debated, nothing has been brought to a vote. The court expressed concern about the frustration induced by this protracted legislative process. "The representative

body is to enact or revise the relevant laws in due time,” said the court. “Nevertheless, the timetable for such legislative solution is hardly predictable now and yet these petitions involve the protection of people’s fundamental rights. It is the constitutional duty of this Court to render a binding judicial decision, in time, on issues concerning the safeguarding of constitutional basic values such as the protection of peoples’ constitutional rights and the free democratic constitutional order.”

The court said that the freedom to marry extends both to deciding whether to marry and whom to marry. “Such decisional autonomy is vital to the sound development of personality and safeguarding of human dignity, and therefore is a fundamental right.” The court insisted that allowing same-sex couples to marry “will not affect the application of the Marriage Chapter to the union of two persons of the opposite sex” and that it would not “alter the social order established upon the existing opposite-sex marriage.” The court said that the failure of current law to allow same-sex couples to marry “is obviously a gross legislative flaw” and that the current provisions “are incompatible with the spirit and meaning of the freedom of marriage as protected by Article 22 of the Constitution.”

Moving to the equality issue, the court addressed the problem that Article 7, unlike the United States’ equal protection clause, explicitly requires equality “irrespective of sex, religion, class, or party affiliation,” but the court did not see this list as a barrier to protecting equality for gay people (or, it added, people with disabilities). They said that the classifications listed in Article 7 “are only exemplified, neither enumerated nor exhausted.” In other words, this is a list of “including but not limited to” classifications, and the court saw sexual orientation as a classification governed by the same equality principle.

“Sexual orientation is an immutable characteristic that is resistant to change,” wrote the court. “The contributing factors to sexual

orientation may include physical and psychological elements, living experience, and the social environment. Major medical associations have stated that homosexuality is not a disease. In our country, homosexuals were once denied by social tradition and custom in the past. As a result, they have long been locked in the closet and suffered various forms of de facto or de jure exclusion or discrimination. Besides, homosexuals, because of the demographic structure, have been a discrete and insular minority in the society. Impacted by stereotypes, they have been among those lacking political power for a long time, unable to overturn their legally disadvantaged status through ordinary democratic process. Accordingly, in determining the constitutionality of different treatment based on sexual orientation, a heightened standard shall be applied.” This appears to be the equivalent of the U.S. legal concept of a “suspect classification,” one deemed illegitimate in the absence of good justification.

The court rejected any idea that reproductive capacity has anything to do with the freedom to marry, pointing out that different-sex couples may marry even if they are incapable of procreation or unwilling to engage in procreative activities. “Disallowing two persons of the same sex to marry, for the sake of their inability to reproduce, is a different treatment having no apparent rational basis,” wrote the court. It also rejected the kind of moralistic arguments that are raised by marriage equality opponents, concluding, “Disallowing two persons of the same sex to marry, for the sake of safeguarding basic ethical orders, is a different treatment, also obviously having no rational basis. Such different treatment is incompatible with the spirit and meaning of the right to equality as protected by Article 7 of the Constitution.”

While the court gave the government two years to make the necessary legislative adjustments to carry out this ruling, it warned that failure to do so would not prevent the decision from going into effect. Upon the two-year anniversary, if not sooner, same-

sex couples will be entitled to apply for marriage registration to the usual authorities and to “be accorded the status of a legally recognized couple, and then enjoy the rights and bear the obligations arising on couples.”

Without being able to read and understand the original Chinese text, it is hard to assess whether the ruling leaves much leeway to the legislature to consider alternatives to true marriage equality. In Europe, for example, the Court of Human Rights has been willing to allow countries to adopt registered partnerships or civil unions rather than extending explicit marriage rights to same-sex couples, although that is likely to change as the number of countries having voluntarily legislated for marriage equality has grown to encompass several of the largest countries who are parties to the European Convention on Human Rights. However, the clear import of the English summary is that same-sex marriages would have to include all the usual legal rights accompanying opposite-sex marriages to meet the equality test the court embraced, in a more explicit way than the U.S. Supreme Court did in *Obergefell v. Hodges* in 2015.

The local English-language press in Taiwan reported that none of the major parties responded with opposition to the ruling, which was quickly embraced by Premier Lin Chuan, who “ordered Chen Mei-ling, secretary-general of the Executive Yuan, to coordinate the Ministry of Justice, Ministry of Interior and other branches to draft the revision proposal,” according to Cabinet spokesman Hsu Kuo-yung. The cabinet will approve a proposal to submit to the legislature. The two options that seem available are a bill amending existing laws to accommodate same-sex marriages, or a separate same-sex marriage bill. In terms of timing, it seems possible that marriage equality will go into effect sooner than two years. Although the current legislative session ended on May 31, the legislature will reconvene for some special sessions during July and August and will resume its regular session thereafter. ■

# District Court in 2nd Circuit Denies Motion to Dismiss Title VII Sexual Orientation Discrimination Claim, Despite Bad Controlling Precedent Still on the Books

Senior Judge Alvin K. Hellerstein of the U.S. District Court for the Southern District of New York, within the jurisdiction of the 2nd Circuit Court of Appeals, declined to dismiss a Title VII claim for sexual orientation discrimination, citing the “evolving state of the law on this question,” rather than abiding by the controlling precedent of the circuit. *Philpott v. New York*, 2017 U.S. Dist. LEXIS 67591, 2017 WL 1750398 (S.D.N.Y. May 3, 2017).

Following the lead of a senior district judge in Connecticut (also in the 2nd Circuit), Warren W. Eginton, Judge Hellerstein also reacted to the flurry of Title VII developments in the 2nd and 7th Circuits in the last two months (namely the *Christiansen*

there, made a series of discriminatory comments and excluded him from projects and meetings because of his sexual orientation. When he complained about this discrimination, he was fired shortly thereafter.

Philpott then brought an employment discrimination action and, after withdrawing an Americans with Disabilities Act claim for chemical dependence discrimination, he continued with claims for sexual orientation discrimination, hostile work environment, and retaliation under Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. SUNY, represented by the State Attorney General’s Office, moved to dismiss on a variety of grounds in

The rest of the issues for the motion to dismiss were much more straightforward. After recounting many of the disturbing comments Dr. Heath allegedly made about Philpott’s sexual orientation and gay people generally, before Philpott complained and then ultimately was terminated, Judge Hellerstein easily concluded Philpott plausibly alleged claims for discrimination, hostile work environment, and retaliation. He also added that, despite filing with the Equal Employment Opportunity Commission more than 300 days after many of the episodes complained of, Philpott avoided a statute of limitations bar because other prior acts can still be used as background evidence in support of a timely claim and, under 2nd Circuit precedent, “[a] claim of hostile work environment is timely so long as one act contributing to the claim occurred within the statutory period; if it did, ‘the entire time period of the hostile environment may be considered by a court of the purposes of determining liability.’”

Despite the overwhelming good news Judge Hellerstein gave Philpott, he did dismiss his Title IX claim, however. Over the years since Congress passed Title IX, the courts have concluded it was intended to cover discrimination against students, not discrimination happening to employees at educational institutions, especially because of the administrative exhaustion required by Title VII, but not Title IX. Judge Hellerstein endorsed this view and saw Philpott’s claim as “quintessentially one for employment discrimination.”

Judge Hellerstein concluded with a schedule for the parties to follow for the next procedural steps of the litigation, although it is unclear if the case may now be delayed to wait for the *en banc* 2nd Circuit decision in *Zarda*. Philpott is represented by Daniel E. Dugan of The Law Offices of Stewart Lee Karlin, P.C. in New York, New York. – *Matthew Skinner*

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

## Judge Hellerstein wrote that it would be “improper” to dismiss Philpott’s Title VII claim at this stage of the litigation.

and *Hively* decisions), perhaps seeing the writing on the wall. See *Boutillier v. Hartford Public Schools*, 2016 U.S. Dist. LEXIS 159093, 2016 WL 6818348 (D. Conn. Nov. 17, 2016) (rejecting an employer’s motion to dismiss a Title VII sex discrimination claim brought by an openly gay employee despite 2nd Circuit precedent). Indeed, only 22 days after he denied this motion to dismiss, the 2nd Circuit announced it would go *en banc* to affirmatively reexamine this question in the case of *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2d Cir. 2017), with argument scheduled for September 26.

Jeffrey Philpott was the Vice President of Student Affairs at the State University of New York’s College of Optometry (SUNY Optometry) from 2010 through 2015. In his complaint, he alleged that Dr. David Heath, the President of SUNY Optometry, and Dr. Guilherme Albiéri, a colleague of his

January, but probably could not have foreseen what would happen in the months to come.

Judge Hellerstein wrote that it would be “improper” to dismiss Philpott’s Title VII claim at this stage of the litigation, in light of these developments. He also rejected the suggestion that Philpott plead his case as a gender stereotyping sex discrimination case. “The fact that plaintiff has framed his complaint in terms of sexual orientation discrimination and not gender stereotyping discrimination is immaterial,” wrote Hellerstein. “I decline to embrace an ‘illogical’ and artificial distinction between gender stereotyping discrimination and sexual orientation discrimination, and in so doing, I join several other courts throughout the country,” citing *Videckis v. Pepperdine University*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) (collecting cases).

# Federal Court Recognizes Gender Dysphoria Discrimination Claims under Americans with Disabilities Act

For the first time, a federal court has recognized that individuals suffering from gender dysphoria are entitled to protection against workplace discrimination under the Americans with Disabilities Act (ADA), a federal law that requires employers to reasonably accommodate employees' disabilities. The May 18 ruling by U.S. District Judge Joseph F. Leesom, Jr., accepted an argument by attorneys for Kate Lynn Blatt, a transgender woman, that a provision in the ADA excluding protection for "gender identity disorders" should be narrowly construed to avoid a potential violation of the Equal Protection Clause. *Blatt v. Cabela's Retail, Inc.*, 2017 U.S. Dist. LEXIS 75665, 2017 WL 2178123 (E.D. Pa.).

Blatt, who is also alleging sex discrimination by her employer, Cabela's Retail, Inc., was diagnosed with gender dysphoria in October 2005. She alleges that her gender dysphoria "substantially limits one or more of her major life activities, including, but not limited to, interacting with others, reproducing, and social and occupational function." The ADA provides protection for people suffering from physical or mental impairments that substantially limit one or more of their major life activities.

Blatt claims that shortly after she was hired by Cabela's in September 2006, she began to experience discrimination, culminating in her termination in February 2017. The court's decision does not provide much factual detail, because it is narrowly focused on Cabela's motion to dismiss the portion of Blatt's complaint that relies on the ADA.

Part of the opposition to the ADA in Congress in 1990 focused on the possibility that the proposed law could be interpreted to prohibit discrimination against sexual minorities – gays, lesbian, bisexuals, and transgender people – on the theory that "abnormal" sexuality was a "disability" within the meaning of the statute. To combat this argument, the bill was amended

to provide that "homosexuality and bisexuality are not impairments and as such are not disabilities under this Act." The provision goes on to say that the term "disability" "shall not include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders." It also excludes protection for people afflicted by "compulsive gambling, kleptomania, or pyromania; or psychoactive substance use disorders resulting from current illegal use of drugs."

This provision has long been considered to exclude any protection for transgender people related to their gender identity under the ADA. During the debate over the bill, it was made

to equal protection of the laws under the 14th Amendment, but that the court could avoid having to consider the constitutionality of the statute by interpreting it to cover Blatt's claims.

Judge Leesom accepted Blatt's argument, finding that there is a "fairly possible" interpretation of the exclusionary provision, "namely, one in which the term gender identity disorders is read narrowly to refer to only the condition of identifying with a different gender, not to encompass (and therefore exclude from ADA protection) a condition like Blatt's gender dysphoria, which goes beyond merely identifying with a different gender and is characterized by clinically significant stress and other impairments that may be disabling."

**This provision has long been considered to exclude any protection for transgender people.**

clear that this would not deny protection to transgender people who suffer from other disabling conditions, such as blindness, deafness and the like, not related to their gender identity.

Cabela's asked the court to dismiss the two ADA counts of Blatt's four-count complaint: failure to accommodate her gender dysphoria, and retaliation against her for reporting discrimination and requesting accommodations for her disability. Cabela's argued that because of the exclusionary provision, any claim related to Blatt's gender identity was excluded from coverage. Cabela's was not seeking in this motion to dismiss Blatt's sex discrimination claims under Title VII.

Blatt's attorneys countered with the argument that denying protection for a disability without a rational justification would violate Blatt's right

Leesom breaks down the text of the exclusion into "two distinct categories: first, non-disabling conditions that concern sexual orientation or identity, and second, disabling conditions that are associated with harmful or illegal conduct. If the term gender identity disorders were understood, as Cabela's suggests, to encompass disabling conditions such as Blatt's gender dysphoria, then the term would occupy an anomalous place in the statute, as it would exclude from the ADA conditions that are actually disabling but that are not associated with harmful or illegal conduct. But under the alternative, narrower interpretation of the term, this anomaly would be resolved, as the term gender identity disorders would belong to the first category described above."

The judge found that this interpretation was consistent with

controlling precedents in the 3rd Circuit, which covers the federal courts in Pennsylvania. The 3rd Circuit Court of Appeals has endorsed the view that the ADA, as “a remedial statute, designed to eliminate discrimination against the disabled in all facets of society, must be broadly construed to effectuate its purposes.” This requires a narrow reading of any exclusionary provisions. This is also consistent with 2008 Amendments to the ADA that emphasized the Congressional purpose to allow a liberal interpretation of the concept of disability so as to provide maximum protection against unjustified workplace discrimination.

Leesom held that because a narrow interpretation of the exclusionary provision would avoid raising the constitutional equal protection question, it was his “duty to adopt it,” and the motion to dismiss should be denied.

This ruling does not necessarily mean that Blatt will ultimately win her case, but it will remove the employer’s argument that her case cannot be brought under the ADA. Even if she had lost this motion and suffered dismissal of her ADA claim, Blatt could still litigate a sex discrimination claim, as the 3rd Circuit has accepted the argument that anti-transgender discrimination may be attacked as sex discrimination under Title VII by using the sex-stereotype theory that was approved by the Supreme Court in 1989 in the *Price Waterhouse v. Hopkins* case. But finding ADA coverage is very important, because that statute imposes a duty of reasonable accommodation to enable an employee with disabilities to work, while Title VII does not impose any gender-related accommodation requirements other than, arguably, some accommodation to pregnancy and childbirth. The ADA also has provisions governing medical testing and confidentiality of medical information, which may be useful for individuals dealing with gender dysphoria as well.

Blatt is represented by Sidney L. Gold, a Philadelphia lawyer, with assistance from the Civil Justice Clinic of Quinnipiac University School of Law, as well as Neelima Vanguri, an attorney at Gold’s law firm. ■

## West Virginia’s Highest Court Reads LGBTQ Out of Hate Crimes Law

**O**n May 9, 2017, West Virginia’s highest court held that the state’s hate crimes law cannot be used to prosecute somebody for an anti-gay hate crime. The prosecution urged the court to follow developing Title VII precedents and construe the word “sex” in the state’s hate crimes law as including sexual orientation, but the court refused to do so. *State v. Butler*, 2017 WL 1905948, 2017 W. Va. LEXIS 333 (W.V. Supreme Ct. of Appeals). Chief Justice Allen H. Loughry, II, wrote for the court. Justices Margaret L. Workman and Robin Jean Davis dissented.

In May of 2015, a grand jury issued an indictment against the defendant, Steward Butler, charging him with battery and violating the state’s hate crimes law for his attack on Casey

portions of Steward’s indictment based on the hate crimes law.

In a *de novo* review, the West Virginia Supreme Court of Appeals agreed with the lower court finding that the term “sex” has a clear and unambiguous meaning that does not include “sexual orientation.”

In support of this assertion, the court pointed first to a purported “nationwide review of hate crime laws” which “indisputably demonstrates that ‘sex’ and ‘sexual orientation’ are being treated as distinct categories” in hate crime legislation.

Second, the court looked to the “Legislature’s repeated refusal to amend [West Virginia’s hate crimes law] to include ‘sexual orientation’” as indicative of the Legislature’s intent not

### The court pointed to a purported nationwide review of hate crime laws.

Williams and Zackery Johnson, both of whom Butler struck in the face after he observed them kissing on a sidewalk in Huntington during the early morning hours on April 5 of that year.

In relevant part, West Virginia’s hate crimes law (West Virginia Code §61-6-21(b)) reads: “If any person does by force or threat of force, willfully injure . . . or attempt to injure . . . any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of the State of West Virginia or by the constitution or laws of the United States, because of such other person’s . . . sex, he or she shall be guilty of a felony . . .”

The trial court held the “West Virginia legislature could have included sexual orientation as an area of protection . . . [as] [n]umerous other states have done . . .” and that the court could not “expand the word ‘sex’ to include ‘sexual orientation’ . . .” As such, the trial court dismissed those

to include “sexual orientation” within the meaning of “sex.” According to the court, there had been twenty-six failed attempts to so redefine the hate crimes law and this in the court’s eyes only further reinforced the Legislature’s exclusive province to define crimes. In other words, the court’s perspective was that “a legislature says in a statute what it means and means in a statute what it says there.”

The court went on to note that its own “rules expressly prohibit bias and discrimination in the courts of [West Virginia] based on . . . both ‘sex’ and ‘sexual orientation.’” However, the court observed that the penalty for violation of these court rules did not include imprisonment and “just as the Legislature does not prescribe [its] rules, [the court] does not sit as a super legislature, commissioned to pass upon the political, social, economic or scientific merits of statutes pertaining to proper subjects of legislation.”

Justices Davis and Workman argued in dissent that the counts of the indictment under the hate crimes law should not have been dismissed. Justice Davis wrote, “[i]n my opinion, the meaning of ‘because of . . . sex’ is unambiguous” and included discrimination based on sex stereotyping, a rationale in line with *Price Waterhouse v. Hopkins*. Justice Davis continued: “[i]f a man stands on a corner kissing a man and is beaten because he is kissing a man, has he been assaulted because of his sex? Yes, but not simply because he possesses male anatomical parts; rather, the crime occurred because he was perceived to be acting outside the social expectations of how a man should behave with a man. But for his sex, he would not have been attacked. The indictment in this case properly alleged the attack occurred because of the victims’ sex.”

This argument, however, did not carry the day.

The state also assigned error to the trial court’s dismissal of the hate crimes portion of the indictment subsequent to the refusal of the West Virginia Supreme Court of Appeals’ to docket a certified question for review as to whether the ambit of the hate crimes law encompassed discrimination based on sexual orientation. In essence, the state argued the trial court had interpreted the highest court’s refusal to answer the certified question as an answer in and of itself that the hate crimes law did not include sexual orientation as a protected category. The court dismissed this argument, pointing to precedent which held “[t]he action of this court, in refusing to docket for review [a certified question] is not to be construed as a final adjudication of the questions presented on the certification.”

The court received an amicus brief on behalf of Lambda Legal Defense & Education Fund, whose lead author, Greg Nevins, successfully argued to the *en banc* 7th Circuit earlier this year in *Hively v. Ivy Tech* that “sex” in Title VII should be interpreted to include “sexual orientation.” – *Matthew Goodwin*

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

## 8th Circuit Allows ACA Action Against Employee Benefits Plan to Refuses to Cover Gender Reassignment Procedures for an Employee’s Dependent Son

Employee benefits litigation is so complicated! *See Tovar v. Essentia Health*, 2017 U.S. App. LEXIS 9009, 2017 WL 2259632 (8th Cir. May 24, 2017). In this case, Brittany Tovar, employed as a nurse-practitioner by Essentia Health, received health insurance as an employee benefit through the Essentia Health Employee Medical Plan, which “corresponded to an insurance policy offered to employers by HealthPartners, Inc. and was administered either by HealthPartners, Inc. or by its subsidiary HealthPartners Administrators, Inc. (HPAI).” Tovar’s teenage son, covered as a dependent beneficiary under the Plan, was diagnosed with gender dysphoria, and health care providers “decided that various treatments were necessary to treat her son’s condition, including medications and gender reassignment surgery.” But the Plan refused to cover her son’s treatments, because the Plan has a categorical exclusion of “services and/or surgery for gender reassignment.”

The refusal of coverage caused considerable *agita* for Tovar, who paid out of pocket for some medications but could not afford the full treatments or surgery without insurance coverage. She sued Essentia for discrimination under Title VII and the Minnesota Human Rights Act, and HealthPartners and HPAI for discrimination in violation of the Affordable Care Act (ACA), Section 1557 (which prohibits discrimination because of sex in connection with health insurance in certain circumstances, and has been construed in regulations by the Department of Health and Human Services to include discrimination because of gender identity, although the regulation is a bit ambiguous about any requirement that health plans cover sex reassignment surgery). The district court granted the defendants’ motion

to dismiss the case outright on grounds of lack of statutory standing (the employment discrimination claims) and Article III standing (the ACA claims).

Writing for the 8th Circuit panel, Judge Diana Murphy agreed with the trial court that Tovar could not sue under employment discrimination statutes for a denial of a benefits claim on behalf of her son, who is not an employee. The court found distinguishable cases that had allowed male employees to bring suit challenging the refusal of health plans to cover pregnancy expenses of their wives; in those cases, the claim was that male employees were suffering unequal benefits because of their sex, as their spouses were women who were not covered for pregnancy, whereas married female employees’ husbands would be covered without any exclusions for sex-specific medical expenses.

However, a majority of the panel found that the district court erred in dismissing the claims against HealthPartners and HPAI under the Affordable Care Act on Article III standing grounds. The district court had reasoned that the defendants were merely administrators correctly interpreting the Plan, which was adopted by the employer. The court of appeals pointed out that the Plan adopted by the employer was basically an insurance contract sold to the employer by HealthPartners. If HealthPartners was offering employers insurance contracts that discriminate in provision of benefits because of sex, there is no Article III bar to a plan participant suing HealthPartners under the ACA. Of course, the court pointed out, this was not addressing the merits of the claim, which the district court should do on remand.

Dissenting Judge William D. Benton, arguing that the ACA

regulations are entitled to *Chevron* deference, pointed out that those regulations would limit the exposure of third party administrators to situations where they embraced discriminatory interpretations of the Plan that they were administering, but would not subject them to liability for faithfully enforcing allegedly discriminatory provisions adopted by the employer in purchasing the Plan to provide benefits mandated by the ACA to their employees, for which the employer, not the administrator, is responsible. “There is no allegation that HPAI or HealthPartners: 1) discriminated in its administration of Essentia’s policy, 2) shared common ownership or control with Essentia, or 3) served as a ‘subterfuge for discrimination intended to allow [Essentia] to continue to administer discriminatory health-related insurance.’” Thus, argued Benton, Tovar’s allegations do not support a plausible theory of third party administrator liability against HealthPartners under Section 1557.

Since the court’s reversal on the ACA count was limited to rejecting the district court’s ruling on standing, it is possible that the district court on remand could embrace Judge Benton’s dissenting argument. Perhaps Tovar’s solution would be to sue the employer directly for adopting a discriminatory insurance policy, or to file an administrative complaint with the HHS Office of Civil Rights. Her problem there, of course, is that under the Trump Administration and Secretary Tom Price, what are the odds that they would consider failure to cover sex reassignment surgery to be a violation of Section 1557, after the administration has formally backed away from the prior position of the Obama Administration Education Department that the ban on sex discrimination by educational institutions under Title IX includes discrimination because of gender identity? The Trump Administration has yet to make any clear pronouncement on where it stands in the unfolding debate over whether sex discrimination includes discrimination because of gender identity. ■

## Texas Appeals Court Refuses to Let Same-Sex Spouse Seek Conservatorship of Child

The Texas 9th District Court of Appeals ruled on April 27 that the wife of a woman who gave birth through donor insemination lacks standing to bring a suit affecting the parent-child relationship (SAPCR) seeking to be appointed a conservator of the child in the context of a divorce proceeding. *In the Interest of A.E.*, 2017 Tex. App. LEXIS 3817, 2017 WL 1535101 (Tex. App., 9th Dist., Beaumont). Writing for the court, Judge Leanne Johnson rejected the argument that under *Obergefell v. Hodges* the relevant Texas statutes should be construed in a gender-neutral manner to treat the non-birth mother as the

who has a relationship with a new same-sex partner, filed a divorce and custody action in the Texas District Court in Montgomery County on July 8, 2015, shortly after the Supreme Court’s ruling in *Obergefell* caused the 5th Circuit Court of Appeals to affirm a district court ruling that the Texas ban on same-sex marriage was unconstitutional, making same-sex marriage legal in Texas and implicitly requiring that Texas courts accept divorce claims for same-sex marriages lawfully contracted out-of-state.

C.W.’s action combined a divorce claim against M.N and a suit affecting the parent-child relationship, seeking

### C.W.’s main argument on appeal is that her treatment by the trial court as a non-parent violates *Obergefell v. Hodges*.

equivalent of a husband in determining standing to bring such an action. The court also placed weight on the absence of any written agreement between the women concerning the conception and parentage of the child, who was born after the women had separated.

C.W. and M.N. were married in Connecticut in 2011, but resided in Texas. They decided to have a child through donor insemination (referred to in Texas statutes as assisted reproductive technology, or ART), using sperm of an anonymous donor to inseminate M.N. They did not sign any gestational agreement. Before M.N. gave birth, the women separated, M.N. moving out of the marital home. The child, A.E., was born on January 30, 2014. C.W. had some sporadic contacts with the child, but never had overnight visitation, and never provided any financial support to M.N. for the child’s expenses. C.W.,

to be appointed a conservator with visitation rights to the child. M.N. filed an answer to the divorce action, and a motion to dismiss the SAPCR for lack of jurisdiction, arguing that C.W. did not fulfill the standing requirements of the relevant Texas statute to seek parental rights because she was not a legal parent of the child. The trial court granted the motion to dismiss the SAPCR on October 12, 2015, followed by the filing of written Findings of Fact and Conclusions of Law on November 20, 2015. The SAPCR was severed from the divorce action. C.W. appealed the dismissal.

C.W.’s main argument on appeal is that her treatment by the trial court as a non-parent violates *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), by failing to accord her all the rights of a legal spouse, including the benefit of Texas’s statutory parental presumption

concerning the spousal status of a person married to a woman who gives birth to a child. She argued that part of her fundamental right to marry and to have her marriage recognized by the state of Texas encompasses “the unified whole of rights” that “inherently emanate from the marital relationship, including her standing to pursue a suit for conservatorship of a child born during her marriage to M.N.,” as Judge Johnson summarized C.W.’s argument. C.W. contended that the trial court erred by refusing to interpret relevant Texas statutes in a “gender-neutral manner.”

C.W. argued alternatively that she has standing under the state’s law governing ART, because, she argued, “the parties openly treated A.E. as their own until they separated.” She says that she consented to M.N.’s assisted reproduction and should be treated as the intended parent of A.E., consistent with that statute. She notes that the statute provides that the lack of a signed gestational agreement is not fatal to her claim, citing a provision stating that the failure of a husband to sign the required consent form “does not preclude a finding that the husband is the father of a child born to his wife if the wife and husband openly treated the child as their own.”

The trial judge had rejected these arguments, and so did the unanimous three-judge panel of the court of appeals. The attitude of the court towards *Obergefell* can be discerned by noting that the part of Judge Johnson’s opinion summarizing that holding finds it relevant to state: “The dissenters strongly criticized the majority for creating a ‘fundamental right’ that does not find any basis in the United States Constitution, and for overstepping the boundaries of the judiciary,” an egregiously unnecessary thing to include, since the dissents are not relevant to construing the precedential holding of the Supreme Court. The court also noted two pre-*Obergefell* Texas cases, both supporting the argument that Texas statutes could not be construed to allow a same-sex partner to initiate a SAPCR against their former partner to seek parental rights over a child.

“This is not a case involving the failure of a Texas court to give

recognition to the marriage of C.W. to M.N.,” wrote Judge Johnson, “nor is it a case involving a constitutional challenge to any statute. C.W. did not make a constitutional challenge to the Texas statutes at trial. We agree with the legal conclusion reached by the trial court that *Obergefell* does not confer standing upon C.W. to maintain a parentage claim. Furthermore, we conclude that *Obergefell* does not require this Court to act as the Legislature and rewrite the Texas statutes that define who has standing to bring a SAPCR. *Obergefell* invalidated the prohibitions of particular States preventing same-sex couples from obtaining marriage licenses, and it prohibits the State from enforcing laws prohibiting same-sex couples from marrying or prohibiting the recognition of marriages between same-sex couples lawfully solemnized elsewhere. *Obergefell* did not hold that every state law related to the marital relationship or the parent-child relationship must be ‘gender-neutral.’” In other words, this court will take a minimalist approach to construing the precedential effect of *Obergefell*, not crediting the broader reading that same-sex marriages are to be seen as importing all the rights, privileges, benefits and responsibilities that state law provides for different-sex marriages, regardless of the gendered language in statutes adopted under the prior legal regime.

The court insisted that C.W. was not a “parent” because she did not fit within the specific gendered language of the relevant Texas statutes. These statutes were written on the assumption that a child can have only one mother, since references to second-parents use masculine nouns. Furthermore, she wrote, “Under the facts of this case, C.W. would not be entitled to the rebuttable presumption of paternity even if C.W. were a man because the parties have stipulated to the uncontested fact that the child is genetically unrelated to C.W. The child was conceived by assisted reproductive technology (ART), and C.W. did not donate her egg. Additionally, C.W. is not ‘the mother’ of the child because she did not give birth to the child, her maternity has not been adjudicated, and she did not adopt the child.”

The court concluded that C.W. could not rely on the ART statute to establish standing as a parent. First of all, she and M.N. did not sign a gestational agreement. Furthermore, the provision upon which C.W. was pinning her hopes, providing that the failure of a father to sign such an agreement did not preclude a finding that the husband is the father, was unavailing because, wrote the court: “As it is plainly worded, [this subsection] governs a situation when the husband has failed to sign a consent, but it does not govern the situation that exists in the facts before this Court where neither spouse signed a consent form.”

The court rejected C.W.’s argument that she could qualify under the ART statute through a gender-neutral construction. “If the statute is unambiguous, we adopt the interpretation supported by its plain language unless such interpretation would lead to absurd results . . . We presume the Legislature chose a statute’s language with care, including each word for a purpose while purposefully omitting words not included. We must not interpret a statute in a manner that renders any part meaningless or superfluous.” Although the statute does not define the terms “husband” and “wife,” the court insisted that they must be given their meanings in “common usage,” as documented in dictionaries. “Reading the statute as requested by Appellant would affect a substantive change to the respective statutes, and it would materially alter the requirements outlined in subsection (a) and (b) of the ART statute as to husband and wife. The substitution of the word ‘spouse’ for the words ‘husband’ and ‘wife’ would amount to legislating from the bench, which is something that we decline to do.”

Thus, the court found no abuse of discretion by the trial court’s decision to dismiss the SAPCR claim for lack of standing and jurisdiction.

C.W. is represented by Ashley V. Tomlinson, Alene Ross Levy, and Heather D. Daniels, of Laura Dale and Associates, PC, Houston. M.N. is represented by Patric P. McCallum and Charlotte A. Drew, of Drew and McCallum PLLC, The Woodlands. ■

# Kentucky Court of Appeals Holds Refusal of Business to Print Pride Event T-Shirts Did Not Violate Local Anti-Discrimination Ordinance

The Court of Appeals of the Commonwealth of Kentucky has ruled that the Fayette Circuit Court was correct in reversing a Human Rights Commission decision that had found Hands On Originals (HOO) had discriminated unlawfully against the Gay and Lesbian Services Organization (GLSO) pursuant to a local anti-discrimination ordinance, in *Lexington Fayette Urban County Human Rights Commission v. Hands on Originals, Inc.*, 2017 Ky. App. Unpub. LEXIS 371, 2017 WL 2211381 (May 12, 2017).

the Fayette Circuit Court reversed the Commission's decision, three judges of the Commonwealth of Kentucky Court of Appeals issued an opinion, a concurrence, and a dissent (the opinion and concurrence resulting in the affirmance of the lower court's ruling that no unlawful discrimination had occurred).

Chief Judge Joy A. Kramer's opinion noted that the circuit court decision could only be reversed if it was not supported by substantial evidence. She found that considering the undisputed facts before the lower court, the local

President was not himself homosexual and the organization was existed for the promotion of equality for LGBTQ persons but that any individual whether LGBTQ or not could be involved or a member of the organization), that HOO's refusal to make the shirts was not discrimination on account of sexual orientation.

In a concurring opinion, Judge Debra H. Lambert stated that the Supreme Court's *Hobby Lobby* decision allows "closely-held, for-profit entities, to freely advance their owners' sincerely held religious beliefs, as long as those beliefs do not offend existing federal laws that pass scrutiny" and that the similarly-worded Kentucky Religious Freedom Restoration Act "offers similar protection against Kentucky laws that substantially burden the free exercise of religion."

In dissent, Judge Jeff S. Taylor stated that the Commission was correct and that "the deliberate and intentional discriminatory conduct of HOO [was in violation of the ordinance]." Judge Taylor cited the U.S. Supreme Court marriage equality decision, *Obergefell v. Hodges* (2015), stating that the "fundamental right to marry is guaranteed to same-sex couples" and that the logic of Chief Judge Kramer's ruling would "mean that the ordinance protects gays or lesbians only to the extent that they do not publicly display their same gender sexual orientation." He further noted that "there was nothing obnoxious, inflammatory, or even pornographic that GLSO wanted to place on their t-shirts which would justify restricting their speech under the First Amendment."

Accordingly, since two of the three Judges agreed on the same result for differing reasons, the lower court's ruling that HOO did not violate the ordinance was upheld. – *Bryan Johnson-Xenitelis*

**She further noted that the difficulty in deciding this case was that HOO discriminated not necessarily because of sexual orientation, but rather because of conduct (promoting pride/equality for the LGBTQ community).**

GLSO, whose President at all relevant times was a straight opposite-sex married man, requested HOO to make Pride T-Shirts, which named the event and included a rainbow image. When the owner of HOO learned that the GLSO was in support of the LGBTQ community, he told the President of HOO that he could not provide the shirts "because of my Christian beliefs."

A lawsuit followed involving both the local ordinance and constitutional arguments. The County Human Relations Commission ruled that HOO's refusal to make the shirts would "allow a public accommodation to refuse service to an individual or group of individuals who hold and/or express pride in their status," in violation of the local ordinance. After

ordinance which banned discrimination in public accommodations on many grounds, including sexual orientation, applied to this circumstance, as HOO met the definition of a public accommodation. She further noted that the difficulty in deciding this case was that HOO discriminated not necessarily because of sexual orientation, but rather because of conduct (promoting pride/equality for the LGBTQ community). She found that since the case involved "speech" and that "nothing of record demonstrates HOO . . . refused any individual the full and equal enjoyment of the goods, services, facilities, privileges advantages, and accommodations it offered to everyone else because the individual in question had a specific orientation or gender identity" (particularly as the GLSO

# Federal Judge Applies Equal Protection “Intermediate Scrutiny” to Denial of Gender Appropriate Items to Transgender Prisoners

California settled a lawsuit brought by transgender prisoner Shiloh Quinn, a/k/a Rodney James Quine in 2016 and she had gender reassignment surgery earlier this year. Her continuing problems in custody after surgery were reported recently. See *Law Notes* (March 2017 at pages 169-70). As part of Quine’s lawsuit, California agreed to adopt statewide standards addressing myriad transgender issues. See “California Adopts Guidelines for Prisoner Requests for Sex Reassignment Surgery,” *Law Notes* (November 2015 at page 489). The agreement also left some areas unaddressed, with leave to return to court for resolution of the latter. U.S. Magistrate Judge Nandor J. Vadas, who has supervision over the consent decree, ruled on some of the issues in June of 2016, as reported in *Law Notes* (Summer 2016 at page 307). That ruling, and other issues, are now addressed in *Quine v. Beard*, 2017 U.S. Dist. LEXIS 65276, 2017 WL 1540758 (N.D. Calif., April 28, 2017), by U.S. District Judge Jon S. Tigar, who granted in part and denied in part Quine’s motion to enforce the consent decree.

The first two issues involved construction of the consent decree: who is covered and who decides.

Applying general principles of contract construction to the consent decree, Judge Tigar ruled that access to gender appropriate items is not limited to inmates diagnosed as transgender. Instead, inmates who appear to be transgender or exhibit symptoms of gender dysphoria are covered as well. Thus, female transgender inmates who are in facilities classified as “male” facilities and not in designated “hubs” are covered by the consent decree. California may use a higher standard for transferring an inmate to a “hub,” but it must revise its policy on personal property for “non-hub” facilities.

On the issue of who decides, Judge Tigar split the baby. The decree said “medical or CDRC personnel” could identify prisoners entitled to relief. California wanted only “medical.” Quine wanted “personnel” to include “custodial” staff. Judge Tigar ruled that only medical was too narrow and made “or CDRC personnel” superfluous. He declined to extend identification to custodial staff, however, ruling that the “or” had to include mental health staff and social workers, but not non-medical employees, although the latter could initiate the referral.

On the issue of what property

since “race is not susceptible to the logic of *Turner*. It is not a right that need necessarily be compromised for the sake of proper prison administration.” *Johnson v. California*, 543 U.S. 499, 510 (2005). Judge Tigar does not cite Ninth Circuit rulings on Equal Protection review of sexual orientation classifications in other contexts. Rather, noting a circuit-split on whether gender discrimination claims in prison fall under *Turner* in the post-*Johnson* era, he builds an Equal Protection argument “without addressing *Turner* directly.”

Judge Tigar finds that discrimination based on gender classifications is

**Judge Tigar found that discrimination based on gender classifications is generally held to more exacting standards and that California had offered no persuasive justification.**

transgender inmates could possess, the decree provided that the parties should negotiate, with access to the court. Judge Tigar applied Equal Protection principles to the text of the decree, rejecting the state’s argument that the decree allowed only comment, not an opportunity for judicial enforcement as part of “continuing jurisdiction.” The pivotal question was what level of scrutiny should be applied, and Judge Tigar noted that the Ninth Circuit had not definitively ruled.

In *Turner v. Safely*, 482 U.S. 78, 89 (1987), the Supreme Court generally deferred to prison authorities on administrative issues and applied a rational basis test. For racial classifications in prison, however, the Court rejected *Turner* and applied strict scrutiny “even in the context of prison,”

generally held to more exacting standards and finds that California has offered no persuasive justification for minimal rational basis scrutiny for gender-based classifications regarding prison property, citing district court cases from California. He also invokes an older D.C. Circuit case invalidating a classification that located male inmates near to home while placing female inmates in distant locations and said “that sort of classification demands the court’s special attention.” *Pitts v. Thornburgh*, 866 F.2d 1450, 1454-55 (D.C. Cir. 1989).

He finds that the prison transgender classifications here are entitled to intermediate scrutiny, despite California’s argument to the contrary. “A classification relying explicitly upon gender peculiarly suggests that the state

is pursuing an improper purpose . . . . The facial classification especially raises the danger that the state has chosen means that are not substantially related to a legitimate state interest. The state may not employ gender as an inaccurate proxy for other, more germane bases of classification.” Accordingly, Judge Tigar required “an exceedingly persuasive justification” for the prison transgender rules under scrutiny.

As to clothing, Judge Tigar rejects the sweeping premise that males are more escape-prone than females and the extra cloth needed for transgender women presented a security risk. He ordered adoption of rules allowing equal access to pajamas, nightgowns, robes, scarves, and t-shirts. As to non-clothing items, Judge Tigar also rejected barring certain items under the “exceedingly persuasive justification” test, including items the Magistrate Judge approved banning. Bracelets, earrings, hair brushes, hair clips, and tweezers can be made of rubber or plastic or otherwise modified to be safe in prison. Moreover, he rejects the notion that using jewelry as contraband was more widespread among males than females, as an example of a distinction perpetuated without an adequate explanation. He also finds that compression binders to flatten the chest should be allowed free of charge as underwear at all state facilities.

The *Quine* litigation and its progeny are being followed carefully throughout the nation as they mark in many ways the outer limits of adaptation of gender transition and reassignment surgery to Corrections and the accommodation of transgender people in the custodial setting. *Quine* is represented by Morgan Lewis & Bockius LLP; Ad Astra Law Group, San Francisco; and by the Transgender Law Center, Oakland. — *William J. Rold*

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*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.*

## Federal Judge Orders Trial on Failure to Protect Inmate Whose Throat Was Slashed by Ex-Lover

Alabama correctional officials persist in demanding that inmates involved in altercations sign “peace” or “living with” agreements or face disciplinary segregation, without differentiating the aggressor. This can have disastrous results when domestic relationships between inmates turn violent — sometimes leaving the victim without legal recourse. See “Judge Dismisses Failure to Protect Claim by Inmate Assaulted after Ending Relationship with Another Inmate” (*Law Notes*, Oct. 2015 at pages 437-8) (discussing several Alabama cases, including a class action, *Cheatham v. Thomas*, 4:2014cv01952, filed in the Northern District of Alabama by the Equal Justice Initiative, Montgomery, which challenges “Living Agreements” as a “Catch-22 solution” designed mostly to provide legal cover to the state and “not a reasonable response” to inmate-on-inmate violence).

Here, in *Cunningham v. Estes*, 2017 U.S. Dist. LEXIS 73194, 2017 WL 2082690 (N.D. Ala., May 15, 2017), U.S. District Judge Abdul K. Kallon denied the prison officials’ summary judgment and sent the case to trial. Paraphrasing Judge Kallon’s description, gay inmates Antonio Cunningham and Nakemah Grover had a “stormy, on again-off again, romantic relationship” for several years, during which they shared a cell. Several incidents of violence occurred, mostly physical fights, after which the inmates signed “peace agreements” to avoid or to be released from segregation. This went through several cycles, as the violence escalated by Grover, who made death threats — once having a weight bar confiscated after other inmates reported Grover threatened to beat Cunningham with it.

Eventually a sergeant moved them to different cells on the same floor, but the problem continued to become increasingly violent, which Judge Kallon describes in detail. A lieutenant and captain became involved, and

Grover threatened in the captain’s office to cut Cunningham’s throat. Still the supervisors did not move either Cunningham or Grover to different cell blocks. The captain allegedly said to Cunningham: “Shut up you fucking faggot . . . . Go to lock up.” After segregation, the men signed another “peace agreement,” and Cunningham’s request for transfer was denied.

Glover threatened Cunningham with a razor blade on multiple occasions, within the knowledge of the unit officer and command, at one time attempting to cut him while he was in the shower with a double-edge razor blade that had been bent to allow both cutting edges to slice at once. The threats were known to command, and the evidence at summary judgment quoted an officer as saying: “Whatever happens to you all homosexuals needs to happen. Now get away from this cage and me.”

The men remained in the same unit after signing another “peace agreement.” The defendant lieutenant told the defendant captain that the men should be separated or “one or both would be hurt or killed.” The captain refused, telling the lieutenant to tell the two men “he did not want to hear anything else from them.” They remained in the same cell block. Three weeks later, Grover slashed Cunningham’s throat with the razor blade. Cunningham’s carotid artery and jugular veins were severed, and he was airlifted to a hospital for surgery.

Cunningham claimed deliberate indifference to his safety under *Farmer v. Brennan*, 511 U.S. 825 (1993) and *Bowen v. Warden Baldwin State Prison*, 826 F.3d 1312, 1320 (11th Cir. 2016). Defendants claimed qualified immunity. The decision is a primer on qualified immunity, particularly in the Eleventh Circuit. There are numerous quotable passages. In short, Judge Kallon rejected the defense. The law was clearly established, and a jury could find that the defendants knew of the risk

and that their actions were deliberately indifferent to that risk.

Judge Kallon states that the record “belies” defendants’ argument that they did not know of the risk and acted reasonably. Each one had personally been involved in various altercations between Grover and Cunningham. He adds, drawing on the “obvious” risk as being enough under *Farmer*, 511 U.S. at 844: “Although notice of threats is certainly relevant, prison officials may not escape liability just because an injured inmate did not inform anyone that he was being threatened or that he faced an attack from another inmate,” citing *Lane v. Philbin*, 835 F.3d 1302, 1308 (11th Cir. 2016). Here, however, there was evidence for the jury that Cunningham informed each defendant, repeatedly.

Judge Kallon addresses the subjective knowledge of each defendant at length. In this writer’s view, the decision on qualified immunity is nearly bullet-proof, so much so that summary judgment might have been granted for Cunningham – but that could risk reversal. The facts are marshaled so well and the injuries so outrageous that the Eleventh Circuit (to which these defendants have a potential right to appeal on legal issues of qualified immunity) would very likely summarily affirm. Counsel should take note of the intertwining of fact and law on summary judgment and qualified immunity. Here, if the facts are as plaintiff proffered in summary judgment and that is all that is in dispute, there appears to be no legal issue of qualified immunity on which to base an interlocutory appeal. See *Johnson v. Jones*, 515 U.S. 304, 311-13 (1995) (no interlocutory appeals on purely factual issues), and *Cottrell v. Coldwell*, 85 F.3d 1480, 1484-88 (11th Cir. 1996) (lengthy discussion of interlocutory jurisdiction on qualified immunity appeals).

Perhaps the class action and a jury verdict against command in this case will spell the end for Alabama’s inmate “peace” agreements. Stay tuned.

Cunningham is well represented by Gesspass & Johnson, Bennitt Law, and McCants Law Firm, Birmingham. – *William J. Rold*

## Federal Court Rules Mother of Transgender Teen Lacks Valid Due Process Claim against County, School, or Health Care Providers

In *Calgaro v. St. Louis County*, 2017 WL 2269500, 2017 U.S. Dist. LEXIS 79551 (D. Minn. May 23, 2017), U.S. District Judge Paul A. Magnuson granted motions to dismiss and denied plaintiff’s motion for summary judgment in a Sec. 1983 suit brought by Anmarie Calgaro, the single mother of a transgender teen identified as E.J.K., who is living on her own and receiving medical services for her gender transition from the defendant health care providers, who are allegedly being compensated by defendant government agencies. At the heart of the case is

to E.J.K. “Sometime before January 15, 2016, Park Nicollet [Health Services] began providing E.J.K. with medical treatment for a gender transition to the female gender,” continued Magnuson. Calgaro claims that St. Louis County is providing financial assistance to E.J.K. and paying for the medical services, but both Park Nicollet and another health care provider, Fairview, have denied Calgaro’s request to see E.J.K.’s medical records. E.J.K. attends public school in St. Louis County, but the school district has refused Calgaro’s request to participate in E.J.K.’s educational

**At the heart of the case is the mother’s apparent rejection by her daughter and the mother’s objection to various organizations providing assistance for the child to undergo gender transition.**

the mother’s apparent rejection by her daughter and the mother’s objection to various organizations providing assistance for the child to undergo gender transition.

According to the opinion by Judge Magnuson, E.J.K., 17 at the time of the opinion but soon to turn 18, is the biological child of Calgaro, who “has sole physical and joint legal custody” of the child. E.J.K. moved out of Calgaro’s home and “moved in with her biological father in St. Cloud” sometime in 2015. “Shortly thereafter, E.J.K. moved out of her father’s home and began living with various family and friends. Since moving out of her father’s home, E.J.K. has refused to move back in with Calgaro,” who claims she has always offered a home

decisions or to have access to her educational records. E.J.K. had gone to a lawyer and set out her circumstances, and the lawyer gave her a letter opining that E.J.K. is “emancipated,” but E.J.K. has not affirmatively sought a court order of emancipation.

In this lawsuit, Calgaro claims that her parental due process rights have been violated. She claims that the defendants have improperly terminated her parental rights by “determining E.J.K. emancipated without notifying her,” by providing government and medical services to E.J.K. without Calgaro’s parental consent, and by refusing to provide her with the child’s educational or medical records. Calgaro sued the school principal and the interim director of the county

health agency as well as the school, the health care entities, and the county. All defendants moved to dismiss, and Calgaro moved for summary judgment.

Judge Magnusson granted the motion to dismiss. First, he ruled, the claim as to emancipation was misdirected against these defendants, none of whom had “emancipated” E.J.K. Magnusson pointed out that the defendants “legally cannot emancipate E.J.K.” He explained: “In Minnesota, emancipation is an act of a parent and need not be in writing or in express words. Whether a child has been emancipated must be determined largely upon the peculiar facts and circumstances of each case and is ordinarily a question for the jury.” Since E.J.K. had not sought a court order, wrote Magnusson, “Calgaro’s parental rights over E.J.K. remain intact.” Since Calgaro has not affirmatively declared E.J.K. emancipated – indeed, the opposite – only a court can do so.

Turning to the other section 1983 claims, Magnusson first dismissed the claims against the two non-government health care institutions, finding that their receipt of government funds did not turn them into state actors amenable to suit under Sec. 1983. Of course, the school district is a state actor, but Magnusson found that beyond the bare conclusory allegation, Calgaro had failed to show that the school district actions she was challenging were undertaken pursuant to a School District “policy or custom,” which would be required to impose liability on a government agency. Magnusson wrote that the “mere invocation of the words ‘policies’ and ‘customs’ is insufficient to plead” a due process claim against a government entity, so the claim against the school district must be dismissed. As to the principal of the high school, who turned down Calgaro’s requests, the court found that he enjoyed qualified immunity, as there was no binding case law clearly providing that a parent has a fundamental right to access to a child’s school records. The only other circuit that has somewhat relevant case law is the 7th Circuit, in *Crowley v. McKinney*,

400 F. 3d 968 (2005), holding that a *noncustodial* parent does not have a protected liberty interest in receiving their children’s school records. Calgaro would theoretically have a stronger case as a custodial parent, but only if the court were to ultimately determine after a factual hearing that E.J.K. is not emancipated. However, the court said, “Because this existing precedent does not place the constitutional question ‘beyond debate,’ Principal Johnson is entitled to qualified immunity.”

Calgaro was also suing the County for providing the financial assistance for E.J.K.’s transition without her mother’s consent, and also by refusing to give her access to any records the government has on E.J.K. As with the school district, the court found that the county itself did not have any formal policy or custom relevant to this case, and so could not be sued under Sec. 1983. The County also pointed out that any welfare funds used to assist E.J.K. came from the state, not the County. While rejecting the County’s argument that it could not be sued by Calgaro because state law required it to provide the assistance to E.J.K., the court said that, nonetheless, the County was in the same position as the school district, lacking an official policy on these matters. Calgaro did not plead any prior instance of the county providing assistance to a transgender teen in this manner. Obviously, somebody in the county government made a discretionary decision within the scope of their employment to provide the benefits, and that is not something that can ordinarily be attacked on due process grounds. “Calgaro’s claim concerning St. Louis County’s refusal to provide her with E.J.K.’s governmental records fails for the same reason,” wrote the judge.

Calgaro had also sued the interim director of the County Health and Human Services Department, but without showing that this individual played any direct role in the decision to provide benefits or to deny access to records, so that claim had to be dismissed as well.

Calgaro had also sued E.J.K.! “Calgaro stops short of making the absurd argument that E.J.K. deprived Calgaro of her parental rights without due process while acting under color of state law,” wrote Magnusson. Calgaro was arguing that E.J.K. was a necessary party so that the court could issue an order binding upon her. “Although E.J.K. likely is a required party under Rule 19, because Calgaro’s claims against all other Defendants fail, any claims she might raise against E.J.K. are likewise dismissed,” wrote Magnusson.

The court then turned to motions for summary judgment. St. Louis County had sought summary judgment on the claims against it. Since Calgaro never responded to the motion, her claim was considered abandoned and summary judgment was granted. As to Calgaro’s claims, the court found them lacking in merit, as explained in its decision dismissing them, so she is not entitled to summary judgment.

Calgaro is represented by Erick G Kaardal of Mohrman, Kaardal & Erickson, P.A., Minneapolis; Matthew F. Heffron, of Brown & Brown PC, Omaha, NE; and Thomas Brejcha, Thomas More Society, Chicago, IL. The Thomas More Society is a conservative Catholic public interest firm that frequently litigations against LGBTQ rights. The headline announcing this decision on their website states: “Federal Judge Refuses to Grant Relief From Son’s Illegal Emancipation,” and states that the Society is representing Calgaro. Their representation suggests that Calgaro will have the resources for an appeal, claiming that because the court recognized that she remains the custodial parent, she should have a due process right to avoid having others, whether school officials, social welfare officials, or health care institution, make decisions and E.J.K. while excluding her from knowledge or participation. But as E.J.K. will be turning 18 in July, she is probably too late, even if she could persuade the 8th Circuit Court of Appeals that Judge Magnusson had erred in some respect in dismissing her claims. ■

# Federal Court Rejects Liability for Insurer That Refused to Cover Third-Party Surrogacy Expenses for Gay Male Couple

In ongoing litigation by a gay male couple against their insurer, U.S. District Judge Brian M. Cogan dismissed claims for breach of contract, discrimination and misrepresentation stemming from the insurer's refusal to cover various expenses incurred by the plaintiffs in their quest to have a child using a surrogate. *Uddoh & Koev v. United Healthcare*, 2017 WL 2242870, 2017 U.S. Dist. LEXIS 77460 (E.D.N.Y. May 22, 2017).

*Pro se* Plaintiff Humphrey Uddoh is an attorney for the NYC Transit Authority, through which he gets health insurance through the New York State Health Insurance Program. He added his partner, Plamen Koev, as an additional insured, in an application identifying Koev as male. United Healthcare is the policy administrator for the Program.

Uddoh and Koev decided to start a family through surrogacy in 2014, and Uddoh applied for preapproval of IVF procedures, as both men had conditions that required surgery to collect the sperm necessary for in vitro fertilization. It seems that United sent a letter approving coverage without the person who made the authorization decision realizing that Koev was male. An employee of United called one of Koev's medical care providers and learned that Koev was male, upon which he allegedly told United to cancel the procedure. When Uddoh called United to complain, he was accused of insurance fraud, and was threatened that United would seek to recoup the surgical costs it had already paid for his sperm retrieval procedures. The complaint alleges that United employees also made fraud accusations to the health care provider for presenting the claims for payment.

Then the plaintiffs received a letter from United stating that the plan "does not provide benefits in connection with services for surrogacy," and that the coverage for infertility pertained only to a situation where an individual and/or partner has been diagnosed as infertile.

Uddoh showed United that Koev's male gender had been listed on the original application for coverage, so there was no fraud. United then agreed to cover surgical procedures for harvesting sperm from both men, but not for any services rendered to a surrogate.

In this action, the men claimed that in reliance on the initial pre-procedure approval letter they had received, they had spent \$150,000 on services that were not covered under the revised approval letter, and they also sought punitive damages and treble damages. Noting the plaintiffs' admission that their breach of contract action could not

The court rejected plaintiffs' attempt to construct a promissory estoppel claim as well, finding that their reliance on the pre-approval letter was not reasonable, in light of its wording which never referenced surrogacy services.

As to their discrimination claim, the court found plaintiffs' allegations to be "vague." "I assume the claim has something to do with the fact that plaintiffs are a same-sex couple," he wrote, "although I do not know for sure as nowhere in the amended complaint have they alleged that they were members of a protected class or the basis on which they were

**The court noted that the complaint failed to invoke any particular New York statute in support of their claim that they had suffered unlawful discrimination, and noted pointedly that the state's insurance laws do not expressly forbid sexual orientation discrimination.**

be based on the Plan itself with its clear exclusion, they sought to base their action on the preapproval letter, which they claimed was itself an "integrated contract," but Judge Cogan found this implausible; the letter was triggered by a "simple mistake of fact" by United, which thought Koev was female and that this was a routine request for infertility treatment by a different-sex couple, which is covered by the Plan.

Judge Cogan refused to entertain a new theory proffered by plaintiffs for the first time in their response to United's motion to dismiss. "Once we conclude that United simply made a mistake," wrote Cogan, "plaintiffs' claim disintegrates," since "nothing in the language of the pre-approval letter indicates an intent to cover surrogacy."

discriminated against. Even assuming that plaintiffs' complaint is based upon their status as a homosexual couple, it fails. First, there is no dispute that neither homosexual nor heterosexual couples can obtain reimbursement for third-party surrogacy services under the Empire Plan. All couples are treated the same. There is thus no discrimination against plaintiffs based on their sexual preference."

The court noted that the complaint failed to invoke any particular New York statute in support of their claim that they had suffered unlawful discrimination, and noted pointedly that the state's insurance laws do not expressly forbid sexual orientation discrimination. Further, Judge Cogan mentioned that the 2nd Circuit had rejected sexual

orientation discrimination claims under Title VII (but this was before the 2nd Circuit announced that it would reconsider that precedent *en banc* in the *Zarda* case, to be argued in September). “Before we get any further afield,” he wrote, let us return to the point that the ongoing debate about whether anti-discrimination statutes prohibiting sex discrimination include gender stereotyping in the workplace has nothing to do with this case. I reference it merely to show how far removed from the situation presented here are the only New York statutes cited by plaintiffs. If United had knowingly approved third-party surrogacy coverage for heterosexual couples and not homosexual couples, plaintiffs still would not have a claim because the law does not cover that discrimination. And if Sec. 2607 [of the NY Insurance Law] covered sexual orientation, it is undisputed that homosexual couples and heterosexual couples are treated the same under the Empire Plan.”

The court also rejected the plaintiffs’ attempt to fix liability on United under a negligent misrepresentation theory, concluding that “the claim fails for the same reasons” as the promissory estoppel claim. Furthermore, he found that such a claim in this context would require the showing of a special relationship between the plaintiffs and United, but New York courts have repeatedly rejected the claim that an insurer has a special relationship (other than an ordinary contractual relationship) with its insured. “Indeed,” wrote Cogan, “United brought no special expertise to this issue; all that plaintiffs had to do was read the Empire Plan’s policy and they would have seen that third-party surrogacy coverage was excluded.”

Finally, Cogan explained that he was dismissing the case without leave to amend, because it would be “futile.” They had already filed one amended complaint and “it is not as if the amended complaint failed because of a dearth of factual allegations – the whole story is there, but it simply does not amount to an actionable claim.” ■

## Innocence Project New Orleans Wins Habeas Petition for Man Convicted of Murdering Gay Victim in Early 1980s

After having his petition for a writ of habeas corpus denied by the Louisiana Supreme Court in a 4-3 vote, John D. Floyd, convicted of killing a gay man, successfully petitioned a federal district court for habeas relief in an action brought by Innocence Project New Orleans. In *Floyd v. Vannoy*, 2017 WL 1837676, 2017 U.S. Dist. LEXIS 69705 (E.D. La. May 8, 2017), District Judge Sarah S. Vance granted Floyd’s habeas petition, holding that he had met his burden in showing that the State had withheld favorable, material evidence in violation of clearly established federal law. As a result, Floyd is now entitled to a new trial or release within 120 days from the court’s order.

Floyd was convicted of second degree murder in January 1982 in the death of William Hines, Jr., an openly gay man, and was sentenced to life in prison. During a joint bench trial, Floyd was acquitted of second-degree murder of Rodney Robinson, another openly gay man. Hines and Robinson were both murdered in November 1980, just three days and one mile apart in downtown New Orleans, under substantially similar circumstances. Both men were found stabbed to death, naked in bed, after having apparently shared a glass of whiskey with the perpetrator.

In the days following, Floyd allegedly boasted to the owner of a local bar that he was responsible for Hines’ murder. He also allegedly made comments to a friend indicating a guilty conscious for the murder of Robinson. This led local law enforcement to begin questioning Floyd. Floyd alleges that the detective who questioned him began drinking with Floyd at a local bar before noon and bought Floyd “about five or six beers” before arresting him. After Floyd was allegedly kicked and beaten, he signed a written statement confessing to the murders of Hines and Robinson. While Floyd confessed to both murders, he was ultimately acquitted of Robinson’s

murder because of considerable physical evidence indicating that Robinson was murdered by an African-American male with Type A blood; Floyd is white and has Type B blood. But Floyd was nevertheless convicted of the Hines murder, although physical evidence connected him to the murder.

Twenty-three years after his conviction, Floyd filed an application for habeas corpus relief. After his petition failed in state court, he brought a petition in federal court, arguing that in light of newly-discovered evidence exculpating him from both murders, he was actually innocent of the Hines murder. Floyd asserted that the State had suppressed material, favorable evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Specifically, Floyd alleged that the State withheld fingerprint comparison results found at the Hines scene; fingerprint analysis found at the Robinson scene; and an affidavit from Hines’ close friend claiming that Hines mostly preferred black men as intimate partners.

To prevail on his *Brady* claim, Floyd was obligated to show: (1) that the prosecution suppressed evidence; (2) the evidence was favorable to the defense; and (3) the evidence was material to his guilt or punishment. *Mahler v. Kaylo*, 537 F.3d 494, 500 (5th Cir. 2008). On September 29, 2008, the Innocence Project obtained copies of the New Orleans Police Department’s (NOPD) fingerprint comparison reports for both the Hines and Robinson murders. These reports revealed – for the first time – that in both cases fingerprints were found on whiskey bottles and/or glasses left at each scene. Notably, the reports revealed that the fingerprints lifted from both scenes did not belong either to the victim or to Floyd, but rather to an unidentified third party.

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# CIVIL LITIGATION

**U.S. SUPREME COURT** – Will the Supreme Court’s October 2017 Term include major rulings in cases involving LGBT rights? For those following the Court closely, suspense mounted through May as the Court continued to list *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, No. 16-111, on its conference agendas, and twice listed *Pavan v. Smith*, No. 16-992, requesting the record from the Arkansas Supreme Court after the second conference listing. (The Court had previously requested the *Masterpiece Cakeshop* record from the Colorado courts.) *Masterpiece Cakeshop* is seeking review of the Colorado Civil Rights Commission’s determination that the business does not enjoy a First Amendment religious free exercise exemption from complying with the state’s statutory ban on sexual orientation discrimination, while *Pavan v. Smith* challenges Arkansas’s refusal to afford married same-sex couples the same right afforded to married different-sex couples to have the name of a birth mother’s spouse entered as the second parent on birth certificates. The *Masterpiece Cakeshop* petition was filed on July 22, and has been distributed for consideration in conference 15 times starting on August 24. Perhaps by the time this issue of *Law Notes* has been published, a decision on a petition will have been announced in one or both of these cases.

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**U.S. COURT OF APPEALS, 2ND CIRCUIT** – The 2nd Circuit affirmed a summary judgment against Arline Magnusson, rejecting her sexual orientation hostile environment claim under Title VII, finding that she had failed to follow her employer’s sexual harassment reporting procedures and thus would not be able to hold the employer liable, even if she “had an otherwise viable hostile work environment claim.” *Magnusson v. County of Suffolk*, 2017 WL 1958699, 2017 U.S. App. LEXIS 8330 (May 11,

2017) (not selected for publication in F.3d). Under Title VII precedents, an employer that has adopted a formal policy against sexual harassment as well as an enforcement mechanism may avoid liability if it has consistently taken complaints seriously, investigated them, and followed through with appropriate action. If an employer can meet these requirements, it will not be held liable for hostile environment sexual harassment claims that were not brought to its attention through such mechanism. As a result of this conclusion, the panel (Circuit Judges Cabranes and Lohier and U.S. District Judge Katherine B. Forrest) did not have to address whether a hostile environment sexual orientation claim is actionable under Title VII. (Subsequently, as reported above, the 2nd Circuit announced on May 25 that it will consider whether sexual orientation discrimination claims are actionable under Title VII in *en banc* review of the *Zarda* case.) The panel also agreed with District Judge Sandra J. Feuerstein (E.D.N.Y.) that Magnusson had not alleged a valid equal protection claim under 42 USC 1983, finding that her allegations concerning “inappropriate” incidents in 2003 and 2012 “occurred nine years apart,” and she had not “presented evidence that these incidents unreasonably interfered with her job performance” or were sufficiently severe to have altered the terms and conditions of her employment. As the court’s opinion will not be officially published in F.3d, it did not set out in detail Magnusson’s factual allegations. Magnusson is represented by Alexander T. Coleman, Michael J. Borrelli, and Pooja Bhutani, of Borrelli & Associates PLLC, Great Neck, N.Y.

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**U.S. COURT OF APPEALS, 3RD CIRCUIT** – A divided panel of the 3rd Circuit concluded that a lesbian from Guatemala who had been convicted in South Carolina as “accessory-after-the-fact” to a murder should be allowed

to seek withholding of removal, thus vacating a decision of the Board of Immigration Appeals and sending her case back for reconsideration. *Flores v. Attorney General*, 2017 U.S. App. LEXIS 8116, 2017 WL 1826703 (May 8, 2017). Senior Circuit Judge Julio Fuentes wrote for the majority. Flores entered the United States with her husband to escape her abusive father. Her husband had a visa but she did not. The couple had a daughter in the U.S. before divorcing, after which Flores entered into relationships with both men and women. She traveled to South Carolina to visit family in 2007 and struck up a relationship with a young man, Fredy Sibrian, but it soon deteriorated as “Sibrian became increasingly ‘violent, jealous and possessive,’” and Flores left him and traveled to North Carolina, where she began dating Antonio Perez. She returned to South Carolina in April 2008 with Perez. “Sibrian confronted them at a gas station, causing a heated exchange that ended when Sibrian shot and killed Perez. According to Flores, she did not immediately report the murder because Sibrian threatened to kill her and her then-three-year-old daughter if she disclosed Sibrian’s actions to the police.” Fearing retribution, she returned to North Carolina. She was later arrested and returned to South Carolina on a charge of murdering Perez. “According to Flores’s testimony, which the Immigration Judge found credible, she pleaded guilty to accessory after the fact because she failed to report the murder to police,” wrote Fuentes. “The record does not reflect that Flores covered up the homicide, lied to police or prosecutors, or assisted the shooter in any way.” After serving two years, she was deported back to Guatemala, but she quickly returned to the U.S. illegally. She was arrested on a prostitution charge in 2015, and was detained by Immigration and Customs Enforcement. She stated during her asylum interview that the fear returning to Guatemala because her abusive father wanted to kill

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her, she had been raped by local gang member immediately after her prior removal to Guatemala, and she fear persecution because she is a lesbian. The asylum officer determined that she had a reasonable fear of persecution, but the Immigration Judge found that she was barred from seeking withholding of removal because of the felony conviction in South Carolina as accessory after the fact to a murder, which the IJ considered a “particularly serious crime” under the Immigration and Nationality Act as a form of “obstruction of justice.” The IJ also found that she had failed to establish that she was likely to be subjected to torture if returned to Guatemala, and so could not seek refuse under the Convention Against Torture. The BIA dismissed her appeal, and she brought it to the 3rd Circuit, represented by Marcia Kasdan of Hackensack, N.J. In a lengthy discussion, Judge Fuentes demonstrated that a South Carolina conviction as accessory after the fact to murder did not fit within the scope of “obstruction of justice” as that term is used in the context of determining whether an undocumented immigrant has committed a “particularly serious crime” that would disqualify them from seeking withholding of removal. Thus, the court vacated the BIA’s finding on this point and remanded for consistent proceedings. However, the court found that on this appeal Flores had not “meaningfully” disputed the BIA’s conclusion that she had failed to appeal the IJ’s ruling on her CAT claim; therefore, it was not “exhausted” and the court of appeals did not have jurisdiction to review it. In a partial dissent, Circuit Judge Patty Shwartz disagreed with the majority’s determination that Flores’ felony conviction did not disqualify her from seeking withholding of removal. “Given that the purpose of the accessory after the fact offense is to help the principal avoid facing justice before a court,” she wrote, “this conduct is related to obstructing the due administration of justice.”

**U.S. COURT OF APPEALS, 4TH CIRCUIT** – The 4th Circuit has tentatively scheduled oral argument during September on the next stage of Gavin Grimm’s appeal from the district court’s dismissal of his Title IX claim against Gloucester County School District for refusing to allow the transgender boy to use gender-appropriate restroom facilities at the high school. The 4th Circuit had previously reversed the district court’s decision based on deference to the Obama Administration’s interpretation of the Title IX regulation concerning gender-specific facilities. The School District petitioned the Supreme Court to review the case. The petition was granted, but shortly before the case was to be argued the Trump Administration withdrew the interpretation to which the 4th Circuit had deferred, and the Supreme Court vacated the 4th Circuit’s decision, dismissed the writ, and remanded the case back to the 4th Circuit. Although Grimm graduates from high school this month, the ACLU is pressing the appeal on the merits before the 4th Circuit. *New York Times*, June 2.

**U.S. COURT OF APPEALS, 5TH CIRCUIT** – In an opinion that provides little detail of the petitioner’s factual allegations, a panel of the 5th Circuit ruled *per curiam* on May 26 to deny a petition for review of the Board of Immigration Appeals’ decision denying her claims for asylum, withholding of removal, or protection under the Convention Against Torture as a transgender woman from Honduras. *Osejo-Romero v. Sessions*, 2017 U.S. App. LEXIS 9295, 2017 WL 2312855. The petitioner once worked as an investigator with Honduran law enforcement, and claimed to have received threats and was subject to surveillance by Los Pirras, a criminal gang. Living then as a gay man, petitioner also claims to have suffered incidents of abuse, but the court found that they did

not amount to persecution of the type that would support an asylum claim. The court went on, “the BIA agreed with the IJ that the fact that police officers made [petitioners] feel uncomfortable was insufficient to constitute persecution and that, in any event, there was no evidence that corrupt police officers knew that [petitioner] had reported them.” In order to win this appeal of the denial of asylum, the petitioner would have to show that the evidence compels a finding of past persecution, but the court found that she fell short on this record. The burden is even higher to win withholding of removal, so the court found that she fell short there as well. There is no reference in the decision to any general evidence of conditions in Honduras for transgender women. Wrote the court, the petitioner “does not show that the evidence is so compelling that no reasonable factfinder could fail to find a clear probability of future persecution.” Furthermore, the court found no evidence that she had been or would likely in future be subjected to torture in Honduras because of her gender identity. “Conclusory assertions do not compel a conclusion different from that of the BIA,” snapped the court. Petitioner is represented on this appeal by Clement Lee of New York and Jonathan Ference-Burke of Ropes & Gray’s Washington office.

**U.S. COURT OF APPEALS, 6TH CIRCUIT** – Remember Kim Davis, the Rowan County, Kentucky, Clerk who refused to issue marriage licenses to same-sex couples after the *Obergefell* decision because of her religious objections to same-sex marriage, and who was remanded to prison for contempt of court by U.S. District Judge David L. Bunning until she was willing to let other employees in her office issue licenses? The main lawsuit against Davis that received all the attention back in 2015 seeking injunctive relief was not the only action

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filed against her. Two gay men who had been together for seventeen years and resided in Rowan County, David Ermold and David Moore, applied for a marriage license a week after the Supreme Court's ruling and were turned down by Davis. As another lawsuit was on file against Davis seeking injunctive relief, the Davids sought only damages in their Sec. 1983 case, which was also assigned to Judge Bunning, who sat on Davis's motion to dismiss this case while the other case played out. Readers may recall that newly-elected Governor Matt Bevin came to Davis's rescue, first through an executive order adopting a new marriage license form that would not name the County Clerk or require her signature, and then by signing into law a measure that revised the marriage license process in Kentucky so as to remove the main point of Davis's objection: that the existing procedure and forms involved personal approval of a same-sex marriage by a religiously-objecting county clerk. Ultimately, Judge Bunning dismissed the first case against Davis as moot, finding that "marriage licenses continue to be issued without incident, [so] there no longer remains a case or controversy before the Court." On August 18, 2016, Judge Bunning dismissed the Davids' lawsuit on the same grounds, and they appealed. On May 2, 2017, a 6th Circuit panel held in *Ermold v. Davis*, 855 F.3d 715, that the enactment of the Kentucky law that resolved Davis's issues did not moot the plaintiffs' case against her, as they were seeking damages for the harm they suffered when she turned down their application back in July 2015. Judge Karen Nelson Moore's opinion for the panel stated, "Neither the Executive Order nor Senate Bill 216 rendered this damages-only case moot because, as we have held, 'so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case.' Indeed, where a claim for injunctive relief is moot, relief in the form of damages for a past

constitutional violation is not affected." Further, an exception for cases where damages are insubstantial was found not to apply to this case. Concurring, Circuit Judge Eugene Siler wrote, "The district court may have meant to dismiss this case because Kim Davis was protected by the Kentucky Religious Freedom Restoration Act, KRS Sec. 446.350 (2013), but it did not discuss the issue." He noted that this statute pre-dated the *Obergefell* decision. "To be sure, maybe Davis was not using that law as a shield to excuse her from issuing the marriage licenses after *Obergefell*. Or maybe no defense could be made based upon that statute once *Obergefell* was decided in 2015. The district court has never ruled on the effect of that statute upon the conduct of the county clerk. It should have the first opportunity upon remand to decide whether that or any other provision of the law would protect Davis as a qualified immunity or absolute immunity defense under the circumstances."

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**CALIFORNIA**—A transgender employee who took Family & Medical Leave Act (FMLA) unpaid leave to undergo transition surgery and then sought a work scheduling accommodation in connection with his recuperation survived motions to dismiss his FMLA and wrongful discharge lawsuit in *Duane v. IXL Learning, Inc.*, 2017 U.S. Dist. LEXIS 72993 (N.D. Cal. May 12, 2017). Adrian Scott Duane worked for IXL Learning, Inc., from June 2013 to January 2015. In common with many other employees of the company, he obtained permission from his supervisor to work outside the office and with "irregular hours." In July 2014, Duane informed his supervisor that he would periodically miss work for weekly preoperative appointments for his phalloplasty surgery and he would be taking FMLA leave of 6 to 8 weeks for the surgery and recuperation. Duane's supervisor told him that he

could work remotely on days he had pre-operative appointments. Duane took leave beginning in October 2014 for the surgery and recuperation period. In mid-December 2014, he emailed his supervisor to request to work half-days in the office and half-days at home upon return to work due to effects of a "surgical complication," but the response was a preference to have him in the office where he was "more productive," and when he returned from leave he was given a fixed hours schedule and a requirement for frequently emailed reports to his supervisor. Duane claims these requirements were "very strict by the standards of other employees at IXL, nearly all of whom work flexible hours and from home, with few checkups or restrictions." This led him to post an anonymous review of IXL on the Glassdoor website, where employees beef about their companies. The review was strongly critical of IXL, and is quoted in full in Judge William Alsup's opinion. Duane also told his supervisor that he felt discriminated against, and the supervisor relayed this concern to IXL CEO Paul Mishkin. Mishkin met with Duane. After Duane explained why he felt discriminated against, Mishkin handed Duane a printout of his Glassdoor review and demanded evidence proving the statements he made in the review. Duane's response: "I'm queer and I stick out." Duane alleges that after leaving the meeting he realized that "Mishkin had intended to terminate him before their meeting had started" because the items in his desk were already removed and HR had already prepared discharge papers for him. Mishkin terminated him purportedly because of the anonymous review, which Mishkin claimed demonstrated Duane had poor judgment and poor ethics. Duane then unleashed multiple lawsuits, filing charges with the National Labor Relations Board, the Equal Employment Opportunity Commission, and an FMLA and wrongful discharge lawsuit in federal court in San Francisco. The NLRA case

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crashed and burned, an Administrative Law Judge finding that Duane's posting of the review was not protected concerted activity under NLRA Section 8(a)(1), but rather an individual gripe; this finding was affirmed by the NLRB. However, Duane scored two preliminary victories during May. In the federal lawsuit, District Judge Alsup rejected the employer's motion to dismiss the FMLA and wrongful termination claims, although he granted a motion to dismiss the termination claim that Duane brought against Mishkin personally, finding that FMLA and wrongful termination claims are actionable only against the employing entity, not against individual members of management. The wrongful termination claim under California law is premised on violation of public policy, in this case the FMLA. Judge Alsup also rejected the employer's argument that California Labor Code Sec. 232.5(a) could not be a basis for the public policy argument due to federal preemption by the NLRA. On May 24, the EEOC filed a lawsuit against IXL Learning, also in the Northern District of California, alleging violations of Title VII of the Civil Rights Act, Title V of the Americans with Disabilities Act, and Title I of the Civil Rights Act of 1991, alleging that IXL "discriminated against its former employee, Charging Party Adrian Scott Duane, by terminating his employment for engaging in protected opposition activity," i.e., a retaliation complaint. *EEOC v. IXL Learning, Inc.*, Case 3:17-cv-02979-VC (N.D. Cal.). This case was assigned to District Judge Vince Chhabria. Duane is represented in his federal lawsuit by David Marek of Palo Alto, Roberta L. Steele, Marcia L. Mitchell, and Ami Sanghvi of the EEOC's San Francisco regional office represent the agency suing on Duane's retaliation charges.

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**CALIFORNIA** – U.S. Magistrate Judge Kandis A. Westmore (N.D. Cal.) ruled

that an HIV-positive gay plaintiff suing the city for discrimination was entitled to proceed anonymously as "John Doe" in *Doe v. City and County of San Francisco*, 2017 WL 1508982, 2017 U.S. Dist. LEXIS 64291 (April 27, 2017). The plaintiff had filed suit against the city in Superior Court. He alleged, as summarized by the court, that "Defendants, without probable cause, had caused Plaintiff to be declared 'gravely disabled' and involuntarily detained for mental health reasons. Plaintiff brings claims for (1) violation of 42 USC Sec. 1983, based on deprivations of Plaintiff's First Amendment right to petition and Fourth Amendment right to be free from unreasonable seizure; (2) discrimination based on disability, medical condition, psychiatric condition, and sexual orientation; (3) false arrest and excessive force; (4) false arrest and false imprisonment; (5) assault and battery; (6) intentional infliction of emotional distress; (7) negligent infliction of emotional distress; (8) trespass; (9) conversion; (10) invasion of privacy; and (11) negligent hiring, training and retention." Defendants removed the case to federal court, where the court required that plaintiff file an amended complaint under his real name. The plaintiff moved for reconsideration of this order, requesting permission to continue the suit as "John Doe." Judge Westmore granted the motion for reconsideration, and issued this decision, finding that plaintiff should be allowed to proceed anonymously, mainly because his HIV-positive status is implicated in the case and, he represented to the court, he had kept that information confidential, limited only to family and close friends. Judge Westmore wrote that "the use of a pseudonym is appropriate to protect Plaintiff from injury or personal embarrassment, based on Plaintiff's HIV-positive status. In recent years, courts have permitted the use of anonymous pleading where a party is HIV-positive, recognizing that

'HIV-positive plaintiffs are in a highly sensitive position and therefore should be allowed to proceed anonymously,' citing cases from other jurisdictions. The judge found that this issue "implicates significant privacy concerns," and rejected the defendants' argument that "Plaintiff's HIV-positive status is not 'necessary to decide any fact or legal issue in this case,' and that 'Defendants have no intention of revealing any of this information in order to defend Plaintiff's allegations.'" She pointed out that part of the allegations of Plaintiff's complaint was that "Defendants denied Plaintiff 'full and equal services because of disability, HIV status, psychiatric condition, and sexual orientation.'" Thus, she asserted, "Plaintiff's allegations regarding his HIV-positive status are not, as Defendants suggest, 'gratuitous.'" Furthermore, the court could not see how Defendants would be prejudiced, since they knew the identity of the plaintiff and his "interest in shielding his identity outweighs any potential prejudice to Defendants." Also, defendants had failed to show how the public interest would be harmed.

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**CALIFORNIA** – U.S. Magistrate Judge Donna M. Ryu granted a motion to excuse the plaintiff, who lost a jury verdict in an excessive force trial against two San Francisco police officers, from paying the cost bill assessed by the court clerk in *Moujaes v. San Francisco City and County*, 2017 U.S. Dist. LEXIS 65329, 2017 WL 1540732. The plaintiff, a public interest lawyer, is a "self-described masculine-presenting lesbian of Middle Eastern and South Asian descent. On July 14, 2013, she was driving in a car with her girlfriend, an Afro-Cuban, on Mission Street in San Francisco when she was pulled over by the defendants for making an illegal left turn." What happened during the traffic stop was sharply disputed by the parties, but "it is undisputed," wrote Judge Ryu, "that Plaintiff suffered a dislocated

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shoulder from the incident that required emergency medical treatment.” She brought claims against the City and individual officers under 24 USC 1983 for unlawful seizure, wrongful arrest, and excessive force, as well as for municipal liability. The court granted summary judgment to defendants on all claims except excessive force against the two police officers involved in the stop. Those claims went to a weeklong trial, at the end of which the jury returned a verdict in favor of defendants, after which defendants filed a timely bill of costs for \$9,922.41, which the clerk reduced to \$3,517.25. The plaintiff moved the court to review the final cost bill and decline to award costs. 9th Circuit precedent lists five “appropriate reasons for denying costs”, which include the substantial public importance of the case, the closeness and difficulty of the issues, the chilling effect on future similar actions, the plaintiff’s limited financial resources, and the economic disparity between the parties. Judge Ryu found that four out of these five factors weighed in favor of denying the cost bill. “This case raised important issues of public concern regarding police conduct in routine traffic stops involving persons of color which culminate in the use of force and injury,” she wrote, noting as well: “Although it was not a central theme of the case, during opening statements, Plaintiff’s counsel argued that Plaintiff and her partner were perceived as males on the night of the incident. Plaintiff also testified that she believed the police approached her vehicle with their guns drawn because the police ‘perceived’ her in a certain way and ‘made assumptions’ about her based on the way she looked, and the neighborhood she was in. The court and counsel spent considerable time on these issues in voir dire.” As to “closeness and difficulty of the issues,” Judge Ryu remarked that “resolution of the issue whether Defendants used excessive force depended upon the

jury’s careful evaluation of conflicting witness testimony . . . . Although the jury rendered a verdict in favor of Defendants, this result was far from guaranteed.” Furthermore, awarding costs against plaintiffs in cases like this could chill future civil rights actions, and the economic disparity between an individual public interest lawyer and the City of San Francisco was huge. An amount that would be significant to her might be deemed trivial by the City. However, although the plaintiff earns a “modest income” as a public interest lawyer, the court did not deem this fact as weighing in her favor. On balance the court deemed it appropriate to deny the bill of costs, and it specifically rejected the city’s argument that plaintiff had a “malicious motive” in bringing the case. The court also granted the plaintiff’s motion to seal portions of her declaration concerning her net and gross income, monthly expenses, and available income after deduction of monthly expenses, which she had filed in support of her motion.

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**ILLINOIS** – U.S. District Judge Staci M. Yandle denied a motion to dismiss a retaliation claim filed under Title VII and the Missouri Human Rights Act by a transgender woman against her former employer in *Hileman v. Internet Wines & Spirits Co.*, 2017 U.S. Dist. LEXIS 82625, 2017 WL 2345552 (S.D. Ill. May 30, 2017). Jaimie Hileman worked for the defendant from October 2011 until March 2015. In April 2013, she told her employer that she was transgender and planned to transition consistent with her female gender identity. She claims she was then subjected to discrimination and retaliation, and filed a charge under Title VII with the EEOC in August 2013. In November 2013, her boss threatened her, stating she “picked the wrong guy to fight” and that he would “never stop” and he “never loses.” Hileman then filed an additional retaliation

charge. In December 2014, she filed suit in federal court. That suit was settled in March 2015, with Hileman’s resignation from the company as part of the overall settlement. The settlement agreement included a Non-Disparagement Clause. In November 2015, a local television news program aired a report about the transgender community that included an interview with Hileman, who talked about her discrimination case without mentioning the name of her former employer, but the employer was upset and demanded that she request the television station to remove the report from its website. The employer then foiled a state court action against Hileman, alleging breach of the settlement agreement and defamation. The state court dismissed the defamation claims, partially dismissed the breach of contract claim, and sanctioned the employer for failure to respond to discovery requests. Hileman claims that her employer knew its lawsuit was not meritorious when it was filed, and alleges in the current federal lawsuit that the state lawsuit (which is still pending) constitutes unlawful retaliation under Title VII. She filed charges with the EEOC and the Missouri Human Rights Commission, and filed this lawsuit after receiving right to sue notices from those agencies. The employer moved to dismiss, claiming she had failed to sufficiently plead a prima facie case. Judge Yandle rejected the employer’s argument. First, she pointed out, it is clear that both Title VII and the MHRA anti-retaliation provisions extend to protect former employees from retaliation by their employers. Furthermore, the court pointed out, there is a low pleading threshold to survive a motion to dismiss, which the judge concluded had been met in this case. Clearly, filing a non-meritorious state court action against a former employee is a “materially adverse action,” which is needed to sustain a retaliation claim. Ultimately Hileman will have to prove that the state law

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action was totally non-meritorious, but she is a long way towards that as the state court has already dismissed most of the employer's claims against her. Hileman is represented by Joshua M. Pierson and Ferne P. Wolf of Sowers & Wolf, LLC, St. Louis.

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**IOWA** – On May 4, a jury awarded Jane Meyer more than \$1.4 million in damages against the University of Iowa, finding that she had suffered discrimination because of her sexual orientation. Meyer claimed that the school retaliated against her for complaining about the school's discharge of Tracey Griesbaum, a field hockey coach who was Meyer's partner. Meyer was an administrator in the university's athletics department. The eight-person jury found in favor of Meyer on all five counts charged under the state's anti-discrimination law *New York Times*, May 4. The day after the verdict was announced, University President Bruce Harreld announced that the school "will hire an independent firm to conduct an external review of University employment practices as defined by the Iowa Civil Rights Act," and that the review would be with the Athletics Department. *Cedar Rapids Gazette*, May 6. \* \* \* The ACLU of Iowa reported that Newton High School has resolved a dispute with the parents of a transgender student who claims his free speech rights were violated when he was ordered to wash off "Love trumps hate" that he'd inked on one of his arms or he would be sent home from school. The ACLU also charged that a teacher had repeatedly referred to the transgender boy as a "girl" even though he openly identifies as male. The ACLU's news release state that the teacher and an administrator involved have expressed their regrets to the student, and the school has agreed to provide training on civil rights protections for students. The alternative for the school would be to face an ACLU Title IX lawsuit. *AP State News*, May 22.

**KANSAS** – Finding no abuse of discretion by Ellis District Judge Glenn R. Braun, the Court of Appeals of Kansas upheld a decision by Judge Braun to terminate a lesbian mother's parental rights over her two very young children. Judge Braun found that state officials had appropriately sought termination of parental rights upon evidence that the mother's same-sex partner had physically abused one of the children, and the mother – refusing to believe that her partner could have engaged in such conduct – had recalcitrantly persisted in maintaining contact with her partner and intended to allow her partner to have continued contact with the children. *In the Interest of R.M. and R.B.*, 2017 WL 2021925, 2017 Kan. App. Unpub. LEXIS 365 (May 12, 2017). Police removed the children from the custodial home after a pediatrician stated that injuries suffered by the two-year old boy were consistent with child abuse and not consistent with the "accident" described by mother's partner to physicians and police investigators. Because of the son's injuries state authorities first put the children into the care of Saint Francis Community Services, which had "held medically fragile children before," wrote Judge Kathryn Gardner for the court. After two months with Saint Francis, the children were placed with their maternal grandmother and stepgrandfather. Appealing the termination of her parental rights, the mother claimed that placement with Saint Francis violated her First Amendment rights, and that the overall procedure by which she was deprived of her children violated her due process right to raise her children and discriminated against her based on her sexual orientation. The court rejected all these arguments. It concluded placement temporarily with Saint Francis did not violate the Establishment Clause, as that mother had "shown no evidence that Saint Francis encouraged, let alone coerced, her children into participating

in religious activities or conditioned their receipt of any benefits on such participation. None of the case plans or court orders contains any reference to religious acts or beliefs or requires Mother or her children to do anything of a religious nature." The court rejected the mother's argument that her due process rights were violated when her visitation privileges were suspended, pointing out that mother's insistence on maintaining contact with her partner in violation of express restrictions imposed by the court upon its conclusion that contact with the partner (who eventually entered a no contest plea to charges of abusing the son) was harmful to the child, and pointed out that her parental rights "were terminated only after a 3-day trial that afforded her a full and fair opportunity in which to present her case. Prior to her trial, visitation was suspended at times due to Mother's non-cooperation." The court found that mother was first raising a constitutional equal protection claim on appeal, and having failed to present it to the trial court, had not preserved the claim for appellate review. The court found that the termination of mother's parental rights was supported by clear and convincing evidence, as required by Kansas statutes. "The district court emphasized that Mother never acknowledged that her partner had injured her child, that Mother had defied the terms of the reintegration plan requiring her to terminate her relationship with that partner, and that Mother had stated her intention to reintroduce that partner into her children's lives," wrote Judge Gardner. "The court found clear and convincing evidence that Mother was unfit and that her conduct was unlikely to change in the foreseeable future." The court noted the common law duty in Kansas for a parent to protect her child from abuse, stating that this weighed heavily against mother's parental claims. "By refusing to end her relationship with the person who had abused her child, Mother

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failed to adjust her conduct to meet her children's basic needs for safety," wrote the court. "Was the termination in the best interests of the children? That determination is entrusted to the district court's sound discretion based on a preponderance of the evidence. The district court understood the relevant facts and applied the proper law. And its conclusion is one other judicial officers would have reached under comparable circumstances. So we find no abuse of discretion in the district court's determination that the termination of Mother's parental rights was in the best interests of the children." Mother is represented by Daniel C. Walter of Walter & Walter LLC, Norton, Kansas. The maternal grandmother was represented by Paul R. Oller, of The Oller Law Firm LLC, of Hays, Kansas. County Attorney Charlene Burbaker defended the trial court's ruling.

**MASSACHUSETTS** – U.S. District Judge William G. Young (D. Mass.) approved on May 15 a \$7.5 million class action settlement between former associate Jacqueline Cote and Walmart, concerning the employer's lack of health insurance benefits for same-sex spouses prior the 2014, when the company changed its policies in reaction to the *Windsor* decision by the Supreme Court. The settlement will cover claims by Walmart associates in the U.S. and Puerto Rico that they were unable to obtain health insurance coverage from Walmart from January 1, 2011, until December 31, 2014, and covers the costs of administering the settlement and legal fees and expenses, according to a press release from GLAD, which represented the class together with attorneys from Outten & Golden LLP, the Washington Lawyers' Committee for Civil Rights & Urban Affairs, and Arnold & Porter Kaye Scholer LLP. The case is *Cote v. Wal-Mart Stores, Inc.*, No. 15-cv-12945-WGY (D. Mass.)

**MINNESOTA** – The University of Minnesota Duluth settled a discrimination suit brought by the former director of its GLBT Services Office, under which she charged a hostile environment and retaliation as she resigned in 2015. Angie Nichols and her attorneys will receive \$75,000 under the settlement, in which the University does not admit wrongdoing or violation of the law but agrees to pay Nichols for lost wages, emotional distress and attorneys' fees in exchange for her withdrawal of her lawsuit. The case had been scheduled to go to trial in Minnesota state District Court in September. Nichols is represented by Michelle Kornblit of Minneapolis. *Duluth News-Tribune*, May 5.

**NEW JERSEY** – U.S. District Judge Freda L. Wolfson affirmed a ruling by the Social Security Administration denying disability benefits to Joseph Brando, a person living with HIV, in *Brando v. Colvin*, 2017 U.S. Dist. LEXIS 83118, 2017 WL 2364194 (D.N.J. May 31, 2017). Although we generally don't publish routine denials of disability benefits to people living with HIV, this opinion was lengthy and replete with numerous references to Brando's HIV-positive status, unlike in the many cases we have refrained from reporting, where there was only a mention in passing of a petitioner's HIV-positive status. So this opinion provides a useful example of the district court wrestling at length with the issue of qualification for disability benefits for a long-term survivor of HIV infection. In this case, the plaintiff is almost 34 years old, and has been living with HIV/AIDS for more than eight years, alleging a disability onset date of July 1, 2000. The opinion exemplifies the difficulty HIV-positive people may have accessing Social Security Disability benefits when they are receiving current-generation medical care that is keeping them reasonably healthy. Naturally, in such

circumstances, vocational experts will testify that they are capable of fulfilling a range of jobs that are available in the national economy, and the fact that they are living with HIV does not entitle them to different treatment from people with a range of serious medical conditions who are nonetheless capable of working due to successful treatment regimens.

**NEW YORK** – Kings County Justice Francois A. Rivera rejected motions to dismiss or strike complaints against a medical practice, its doctor-owner, and a woman apparently employed as the practice administrator, brought by a heterosexual woman who was employed in the medical practice through a temporary agency, in *Rudzinski v. Glashow*, 2017 N.Y. Misc. LEXIS 1591, 2017 NY Slip Op 50583(U), 2017 WL 1711665 (Sup. Ct., Kings Co., May 1, 2017). Plaintiff Janine A. Rudzinski claims that Lael Carter, who was Rudzinski's direct supervisor at the Glashow medical practice, came out to her as bisexual and made repeated and unwanted sexual advances to Rudzinski. Furthermore, "Carter printed out and handed the plaintiff a copy of her personal profile from a website geared toward BDSM. Carter advised the plaintiff to fill out a checklist about her own BDSM preferences. Carter repeatedly talked to the plaintiff about the BDSM sexual practices that she and her husband engaged in with other people," wrote Justice Rivera, summarizing the allegations of the complaint. Rudzinski also alleged that Carter use her supervisory position to pressure Rudzinski to move into her home on a temporary basis, including reprimanding her on her job performance and advising that if she agreed to move in with Carter and her husband, Rudzinski would be viewed more favorably. Rudzinski also alleged a threat by Carter to terminate her if she did not move in, so she eventually did, then suffering further

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harassment. “While in Carter’s home,” alleged Rudzinski, “Carter’s husband also began harassing the plaintiff by groping her breasts and forcibly kissing her without her consent.” Rudzinski complained to a co-worker about Carter’s conduct. Dr. Glashow then became aware of Rudzinski’s claims and asked his attorneys to investigate, but Rudzinski “was unable to proceed with the investigation because of the severe emotional distress” she had suffered. Then, she alleges, Dr. Glashow used her “alleged failure to cooperate as a pretext for firing her.” She also claimed that she was not properly compensated for overtime hours she worked. Her lawsuit charges violations of the New York State and City human rights laws for discrimination and retaliation, as well as an overtime claim under the state Labor Law and a tort claim for intentional infliction of emotional distress. In the May 1 opinion, Justice Rivera ruled against the defendants’ motions, as well as rejecting an assertion by both Glashow and Carter that the claims against them must go to arbitration pursuant to a provision in a contract between Glashow’s practice and TriNet HR Corporation, a company to which Glashow subcontracted its human resources functions. This is a rare case in which a plaintiff alleges that she suffered discrimination for being heterosexual and pressured by her supervisor to engage in BDSM with the supervisor and her husband. Sounds to us like the plot of a bad B movie. Rudzinski is represented by Gulsah Senol of Akin Law Group PLLC, New York City.

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**NEW YORK** – The U.S. Department of Health & Human Services announced that St. Luke’s-Roosevelt Hospital Center in New York entered into a \$387,200 settlement for failing to appropriately safeguard two patients’ protected health care information. Impermissible disclosures were made by the Spencer Cox Center for Health, which provides

care to persons living with HIV or AIDS and other chronic diseases. The Department’s Office of Civil Rights had brought the enforcement action on a complaint that a staff member had faxed HIV status information on a patient to the patient’s employer instead of mailing it to the patient’s personal post office box, as the patient had requested. OCR’s investigation uncovered an earlier instance of improper disclosure of HIV information, and noted the failure of the Center to correct its procedures when the earlier case was brought to its attention. The settlement was publicized on-line by Eric D. Fader of Day Pitney LLP, New York; see 2017 WLNR 16811066 (May 31, 2017).

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**NORTH CAROLINA** – Plaintiffs in *Carcano v. McCrory*, the lawsuit pending in U.S. District Court in North Carolina challenging H.B. 2, vowed to continue litigating despite North Carolina’s repeal of H.B. 2 and replacement of it with a law that will continue to deprive LGBT people of protection against discrimination. They will file a fourth amended complaint, this time challenging the new law. Governor Roy Cooper as now the named defendant in place of the defeated incumbent governor. Cooper engineered the legislative compromise under which H.B. 2 was repealed and replaced. Plaintiffs will bring federal constitutional and statutory claims against H.B. 142, which did away with H.B. 2’s mandate against allowing transgender people to use gender-consistent facilities in public institutions but, at the same time, implemented a moratorium through December 2020 against local government’s banning sexual orientation or gender identity discrimination. The plaintiffs argue that the new law perpetuates H.B. 2’s harms in violation of equal protection, due process, and federal sex discrimination laws, such as Titles VII and IX. *Greensboro News & Record*, May 2.

**OHIO** – The *Cincinnati Inquirer* reported that Rachel Dovel has settled her lawsuit against the Public Library of Cincinnati and Hamilton County over their refusal to cover her gender confirmation surgery under their employee benefits plan. As a result of this lawsuit, the library now covers such surgery and is offering training on LGBT inclusion.

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**TENNESSEE** – After refusing to allow state legislators to intervene in a pending divorce proceeding involving a lesbian couple, Knox County Circuit Court Judge Greg McMillan granted a divorce and approved a plan for Sabrina and Erica Witt to split custody of a child conceived through donor insemination. McMillan had initially ruled that the non-biological mother was not eligible for a custody award, but he changed his mind and granted the divorce on May 2. The case set off a split between conservative legislators who were encouraged to intervene by the anti-gay Family Action Council of Tennessee, and the Attorney General’s Office, which argued that state law should not be interpreted inconsistently with *Obergefell*. Legislators are appealing the decision to deny their intervention motions, and passed a new law intended to keep state courts from adopting gender-neutral interpretations of the language in the state’s custody statute. Four married lesbian couples expecting children quickly filed a lawsuit on 8 challenging the constitutionality of the new law. *Canadian Press*, May 11.

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**TEXAS** – Judge Sidney A. Fitzwater of the U.S. District Court for the Northern District of Texas rejected a content by a transgender woman that the insurance company that administered her employer’s benefits plans had violated her statutory rights under the Employee Retirement Income Security Act (ERISA) by denying short-term disability benefits

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coverage for her recuperation period from breast augmentation surgery. *Baker v. Aetna Life Insurance Co.*, 2017 U.S. Dist. LEXIS 70595, 2017 WL 1881309 (Mar 9, 2017). The short term disability policy administered by Aetna on behalf of Baker's employer specifically extends to periods of disability due to illness or injury that is non-occupational, the policy gave the administrator (which is also the underwriter in this case) discretion to deal with claims. Baker's transition, including hormone treatment and sex reassignment surgery, was covered under the employer's health insurance plan. The hormone replacement therapy resulted in her development of "size B-C breasts," but the licensed professional counselor who was advising her through the transition recommended breast augmentation therapy (implants), and Baker filed a claim for coverage under the STD Plan for her post-surgery recovery period. Unfortunately, in the claim form Baker responded to the question "What is the primary medical condition that keeps you from working?" with the answer "cosmetic procedure." Wrong move!! The only kinds of cosmetic procedures that are normally covered through insurance policies are those that are necessary to restore reasonable appearance after a disfiguring illness or accident, and not those that are to enhance appearance in the absence of illness or injury. While Aetna accepted that medical costs of transition are medically necessary procedures in response to a diagnosis of gender dysphoria, as far as Aetna was concerned Baker could get along just fine with the breasts she had developed as a result of her hormone treatments, which were not negligible in size. In rejecting her ERISA claim, Judge Fitzwater found that Aetna's interpretation of the Plan language was not incorrect, and that the denial of benefits was not an abuse of discretion by Aetna acting as plan administrator. Fitzwater accepted Aetna's argument that Baker "did not establish that breast augmentation

surgery was medically necessary to treat her specific case of Gender Dysphoria," as she had developed "average size breasts" without the need for this surgery. "The plain language of the STD Plan entitles a participant to benefits if she is 'disabled and unable to work because of: An illness.'" The court found Aetna's interpretation of this to be "consistent with a fair reading of the STD Plan. And any other interpretation would be likely to produce costs that Aetna could not reasonably have anticipated by requiring it to cover cosmetic procedures unrelated to illness." Furthermore, responding to Baker's argument that Gender Dysphoria is recognized as an illness and that this procedure was undertaken in connection with that illness, the court found that the medical evidence in the file, a letter from the surgeon and a letter from the counselor, were not sufficient to establish that the augmentation procedure was "medically necessary," even though the counselor (but not the surgeon) had stated that it was. The court found that Aetna was not required to "prefer opinion evidence – in this case from a non-physician – over other evidence in the record, particularly considering the conclusory nature of [the counselor's] letter." It seems the counselor merely asserted the procedure was necessary without any explanation or citation of authority. The court also rejected any suggestion that Aetna's dual status as plan fiduciary and underwriter was a significant factor here, in light of the institutional safeguards it had adopted to reduce the risk of bias in evaluating claims. Baker is represented by Michael J. Hindman and Kasey Cathryn Krummel, of Hindman/Bynum PC, Dallas.

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## CRIMINAL LITIGATION NOTES

**U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS** – A Navy corpsman who was convicted on two

specifications of abusive sexual contact and one on sexual assault succeeded on appeal in getting the sexual assault conviction overturned because of an error by the military judge in allowing the prosecution to use charged sexual misconduct as propensity evidence for the other charged sexual conduct. *United States v. Upshaw*, 2017 WL 2361911 (May 31, 2017) (not reported in M.J.). In both instances the defendant was found to have offer rides home from an Oceanside, California, bar to drunken Marines, and in both instances the victims testified that they awakened to find the defendant groping them sexually. In one case, it was alleged that anal penetration took place. The military judge allowed the prosecution to introduce evidence about one of cases in prosecuting the other case, even though at the time the defendant had not yet been convicted on the first case. This was allowed as "propensity" evidence to bolster the victim's testimony in the second case; due to his heavy inebriation at the time of events, his recollection was uncertain. In affirming convictions of abusive sexual contact in both incidents, the appellate court found that the trial record was convincing beyond a reasonable doubt that the abusive sexual contact had occurred, but it found that admission of the propensity evidence based on allegations that were not yet proven at the time the evidence was admitted violated the defendant's constitutionally guaranteed presumption of innocence unless proven guilty beyond a reasonable doubt. However, the appellate court found that the defendant should have to stand trial once more on the sexual assault charge, as it is possible the propensity evidence tipped the balance on that charge.

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**CALIFORNIA** – A convicted sex offender's attempt to seize upon a clerical error in order to avoid having to submit to HIV testing five years after his conviction was unavailing in *People v.*

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*Haggard*, 2017 WL 2265088, 2017 Cal. App. Unpub. LEXIS 3548 (5th Dist. Ct. App. May 24, 2017). Loal Haggard pled no contest to five counts of committing a lewd act with a child under the age of 14, including putting “her mouth on his penis.” The minutes from the plea hearing included the notation “Order for HIV testing signed in open court.” This Order stated that Haggard was to be tested “while in custody at the county jail, before being transported to the state prison.” While the testing order was “reflected in the minutes from the sentencing hearing and the transcript of the court’s oral remarks at that hearing,” it was not mentioned in the subsequent sentencing hearing minutes, and neither on the “abstract of judgment form” where there is a box to be checked to indicate that HIV testing has been ordered, but the box was not checked. It turns out that Haggard was not tested for HIV before being sent to the state prison, and this did not come to the attention of authorities until five years later. (The court says that the record does not indicate how the authorities discovered this lapse.) When it came to their attention, the trial court scheduled a new hearing and again ordered HIV testing. Haggard appealed this ruling on both statutory and constitutional grounds, but was rebuffed by the Court of Appeal, which found that the testing order was valid when made and that the victim had a continuing interest in learning Haggard’s HIV status. The court also rejected Haggard’s argument that this violated his constitutional rights, observing that HIV testing was not a punishment but was imposed where, as here, the defendant had pleaded no contest to engaging in conduct that could theoretically lead to HIV transmission. But there is an air of absurdity to the entire thing. If the victim has not exhibited evidence of HIV exposure more than five years after her last contact with the defendant, it strikes us as implausible that he might have transmitted HIV to her,

so testing of him would seem to serve no legitimate purpose at this late date. Given the passage of time, if the victim is concerned about HIV exposure, she should submit to HIV testing, and under current testing protocols it is virtually certain that she would test positive had she been exposed to HIV by the defendant under circumstances that were likely to result in transmission. The court rejected Haggard’s argument that the original testing order was erroneous “because the record does not contain evidence sufficient to support a finding of probable cause,” wrote the court. “Haggard’s plea of no contest to a charge of placing his penis in the victim’s mouth, however, by itself supplies probable cause to believe a fluid capable of transmitting HIV – semen – was transferred from him to the victim. Haggard appears to suggest that probable cause was not established in the absence of evidence that he ejaculated, but he cites no authority for this notion and we do not believe it is correct. Probable cause need not be supported by evidence sufficient to show a proposition is true even under the preponderance standard. The term refers to ‘circumstances which warrant suspicion’ or ‘only the probability, and not a prima facie showing’ of the fact in question. Haggard’s plea alone was enough under this standard.”

**CALIFORNIA** – A man convicted of sexual penetration and lewd acts upon a female child got an appellate court to remove from the “abstract of judgment” a requirement that he submit to HIV testing in *People v. Zazueta*, 2017 WL 2303164 (Cal. 2d Dist. Ct. App. May 26, 2017). The relevant statute authorizing criminal courts to order HIV testing of defendants lists specific statutes for which testing is mandatory, and allows courts to order testing for violations of other statutes where the court finds “probable cause to believe that blood, semen, or other bodily fluid

capable of transmitting HIV has been transferred from the defendant to the victim.” Zazueta’s crimes against the minor victim involved fondling and penetrating her with his fingers, but the trial judge made no finding on the record that anything he did was likely to have transmitted HIV, and did not order HIV testing. Somehow, however, the box for HIV testing was checked on the “abstract of judgment.” Most of this decision involves various challenges by Zazueta to his conviction, which were mainly unsuccessful, but he did succeed in getting the court of appeal to remove the testing order. “Because AIDS testing could not have been ordered mandatorily based on Zazueta’s crimes, or based on his crimes with the finding that no probable cause existed to believe HIV may have been transferred to H.D., and because the court did not, in fact, order AIDS testing, we agree with Zazueta that the abstract of judgment must be corrected to reflect that no such testing was ordered.” Zazueta was represented on appeal by appointed counsel, Daniel G. Koryn. The state conceded in response to the appeal that the testing order must be stricken, but evidently it took an order from the Court of Appeal to get that done.

**CALIFORNIA** – The 4th District Court of Appeal ruled that Orange County Superior Court Judge Dan McNerney did not err in allowing testimony that defendant David Ayala was “homosexual” during Ayala’s trial on charges of lewd act and forcible sodomy, possession of child pornography and using a minor to produce obscene matter. *People v. Ayala*, 2017 Cal. App. LEXIS 3599, 2017 WL 2243009 (May 23, 2017). Ayala began making moves on the 12-year-old son of a neighbor, gradually induced the boy into more explicit activity that included oral and anal sex and recording images of the naked boy having sex. The boy, whose parents

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had divorced, moved in with Ayala to finish up high school. Eventually the boy became resistant to some of Ayala's sexual demands, leading Ayala to become rough and subject the boy on some occasions to non-consensual anal sex. Finally the boy told his step-father what had been going on, which led to a police investigation and prosecution of Ayala. During the trial, the boy testified in response to prosecution questioning that Ayala had told him that Ayala was a homosexual. The investigation also led the police to another man who testified that Ayala sought to have sex with him when he was a boy, and similarly that Ayala had told him that he was gay. In appealing his conviction, Ayala pointed to precedents against admitting such characterizations about a defendant, since being gay is not illegal and does not necessarily connote pedophilia or forcing people to have sex against their will. The court of appeal agreed that ordinarily such evidence should not be introduced. Indeed, the state conceded that evidence of a defendant's sexual orientation, by itself, is "irrelevant," but asserted that in this case it was relevant as part of the proof of the defendant's course of action in grooming the boys to be receptive to his sexual advances. But the court concluded on this point, "We need not decide whether the trial court should have excluded Ayala's statement to Jacob under Evidence Code section 352 because any error in admitting Ayala's statement was harmless. The brief references to Ayala's sexual orientation was dwarfed by the overwhelming evidence of Ayala's criminal conduct." The court also rejected Ayala's argument that the trial court erred by refusing to charge the jury on a lesser-included offense of attempted sodomy. The court pointed out that the prosecution was for actual anal and oral penetration. Although there was testimony about certain attempts by Ayala to penetrate Jacob that were unsuccessful because of Ayala's erectile dysfunction, the court pointed

out that the prosecution was focused on the successfully concluded acts. Ayala was represented on appeal by appointed counsel Robert L.S. Angres.

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**MISSISSIPPI** – U.S. District Judge Louis Guirola sentenced Joshua Vallum on May 15 to 49 years in prison for what was described as the first-ever conviction on federal hate crime charges arising from the murder of a transgender person. Vallum had previously been sentenced to life without parole on state murder charges for the same offense. He acknowledged guilt in the 2015 death of Mercedes Williamson, 17. The prosecution claimed that Vallum killed Williamson, which whom he had a sexual relationship, to keep fellow gang members from discovering this, as the Latin Kings gang bans homosexual activity for its members and declares such activity to be punishable by death. Vallum told sheriff's deputies initially that he had dated Williamson for some time before discovering that Williamson had a penis on May 30, 2015, and then "blacked out" and could not remember killing her. But prosecutors alleged that Vallum knew of Williamson's transgender state long before he killed her. *Boston Globe*, May 16.

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**MISSOURI** – The Missouri Court of Appeals ruled May 30 in *Mangum v. State*, 2017 Mo. App. LEXIS 515, 2017 WL 2334044 (Mo. App., S.D., Div. II), that the Butler County Circuit Court correctly denied relief to David L. Mangum, who pled guilty to two counts of violating Missouri's HIV exposure statute, Sec. 191.677.1, and sought to get his plea vacated on the ground that the attorney assigned to represent him at sentencing had failed to file and litigate a motion asserting that application of the statute violated his 14th Amendment equal protection rights. Mangum argued that the statute imposes burdens on person living with HIV that are

not imposed on persons with similar communicable diseases, and that if his counsel had suggested litigating that question, he would not have pled guilty and insisted on going to trial. The plea negotiation took place after counsel was appointed on February 29, 2016. Writing for the court, Senior Judge Paul McGhee pointed out that by pleading guilty, Mangum had "waive any claim that counsel was ineffective except to the extent that the conduct affected the voluntariness and knowledge with which his plea was made . . . Here, Movant has not shown that his counsel failed to use the customary skill and diligence of a reasonably competent attorney in similar circumstances when counsel failed to litigate whether section 191.677 deprived Movant of equal protection . . . Thought Movant frames his argument as one of ineffective assistance of counsel, it is more aptly characterized as a backdoor attempt to directly challenge section 191.677's constitutionality (which Movant likely realizes is waived)." The problem, the judge pointed out, is that Mangum had failed to provide evidence that "under the prevailing professional norms at the time, a reasonably effective plea counsel should have raised an equal protection challenge to section 191.677. Based on this failure to support his argument with relevant authority or explain why such authority is not available, we may deem Movant's argument abandoned." The judge insisted that at the time the plea was entered, the provision was presumed constitutional, and "Movant's plea counsel is held only to the state of the law at the time of the guilty plea." Indeed, Judge McGhee pointed out, "Section 191.677 remains constitutional, and this Court is unaware of any judicial authority to the contrary." We took a look at the statute and were appalled to see that it expressly provides that "the use of a condom is not a defense" to a violation of the sexual contact provision. And, of course, this statute, which was last amended in 2002, takes no account

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of the impact on transmissibility of HIV of today's state-of-the-art treatment regimen.

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**NEW JERSEY** – The Appellate Division ruled on May 31 that a state law precluding a defense of mistake of age in prosecutions of adults for soliciting or having sex with minors does not violate their due process rights. *State of New Jersey v. Saponaro*, 2017 WL 2348869, 2017 N.J. Super. Unpub. LEXIS 1309 (unpublished opinion). William Saponaro, then 49, was invited by his friend Mark LeMunyon, to join in a planned sexual encounter with B.W., a then-13-year-old boy who had contacted LeMunyon, then 24, through GrindrX. B.W. went to Saponaro's home and "engaged in a variety of sex acts with defendant and LeMunyon," says the per curiam opinion. The next day B.W. told his mom all about his adventure with the two men. She took him to the hospital for an examination, and "authorities were notified." Saponaro was arrested a few days later. There is no question that B.W. was underage, but Saponaro claimed that he was "reasonably mistaken as to the age of the thirteen year old victim." He proffered the evidence that B.W. told Saponaro that he was 18, that the boy appeared to be that old, and that in accessing GrindrX he was using a website that required credit card payment." Cape May County Superior Court Judge had issued an oral opinion rejecting Saponaro's motion in limine to present a mistake of fact defense, after which he entered into a plea bargain, preserving his right to appeal the ruling on the motion. "By enacting the strict liability provisions of N.J.S.A. 2C:14-5c, the Legislature affirmed the long-standing rejection of the mistake of age defense for sexual crimes against underage victims," wrote the court, and the state Supreme Court had ruled that this was within the legislature's power in *State v. Maldonado*, 137 N.J.

536 (1994). In that case, the court said, "Constitutional due-process limitations on strict liability criminal statutes apply only when the underlying conduct is so passive, so unworthy of blame, that the persons violating the proscription would no notice that they were breaking the law." In justifying its firm position, the *Saponaro* court wrote, "Our Legislature recognized that children should be protected – without regard to a perpetrator's knowledge of the minor's age – from sexual assaults. The sexual assault of a child is not passive conduct. It is not blameless. Sexual offenders cannot reasonably plead ignorance of a victim's age. The face-to-face violation provides ample notice to the perpetrator that the victim is a minor. The statute imposing strict liability for sexual relations both protects the public, i.e., minor children, and acts as a strong deterrent to sexual attacks on those children." The court concluded that the statute is a "proper exercise of the Legislature," also asserting: "Just as the strict liability treatment of the sexual assault statute does not violate due process principles, for the same reasons the absence of proof of *mens rea* with regard to the age of an endangered child does not violate the constitution." Saponaro was represented on this appeal by Assistant Deputy Public Defender Frank Pugliese.

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**NEW JERSEY** – A 20-year-old man who fellated a sleeping high school senior while filming the incident on his cellphone and was sentenced to 10 years for aggravated sexual assault when his victim later found out and turned him in to the police, partially struck out in his appeal in *State v. Aman*, 2017 N.J. Super. Unpub. LEXIS 1285, 2017 WL 2255436 (N.J. App. Div. May 23, 2017). According to the *per curiam* opinion, Timothy Aman "and seven others, traveled to Wildwood to attend 'senior week' on June 9, 2013. Defendant and K.C. passed out after drinking alcohol

and smoking marijuana. Defendant awoke and performed fellatio on K.C., while recording the acts on his cell phone. Despite the contact, K.C. did not awaken and did not become aware of the event until K.C. watched the video on defendant's phone, a few weeks later." It seems that this wasn't Aman's first sexual contact with K.C., as a footnote states, "The record contains numerous reference to a separate prosecution in Pennsylvania charging defendant with involuntary deviant sexual intercourse involving the same victim." K.C. went to law enforcement and Aman was prosecuted, entering a guilty plea to aggravated sexual assault before trial. "Although defendant admitted he performed fellatio on K.C., who was not conscious, he now challenges the sufficiency of the factual basis to support the knowledge element of the crime," wrote the court, which was suitably astounded. "Essentially, defendant's argument suggests his plea colloquy did not include proof he was aware he was committing an act of sexual penetration and that K.C. was incapacitated," wrote the court. "We disagree. Defendant's plea contains his admission he fellated K.C. 'while' the victim was 'physically helpless and otherwise incapacitated.' These admissions prove defendant not only knew he was engaging in fellatio, but also that he knew K.C. was incapacitated during the sexual assault. Defendant is hard-pressed to prevail on an argument he did not know his manipulation of K.C.'s genitalia, without K.C.'s consent, at a time K.C. was unconscious, constituted a sexual assault." The court also would not overlook the video which, although not played in a trial, was "significant evidence in the State's case," in which Aman "demonstrates the presence of mind and dexterity to record himself performing the sexual assault on the incapacitated victim." However, the court found some merit to Aman's argument that he was over-sentenced, going step by step through

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the aggravating and mitigating factors, and particularly emphasizing the harm to the victim. The trial judge stated on the record, “The victim states to this court that he has dealt with anger, shame, fear, embarrassment, self-doubt, and disassociation since the sexual assault. The court also takes into consideration the position taken by the victim’s mother in that regard as to the effect it has had with regard to the family unit.” While it was appropriate to assess the harm, the court found that the trial judge had double counted some of the aggravating factors, and so Aman was entitled to resentencing on remand with reconsideration of the weight to be given this factor. Aman is represented on appeal by Alan L. Zegas, with Cissy M. Rebich with him on the brief. Evidently the gay porn fantasy of giving a blow job to a sleeping straight guy does not always result in a happy ending!

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**PENNSYLVANIA** – The Superior Court affirmed the conviction of Megan Batykefer, who was employed as a rowing coach at North Allegheny High School in Wexford, for engaging in sexual intercourse “multiple times from April through June of 2014” with a senior boy on the rowing team. *Commonwealth v. Batykefer*, 2017 WL 1906100 (May 8, 2017)(marked as a non-precedential opinion by the court). The sex took place after the student had turned 18. Batykefer was convicted on a charge of “institutional sexual assault” under a state law that makes it a crime for a school employee to engage in sex with a student. Batykefer argued that under *Lawrence v. Texas* this was constitutionally protected consensual sex between adults, but Common Pleas Judge Edward J. Borkowski disagreed in a bench trial opinion, and sentenced her to a standard-range sentence of 8-23 months, to be followed by three years of probation. The Superior Court rejected her appeal, and adopted Judge Borkowski’s opinion as its own. Wrote

Borkowski: “While the United States Supreme Court has held that there is a due process right of consenting adults to engage in private sexual conduct free from governmental interference, that case specifically did ‘not involve persons who might be injured or coerced or who are situated in relationship where consent might not easily be refused.’ Just as sexual contact between correctional staff and inmates is not constitutionally protected because it is ‘rife with the possibility of coercion, both subtle and overt,’ the relationship between a high school coach and a student who is also on the team that the coach oversees is similarly rife with influence of position and age disparity. As such, there is no constitutional protection for school employees to engage in sexual relations with their students. While the victim acknowledges that it was a consensual sexual relationship, the purpose of the statute is to protect students from such undue and coercive influence.”

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## PRISONER LITIGATION NOTES

### U.S. COURT OF APPEALS, 9TH CIRCUIT

– This is the second time the Ninth Circuit has considered whether an inmate was in imminent danger sufficient to excuse application of the “three strikes” prohibition of *in forma pauperis* status under the Prison Litigation Reform Act. See 28 U.S.C. § 1915(g) [PLRA]. Transgender plaintiff Lonnie Clark Williams, Jr., alleged that she was in continuous danger of physical assault by virtue of her transgender status and her being labeled a sex offender. On her first appeal, as to whether she had exhausted administrative remedies under the PLRA, the circuit allowed the appeal because her alleged imminent danger was continuous. *Williams v. Paramo*, 775 F.3d 1182, 1190 (9th Cir. 2015). On remand, a correction officer submitted an affidavit on exhaustion that the state said met its burden of

showing that administrative remedies were available that Williams failed to exhaust. Her case was dismissed again; she appealed again. On the second appeal, *Williams v. Paramo*, 2017 U.S. App. LEXIS 9443, 2017 WL 2347240 (9th Cir., May 30, 2017), in an unsigned, unpublished opinion – with a panel composed of Circuit Judges Diarmuid O’Scannlain, John Byron Owens, and Senior District Judge Claudia Wilkens (N.D. Calif.) – the court again reversed, saying that the prior finding of imminent danger was the law of the case and that nothing had changed. The officer’s affidavit did not meet the state’s burden under *Ross v. Blake*, 136 S. Ct. 1850, 1859 (2016), to show that a remedy was available, because Williams said the officer refused to process her appeal and the officer could not remember but said he “would” have done so. The circuit remanded again. That this question generated by the PLRA can reach a circuit court twice on the same point illustrates the absurdity to which state defendants have taken the Act. Williams has yet to have a court even consider whether she is in danger or in need of a remedy. *William J. Rold*

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**ALABAMA** – A *pro se* Alabama inmate lost to summary judgment on all federal claims arising from a mix-up of HIV tests leading to a false positive, in *Patrick v. Ala. Dep’t of Corr.*, 2017 U.S. Dist. LEXIS 70693 (M.D. Ala., May 8, 2017). The same thing happened to a California inmate in *Dearwester v. CDCR*, 2016 WL 3753264 (E.D. Calif., July 13, 2016), reported in *Law Notes* (September 2016 at pages 393-4). Here, the Report and Recommendation [R & R] of U.S. Magistrate Judge Wallace Cappel, Jr., found – in a very long decision that may be succinctly summarized – that the conduct, which included questioning plaintiff Roger Patrick about his sexual contacts and reporting him to the Department of Health, arose from nothing more than negligence. He had

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post-test counseling after both the false positive and the subsequent negative results, and he received an apology, according to the R & R. The defendants were not deliberately indifferent to his health care needs or violate the more broadly construed “cruel and unusual punishment” clause of the Eighth Amendment. The R & R recommended that Patrick’s negligence claim under Alabama law be remanded to state court (the case was in federal court on removal jurisdiction), and its outcome there is unclear. Perhaps a *pro bono* negligence attorney will pick it up, since the state admitted the error/mistake in achieving dismissal of the federal claims, and there may be some provable damages for mental distress. *William J. Rold*

**CALIFORNIA** – U.S. Magistrate Judge Kandis A. Westmore, who has the case for all purposes, reviewed transgender inmate Lajazz A. Smith’s *pro se* complaint under 28 U.S.C. § 1915A(a) and allowed her to proceed to service of process against an officer for violation of her constitutional rights, in *Smith v. Valencia*, 2017 U.S. Dist. LEXIS 71533 (N.D. Calif., May 8, 2017). The allegations are only briefly stated, but they involve verbal slurs (“bitch,” “fag,” “boy,” and the like) and telling “other inmates how Plaintiff was raped.” The officer also allegedly “put Plaintiff ‘on the wall’ and dug her nails into Plaintiff’s right arm.” Judge Westmore ruled that these allegations stated claims sufficient to pass screening under protections against violation of equal protection under the Fourteenth Amendment and against use of excessive force under the Eighth Amendment. Judge Westmore cites only general case law, but this would appear to be an application of the “verbal abuse plus” notion of actionable conduct: tying the slurs to recounting of a rape that could have increased danger to this plaintiff from other inmates; and using unnecessary force (albeit not the most excessive in reported cases) while

expressing homophobic/transphobic animus. This is one of the more liberal constructions of cognizable claims in screening that this writer has seen, and it bodes well for allowing *pro se* allegations some room to breathe and develop.

**ILLINOIS** – The nation’s decision to locate prisons in remote, rural locations has many unfortunate ramifications, but one positive consequence is that some federal judges have a higher share of LGBT cases than would ordinarily occur in their districts. The Southern District of Illinois has pioneered several transgender cases involving prisoners. Here, the Northern District of Illinois has built on that. In two cases, decided in tandem by United States District Judge Frederick J. Kapala allowed *pro se* transgender inmates to proceed on what has become known at least in the Seventh Circuit as “verbal abuse plus,” in *Young v. Nailor*, 2017 U.S. Dist. LEXIS 74100, 2017 WL 2117545, and *Mardis v. Enloe*, 2017 U.S. Dist. LEXIS 74101, 2017 WL 2117544 (both N.D. Ill., May 16, 2017). Davon Young and Jaleel Mardis both alleged that prison officials discriminated against them because of transgender status and retaliated against them for filing grievances and reports under the Prison Rape Elimination Act (“PREA”). The instigator defendant was Officer Scott Nailor, who called them “fags,” “fucking sissies,” “princess queens,” and the like; and he wrote disciplinary tickets against them for “flirting with him” when they complained. Another officer, who witnessed the events, said Nailor’s actions were “uncalled for.” The complaint alleged that Nailor received 15 days suspension and that the tickets were dismissed. The PREA report was found “substantiated.” Nevertheless, both inmates were assigned less desirable and more dangerous housing after the incident, a condition not corrected by the defendant

Warden. Nailor continued to harass Young and Mardis, stating in front of staff and other inmates regarding Young: “that’s one of the fags right there”; and directing “deathly stares” at Mardis. Both suffered mental and physical distress. Young experienced sleeplessness, nightmares, and bed-wetting; and she has begun seeing a psychologist. Both are afraid to leave their cells. Judge Kapala found that, although name-calling alone is not unconstitutional, “name-calling that may subject the target inmate to harm, including sexual assault, from others, may implicate the Constitution,” citing *Beal v. Foster*, 803 F.3d 356, 357-8 (7th Cir. 2015), and *Dobbey v. Ill. Dep’t of Corr.*, 574 F.3d 443, 445 (7th Cir. 2009). Young and Mardis were also allowed to proceed in this early stage: (1) against Nailor for discrimination and civil rights violations; and (2) against Nailor and as yet unidentified defendants who placed them in segregation, and against the warden who did not correct the situation, citing *Perez v. Fenoglio*, 792 F.3d 768, 781-82 (7th Cir. 2015). Judge Kapala notes that they will have to fortify their retaliation claims considerably as to causation to survive motion practice. Unusually for prisoner cases, Judge Kapala also allowed Young to proceed against Nailor on the Illinois tort of intentional infliction of emotional distress, finding the allegations sufficiently “outrageous” to be an “unwarranted intrusion . . . calculated to cause severe emotional distress to a person of ordinary sensibilities,” quoting *Knierem v. Izzo*, 174 N.E.2d 157, 164 (Ill. 1961). Judge Kapala found that “allegedly yelling dangerous insults . . . in a public place and then writing . . . a false disciplinary ticket to cover his own misconduct” satisfied pleading this difficult-to-prove tort. Both plaintiffs claimed that race was a further component in the discrimination in that white transgender inmates did not receive such treatment, but Judge Kapala found insufficient

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allegations of racial animus to proceed. Judge Kapala denied appointment of counsel at this time without prejudice. *William J. Rold*

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**ILLINOIS** – This is at least the second case that transgender inmate Anthony Johnson has brought alleging civil rights violations while in federal custody. See *Johnson v. Robinson*, 2015 WL 1726965 (S.D. Ill., April 13, 2015), reported in *Law Notes* (May 2015 at page 229), wherein she was allowed to proceed on *Bivens* claims [*Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)] for cell assignments that placed her in danger of assault. That case is ongoing. Here, in *Johnson v. Kruse*, 2017 U.S. Dist. LEXIS 71325 (S.D. Ill., May 10, 2017), Johnson, proceeding *pro se*, raises *Bivens* claims again, against new defendants on failure to protect and for denial of equal protection. U.S. District Judge Phil Gilbert notes the overlap in claims, but he observes that Johnson names new defendants. Screening the complaint under 28 U.S.C. § 1915A(a), Judge Gilbert finds that Johnson’s complaint fails to identify which defendant did what, lumping them all together as “defendants” without the differentiation needed to satisfy civil rights pleadings: for example, claiming “defendants” interfered with her gender dysphoria treatment and put her in unsafe housing, when it is unlikely that the security defendants did the former or that the medical defendants were responsible for the latter (although he notes she may have needed a lower bunk for medical reasons). Judge Gilbert does not disregard Johnson’s complaint about risk of assault or denial of necessary medication and transgender “products,” but she has failed to plead how each defendant was involved in each violation. He observes that Johnson’s “transgender status makes her vulnerable to assault, abuse, and discrimination, particularly in the prison environment.” He criticizes a nurse for revealing her

HIV status, increasing her risk, but he notes that Johnson failed to name that nurse as a defendant. He accepts that she may have equal protection claims about being singled-out for searches, loss of privileges, and the like, based on her transgender status; but he rules that Johnson was not specific enough about who caused what, when, and how. He dismisses without prejudice to replead, noting that Johnson has an attorney appointed to represent her in the companion case. *William J. Rold*

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**ILLINOIS** – *Pro se* inmate Kenneth Houck alleged that state officials failed to protect him against assault, claiming he was housed with “haters” of sex offenders within the knowledge of officials who failed to take appropriate actions. The history is somewhat convoluted, and Houck has yet to identify some of the “John Doe” defendants, but U.S. District Judge J. Phil Gilbert allows him to proceed on the protection-from-harm case against one named defendant with instructions to identify the Does in *Houck v. USA*, 2017 WL 1397743, (S.D. Ill., April 19, 2017). Judge Gilbert screened the *Bivens* action [*see Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)] under 28 U.S.C. § 1915A, and he found enough for Houck to proceed. The group of “haters” was well-known to prison officials, and Houck’s requests for protection were repeated. Despite reassignments, he was eventually triple-celled again with two “haters,” who threatened him and then carried out their threat. As a result of one of the altercations, Houck was charged and punished for “fighting.” He alleged that a videotape would exonerate him, but it was not preserved. The opinion has extensive discussion of spoliation law as an Illinois tort that may be raised under the Federal Tort Claims Act [FTCA] under certain narrow circumstances. Counsel facing spoliation of evidence issues should read the opinion on this

point. Judge Gilbert found that Houck would have to show exhaustion under the FTCA, and under Illinois spoliation law, he would also have to show that he would win on the underlying tort but for the spoliation. In that regard, Judge Gilbert notes the need to show that his punishment for “fighting” met the “atypical and significant hardship” standard of *Sandin v. Conner*, 515 U.S. 472, 484 (1995). [Note: spoliation can also justify a jury instruction or be used as a presumption in a bench trial, regardless of whether it constitutes an independent tort. Judge Gilbert does not discuss the evidentiary consequences of spoliation.] All dismissals except those against the sovereign were without prejudice to replead. *William J. Rold*

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**PENNSYLVANIA** – United States District Judge Lawrence Stengel dismissed *pro se* inmate Charles Talbert’s complaint with leave to amend, in *Talbert v. Corizon, Inc.*, 2017 WL 2021059, 2017 U.S. Dist. LEXIS 72585 (E.D. Pa., May 12, 2017). Talbert had previously sued Corizon – a private corporation that contracts to provide health care to inmates – during a prior incarceration in 2014, and the suit was settled. He now alleges that, during a six week reincarceration for parole violation, an unidentified Corizon employee mentioned the earlier suit during medical screening and threatened to inject Talbert with HIV. Talbert became fearful, refused any further invasive treatment or tests (demanding he be sent “offsite”), causing his placement in “medical lock” and isolation. He further alleged mental anguish, depression, anxiety, sleeplessness, and the like. Judge Stengel found that Talbert’s complaint did not allege any cause of action, but he applied two legal theories in basically boilerplate. First, he ruled that Corizon had not been deliberately indifferent to Talbert’s health care needs, because they offered care and there was no allegation

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that Talbert had a serious problem that was not treated or any showing that he needed to be sent “offsite” for treatment. Secondly, he observes that “at first blush, plaintiff appears to state a claim for retaliation.” [One is tempted to suppress it, but “duh-h” comes to mind]. He says there is no such claim for two reasons: Talbert did not identify the person who threatened him; and Corizon cannot be sued under *respondeat superior*.” Both statements are true, but one cannot help but compare the treatment of this screening with that of the magistrate judge in California in *Smith v. Valencia*, also in this issue of *Law Notes*. Here, Talbert alleges that a “very slim” Corizon employee threatened him, but he failed to allege that it was one of the defendants. It seems clear that a better description could be had that would include race, sex, approximate age, and hair color, for example, had the judge been interested at all in pressing Talbert for more details and Corizon for photos of its employees who do screening. Secondly, no mention is made of whether Corizon has a policy of non-retaliation for previous lawsuits or has, in the past, tolerated reference to them by its employees. There may be nothing here, but this looks to this writer as case dumping. *William J. Rold*

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**PENNSYLVANIA** – U.S. Magistrate Judge Susan Paradise Baxter’s Report and Recommendation [R & R] recommended that transgender prisoner Jamie Ray Butler’s civil rights case survive a motion to dismiss in *Butler v. Giroux*, 2017 U.S. Dist. LEXIS 80435 (W.D. Pa., May 24, 2017). Butler alleged that she was denied hormone treatment primarily because she had been taking only “street” hormones prior to incarceration and did not have a prescription. This explanation was insufficient to justify dismissal of allegations that defendants (up to the state commissioner and warden) were responsible for failing to evaluate her or for having a policy or practice (including

lack of training) that perpetuated deliberate indifference to transgender patients. Butler had attempted suicide on four separate occasions, and she had requested evaluation for hormones many times, only to be given more referrals, some of which never occurred. Her clinical symptoms were well documented, but nothing was done about them. She alleges failure to follow international standards and the state’s own internal policies, alleging she was subjected to a “blanket” policy of disregarding street hormones. Judge Baxter applied *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) and *Monmouth Cty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987); and she relied on a recent Third Circuit case, *Palakovic v. Wetzell*, 854 F.3d 209 (3d Cir. 2017), involving a suicide due to inadequate prevention policies. Judge Baxter refused to accept defendants’ argument that the claims failed because Butler received “some” care, noting that it was not care responsive to her complaints or condition, and writing: “there are circumstances in which some care is provided yet it is insufficient to satisfy constitutional requirements . . . . Here, Plaintiff [alleges] a longstanding denial of mental healthcare for an acknowledged and documented serious mental disorder. Plaintiff claims that she did not receive a psychological evaluation for nearly a year after her arrival . . . , despite disclosing her condition, her medication history, and her past instances of self-harm and suicide attempts and, further, that medical personnel and prison officials ignored her repeated requests for treatment. Plaintiff alleges that Defendants compounded her suffering when they disregarded DOC written policy and refused to continue hormone therapy, without undertaking an individualized assessment of her need for medication.” “[H]er allegations of systemic delay and denial of treatment render each defendant, regardless of physician or lay status, amenable to suit,” under *Durmer v. O’Carroll*, 991

F.2d 64, 67-68 (3d Cir. 1993). “The test for an Eighth Amendment claim does not turn upon the happenstance of a prescription but, rather, upon a determination of whether a prisoner’s serious medical needs have been deliberately disregarded, leaving her to suffer.” Supervisory liability for policy deficiencies remain valid claims for the same reasons they passed muster in *Palakovic*, and failures in training “can reasonably be said to reflect a deliberate indifference to whether constitutional deprivations of the kind alleged occur.” 854 F.3d at 233. While Butler faces additional hurdles before a trial is ordered, the R & R recommends that the case proceed to discovery. Butler is represented by J. Nicholas Ranjan, Isaac T. Smith, and Lauren Garraux of K&L Gates LLP, Pittsburgh. *William J. Rold*

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**TEXAS** – Two procedural rulings were issued by U.S. Magistrate Judge B. Janice Ellington in *Haverkamp v. Penn*, 2017 U.S. Dist. LEXIS 71843 (S.D. Tex., May 11, 2017), and 2017 U.S. Dist. LEXIS 76388 (S.D. Tex., May 19, 2017). The earlier denied appointed counsel to *pro se* litigant David Allen Haverkamp, aka Bobbie Lee Haverkempt, without prejudice; the latter denied state defendants a change of “venue” from the Corpus Christi Division to the Houston Division of the Southern District of Texas. Both cases recite that Haverkamp claims she suffered discrimination because of her gender identity, including denial of medical care and sex reassignment surgery. There is no explanation of why the state engaged in full motion practice and the appearance of a half dozen lawyers to try to change venue “divisions” within the Southern District of Texas. Judge Ellington wrote a full venue decision, ultimately deciding to retain venue in Corpus Christi, where Haverkamp filed, because more identified witnesses resided closer to that courthouse, despite central medical

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officials being closer to Houston. One suspects there is more going on behind the scenes than is reflected in the decisions. *William J. Rold*

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## LEGISLATIVE & ADMINISTRATIVE

**U.S. CONGRESS** – The Equality Act of 2017 was introduced in the House and Senate on May 2. The measure would amend all federal anti-discrimination laws that now ban sex discrimination to extend to claims of sexual orientation and gender identity discrimination, and would also add sex to the prohibited grounds for discrimination in portions of the 1964 Civil Rights Act that were not amended during floor consideration to add sex. (At that time, a floor amendment added sex to the employment discrimination ban in Title VII, but did not add it to other titles of the Act.) More than 240 members of Congress are co-sponsors, but just a handful of them are Republicans and there is no expectation that Republican committee chairs in either chamber will allow the measure to advance to committee hearings. However, as federal court litigation to establish that bans on sex discrimination already cover sexual orientation and gender identity discrimination claims are increasingly achieving success, it may develop over time that this legislation is not needed.

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**EXECUTIVE ORDER** – Early in May Donald J. Trump signed an Executive Order intended to loosen up any restrictions imposed by federal law on the activities of religious organizations in the political sphere. As with many other EO's issued by Trump, there is very little substantive detail in the Order, much of which addresses issues as to which executive branch departments already had discretion in their enforcement activities. It was more of a "setting the tone" Order to indicate that

whoever drafted it for signing sought to signal that such discretion should be exercised to allow maximum freedom of religious organizations and persons to spout their views in the public forum without incurring federal penalties or exclusions. Since Trump reportedly doesn't read such documents before signing them, and doesn't bother himself with the details of what he is signing, it is unclear whether he personally approves of everything in the Order. The Order includes the ritualistic disclaimer that it does not create any rights or benefits that would be enforceable in court against the government.

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**ALABAMA** – On May 3, Governor Kay Ivey signed into law H.B. 24, a bill allowing adoption agencies to follow "faith-based" policies, such as refusing to place children with same-sex couples, without suffering any consequences from the state. (Since the state does not have any policies protecting LGBT people or same-sex couples from discrimination in any connection whatsoever, one wonders why any Alabama legislator would have thought this measure to be necessary.) Also, under this bill the adoption agencies that do not receive state or federal funding could not lose their licenses for adhering to faith-based policies. Of course, they were in no danger of losing their licenses for this reason before the bill was enacted, either. Lead sponsor Rich Wingo, a Republican from Tuscaloosa, denied that the bill was intended to discriminate against anyone, insisting that the purpose is solely to protect religious freedom. He also claimed that most of the adoptions in Alabama are handled by secular agencies and so would not be affected by the legislation. Governor Ivey, who previously served as President of the State Senate, voiced agreement with the legislature on "the importance of protecting religious liberty in Alabama," where Christians

are such a tiny minority that they are frequently subjected to persecution, having to hold secret religious rituals in the underground catacombs outside major cities to avoid disruption by the militant atheists of the state, and occasionally being confronted with hungry lions loosed upon them in the state's notorious bread-and-circuses Coliseum. Sorry, folks, we're getting carried away here! [www.al.com/news](http://www.al.com/news), May 4.

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**ALASKA** – Alaska state legislators, ever ready to protect the public against subversive minorities, confirmed every one of Governor Bill Walker's 98 appointments to executive branch positions on May 16 except one: Drew Phoenix, a transgender man who was appointed by Walker to the state Human Rights Commission but was denied confirmation by a vote of 35-24. Phoenix went down under a mainly party-line vote, after social conservatives in the state organized a campaign to get voters to write their representatives opposing him. Some Republicans tarred him with the sins of having worked for a subversive organization, the American Civil Liberties Union (Alaska Republicans are strongly opposed to civil liberties, especially for LGBT people), and for having supported attempts to get sexual orientation and gender identity added to the anti-discrimination laws enforced by the Commission. Republican Senator John Coghill said during the debate that although Phoenix may have suffered discrimination in his own life, "that's no reason to put discrimination on somebody else if they don't agree with you." This translates into the argument that protecting LGBT people from discrimination violates the rights of people who want to discriminate against them, especially when that desire is fueled by religious beliefs. Said Coghill, "It is the human rights, not the special rights commission." Since LGBT people are not considered human by many

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Alaska Republicans, protection of their rights should not be part of the mission of a Human Rights Commission. *Alaska Dispatch News*, May 17.

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**CALIFORNIA** – The Senate voted 26-12 on May 31 to approve SB 179, the Gender Recognition Act, under which the state would become the first in the nation to formally establish a legally-recognized nonbinary gender category that could be used on birth certificates, drivers' licenses, and other state issued identification documents by person who do not fully identify as either male or female. The measure would also simplify and streamline the process for individuals seeking to change their legally recognized gender. The measure is co-sponsored by Senators Toni Atkins (D-San Diego) and Scott Wiener (D-San Francisco), both openly LGBT. They are optimistic that it will receive approval from the lower house and the governor. The measure was introduced in response to lobbying by Star Hagen-Esquerro, who identifies as gender binary, and Sara Kelly Keenan, who identifies as intersexual, and takes up a proposal floated several years ago by a group called the Intersex and Genderqueer Recognition Project. According to a lengthy May 27 report by BuzzFeed.com, about fifteen people in California have already succeeded in getting local courts to accept their nonbinary gender for purposes of amending official documents. See Jessica Testa, *California is Ready to Recognize a Third Gender. Is the Rest of the Country?*

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**CONNECTICUT** – Governor Dannel P. Malloy signed into law a ban on licensed health care professionals performing conversion therapy on minors immediately after final passage of the measure by the State Senate on May 10. The bill passed unanimously in the Senate, 36-0, after a 90 minute

debate. The bill does not ban conversion therapy attempts for adults, or place any restrictions on religious leaders providing "guidance". *Connecticut Post*, May 11. This made Connecticut the 8th state to enact such a ban, followed just a few weeks later by Nevada (see below). \* \* \* The Connecticut Board of Regents adopted policies in April addressing issues that transgender or gender nonconforming people face on university campuses. Under the new policies, all 17 of the state's public colleges and universities will formally allow students to use bathrooms and locker rooms consistent with their gender identity, and to use their preferred name on all non-legal school documents and records. (Legal documents will require people to be identified by their legal name.) The state's antidiscrimination law was amended in 2011 to add gender identity or expression as a prohibited ground of discrimination, and Gov. Malloy issued an executive order in February that prompted the Regents to act. The new policy states: "Requiring a transgender or gender nonconforming person to use a separate, non-integrated space, potentially identifies that person as well as potentially marginalized a person. Such treatment fails to recognize that restroom and locker room facilities on the campuses are public accommodations and that denial of access may result in the deprivation of an equal educational or employment environment." Administrators at public schools indicated that the Regents action was merely a reaffirmation of the approach they have taken since the 2011 amendment. The name usage rule will apply to course rosters, student ID cards, email addresses and awards, but legal names must be used on diplomas and official transcripts. The Regents directed administrators to devise appropriate forms to record name changes, including in response to court-ordered name changes that would apply to legal documents. *Danbury News-Times*, May 2.

**INDIANA** – The Logansport City Council unanimously approved on first reading an ordinance that would amend the Housing and Community Development Act, adopted by the city in 2004, to revise the definition of "family" to include families regardless of actual or perceived sexual orientation, gender identity or marital status of its members, reported the *Logansport Pharos-Tribune*, May 2.

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**KENTUCKY** – Kentucky Supreme Court Chief Justice John D. Minton, Jr., denied a request by Family Court Judge W. Mitchell Nance to establish a procedure by which he could abstain from hearing adoption cases involving LGBT people. Minton reported cited "substantive and procedural" reason in a letter he sent to Nance on May 17, in response to Nance's written request. In response to questions from the *Louisville Courier-Journal* (May 20), Nance said that ethics rules require judges to disqualify themselves when they have a personal bias or prejudice, so he could recuse himself on a case-by-case basis. But several organizations filed an ethics complaint against Nance on May 16, claiming that Nance's refusal to hear cases involving an entire class of litigants violated the state's Judicial Code of Ethics. The complaint asked the Judicial Conduct Commission to investigate and remove Nance from judicial office. Nance had filed an order on April 27 requiring attorneys to notify the court if an adoption matter involved same-sex couples so that he could disqualify and recuse himself. He stated at that time that "under no circumstance would 'the best interest of the child be promoted by the adoption' by a practicing homosexual." He had followed up that filing with a letter to Chief Justice Minto proposing a local role that would allow him to recuse himself categorically from such cases. *Fairness Campaign* Press Release, May 16.

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**LOUISIANA** – Although the Louisiana Senate rejected S.B. 155, which would have amended the state’s anti-discrimination law to include sexual orientation and gender identity, on May 31, it had voted 25-13 the previous day to approve an amendment to the domestic violence law that would eliminate the requirement that a victim be of the opposite sex from the offender to be considered a victim of domestic violence. The measure had already been approved by the House and was sent to Governor John Bel Edwards for his expected approval. This would make Louisiana the 49th state to allow same-sex couples to receive domestic abuse protections. *New Orleans Times Picayune*, June 2; *AP State News*, May 31.

**NEVADA** – On May 27, Governor Brian Sandoval signed into law A.B. 229, which codifies the same-sex marriage decision by the U.S. Supreme Court by explicitly authorizing marriage between same-sex couples and revising state statutes to accord same-sex couples the same parental rights as “traditionally married couples,” according to the *Las Vegas Review-Journal*, May 27. Earlier in the month, Sandoval had signed a bill making Nevada the ninth state to ban mental health professionals from performing conversion therapy on minors. SB 201 makes it illegal for a physician or other health care professional to perform therapy intended to change the sexual orientation or gender identity of some under 18. The measure exempts religious organizations and allows counseling by members of the clergy. *Las Vegas Review-Journal*, May 17.

**NEW YORK** – New York City Mayor Bill De Blasio signed a city council bill that establishes a task force to examine how the NY City public schools are teaching sex education, with

a particular mandate for the panelists to consider issues relevant to students who are lesbian, gay, bisexual, transgender, and gender nonconforming, and make recommendations for change, according to a May 31 report by *Newsday*.

**OREGON** – On May 30 Governor Kate Brown signed into law H.B. 2673, a bill intended to smooth the way for transgender people seeking amended birth certificates consistent with their gender identity. It deals with both name changes and sex markers, and streamlines the process to avoid placing unnecessary barriers in the way of individuals who are transitioning and need new, appropriate identification from the state. On the most disputed issue, the measure provides: “Application for legal change of sex of a person may be heard and determined by any circuit court in this state. A circuit court may order a legal change of sex and enter a judgment indicating the change of sex if the individual attests that the individual has undergone surgical, hormonal, or other treatment appropriate for the individual for the purpose of affirming gender identity.” This replaces former language requiring the court to determine that the individual has undergone such treatment and that “sexual reassignment has been completed.” The new language clarifies that surgical reassignment is not a necessary component, and that the applicant need merely attest to the requisite treatment, which no express requirement for the court to engage in fact-finding. The measure also provides that no individual may invoke the change of sex procedure twice. Significantly, the bill eliminates a publication requirement for name and gender changes, to preserve the confidentiality of those who are obtaining legal recognition of their gender identity. Governor Brown is the nation’s first openly-LGBT elected governor, self-identifying as bisexual,

and the measure was shepherded through the House by its openly-lesbian speaker, Tina Kotek. *AP Alerts*, June 1.

**PENNSYLVANIA** – Perhaps surprisingly, the Pennsylvania Human Relations Act and other Pennsylvania laws that deal with discrimination do not expressly forbid discrimination because of sexual orientation or gender identity. Although several dozen municipalities have passed ordinances expressly prohibiting such discrimination, and the state was the first in which a governor (a Republican, at that) had an executive order banning sexual orientation discrimination in the state government, efforts to amend the state laws have gone nowhere because of Republican control of the legislature due to quirks of population distribution and gerrymandering. Responding to developing federal case law, and being bordered on three sides by states that forbid sexual orientation and gender identity discrimination, the Pennsylvania Human Relations Commission has proposed to take action administratively pursuant to its statutory authorization to issue a “Guidance” as to what claims are actionable in the state. The agency has proposed a “Guidance” under the Human Relations Act and the state’s Fair Educational Opportunities Act as follows: “Federal courts and federal administrative agencies have held that discrimination claims filed by LGBT individual may be taken, investigated, and analyzed as sex discrimination claims. The gist of these claims is that LGBTQ individuals do not comply with sexual stereotypes and that adverse action(s) against an LGBTQ individual due to that person’s failure to comply with sexual stereotypes amounts to discrimination based on sex. Accordingly, it is the position of the Pennsylvania Human Relations Commission that it will take and investigate sex stereotyping claims filed by LGBTQ individuals.” The agency added two notes: first, that it has

# LEGISLATIVE / LAW & SOCIETY

not had an LGBTQ discrimination case that has advanced to a public hearing and there is no Pennsylvania case law on point to this issue, and second, that the agency continues to support legislation “seeking to expand the PHRA to specifically cover claims filed by LGBTQ individuals.” The comment period closed on May 26. At the deadline Lambda Legal submitted a commitment supporting the agency’s effort to provide protection for LGBTQ people, but suggesting that the agency should “promulgate and implement rules and regulations that explicitly set forth how the prohibition on sex discrimination with within the PHRA and the PFOEA encompasses discrimination on the basis of actual or perceived sexual orientation, gender identity, gender expression, transgender status, or failure to conform to sex stereotypes.” Indeed, the agency’s proposed guidance language is a well-intended but clumsily worded attempt to achieve this goal, but it is uncertain that the language proposed would do so.

**RHODE ISLAND** – On May 30, the state’s House of Representatives unanimously approved a bill to ban licensed professionals from practicing conversion therapy. H.5277 now goes to the Senate, where an identical bill, S-0267, is pending in committee. As is commonly the case in other states that have enacted such legislation, there is an exemption for religious organizations, so clergy can continue to proselytize against homosexuality because . . . . Religious freedom? The Rhode Island chapter of the ACLU opposed the bill because of “its civil liberties impact far beyond its designated intent.” The organization state reservations about “allowing legislatures wide latitude to ban unpopular medical treatments” and noted controversies about providing hormone therapy to teenagers who identify as transgender. *Providence Journal*, May 31. This is a bit odd: conversion therapy is not just

“unpopular;” it has been condemned by the mainstream professional association as quackery that is dangerous for its victims, and New Jersey court found that offering such therapy for a fee violates the state’s consumer protection laws.

**TEXAS** – Texas remains a hotbed of anti-LGBT legislative activity, although the legislature ended its session with anti-transgender restroom legislation blocked in the House after overwhelmingly passing in the Senate. Both houses passed a bill that would allow child placement agencies in the state’s foster care system – including those receiving government funding – to prioritize their religious beliefs in making foster care and adoption placements. At month’s end it was awaiting a decision to sign or veto from Governor Greg Abbott, who is generally predisposed against LGBT interests. A bill that would disqualify transgender student athletes from competing if they were receiving hormone therapy easily passed in the Senate, but was stalled in committee in the House. The measure was provoked by transgender wrestler Mack Beggs’ triumph in winning the statewide women’s trophy, after the transgender boy was required by scholastic association rules to compete as a girl because, being under 18, he could not undergo sex reassignment surgery. Surprisingly, the Republican-controlled House allowed a hearing on May 1 in the House Business & Industry Committee for HB 225, a measure that would add sexual orientation and gender identity to the list of forbidden grounds of employment discrimination in the state’s Labor Code. Unfortunately, the hearing apparently degenerated into a parade of bigoted and ignorant comments by Republican opponents of the measure, who asserted that unlike the other protected classes, sexual orientation and gender identity are “mutable.” They conveniently overlooked “religion,” which is mutable, and of course, the numerous states

that have banned conversion therapy have taken the position that sexual orientation and gender identity are not mutable. Indeed, federal courts have begun to accept that these are essentially immutable characteristics and, as such, that anti-LGBT discrimination should get heightened scrutiny under the equal protection requirements of the 5th and 14th amendments.

**WISCONSIN** – Three members of the legislatures LGBT caucus have introduced a bill and a resolution intended to respond to the *Obergefell* decision by bringing the state’s laws into conformity. The proposed measure would remove language from the state’s constitution that defines marriage as the union of a man and a woman, and would replace gendered language in state statutes with the gender-neutral term “spouse.” It would also replace the word “biological” with “natural” in reference to same-sex couples who use alternative reproductive technology to have children. [www.gazetteextra.com](http://www.gazetteextra.com), May 18.

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## LAW & SOCIETY NOTES

The American Bar Association has awarded a grant to the **BURTON BLATT INSTITUTE AT SYRACUSE UNIVERSITY** to undertake a nationwide study to identify biases encountered by LGBT and/or disabled lawyers in their professional lives, and to “help develop and implement strategies to ameliorate such biases.” A Syracuse law professor, Peter Blanck, who chairs the Institute, will be the lead investigator on the study, according to a press release issued by Syracuse University on May 10.

*USAToday* reported that transgender cadets due to graduate from **THE AIR FORCE AND ARMY** service academies

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would not be allowed to join the ranks, as last year's policy decision allowing transgender military personnel to serve openly did not specifically apply to enlistment of new personnel. According to a May 11 article in the *Cincinnati Enquirer*, "The Air Force and Army will not commission the cadets after graduation because the Pentagon has not yet established procedures for accepting new transgender troops in its ranks." They will be allowed to graduate if they pass their spring term final exams, but cannot be commissioned as officers, as the policy is scheduled to be developed and phased in later this year. In light of the significant investment in a tuition-free higher education provided to these cadets, this strikes the writer as stupid! If the services have already altered their policies and procedures to accommodate existing transgender personnel, why the delay?

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## INTERNATIONAL NOTES

**AUSTRALIA** – The High Court of Australia (the nation's highest appellate court) voted 4-1 to uphold the conviction of Michael Aubrey for infecting a male sexual partner with HIV. *Aubrey v. The Queen*, [2017] HCA 18 (May 10, 2017). Aubrey had been charged in the District Court of New South Wales with "maliciously causing the complainant to contract a grievous bodily disease (namely, the human immunodeficiency virus [HIV]) with the intent of causing the complainant to contract that grievous bodily disease" and, in the alternative, with "maliciously inflicting grievous bodily harm upon the complainant." He tested HIV-positive in 2002 and began a sexual relationship with the male complainant two years later. He did not disclose that he was HIV-positive, and the men engaged in unprotected intercourse several times. The complainant, who had tested HIV-negative prior to his

relationship with Aubrey, contracted HIV and experienced serious physical and emotional illness as a result. Aubrey admitted at trial that he knew there was a possibility he could infect his partner by having unprotected sex. He was ultimately convicted on the alternative count, there being no proof that he intended deliberately to infect his sexual partner, and sentenced to five years in prison, with a two-year non-parole period. He claimed on appeal that the offence of which he was convicted was "no offence known to law." In upholding the conviction, the court reviewed almost two centuries of developing English and Australian precedent and concluded that recklessly exposing a sexual partner to the possibility of contracting HIV would fall within the scope of the charged offense under Section 35(1)(b) of the Crimes Act. This relied on finding that reckless conduct came within the scope of "malicious" as the term was used in the statute, and that infecting somebody with HIV through non-forcible sexual intercourse could be considering to be "inflicting grievous bodily harm." The illuminating history in the court's opinion showed how over time the courts and legislatures had expanded the meaning of "grievous bodily harm" to go beyond an immediate serious physical injury, and lower courts had brought sexual transmission within the scope of "inflicting" harm, even where there was no force or violence and the only thing vitiating the complainant's consent was that the defendant failed to reveal that he was subjecting the complainant to the risk of sexual transmission of a serious infectious agent. The dissenting judge, Virginia Bell, contended that it was wrong of the Court of Criminal Appeal of New South Wales "to hold that the transmission of the human immunodeficiency virus (HIV) by sexual intercourse is capable of constituting the infliction of grievous bodily harm." She argued that the case should still be decided by reference to

an 1888 decision, *R. v. Clarence*, (1888) 22 QBD 23, which had "settled" in the negative the question of whether transmission of an STD through non-violent sexual intercourse could be considered "inflicting grievous bodily harm," and that any departure from that long-standing precedent should be up to the legislature, not the courts. The majority held that *Clarence* had been superseded by subsequent case law and legislative developments. \* \* \* The Parliament and Premier of Queensland have offered formal apologies for past discriminatory laws under which hundreds of men had been convicted of gay sex offences. Under a bill introduced on May 11, individuals who were charged under those laws can apply to have their convictions removed from official records. Gay sex was decriminalized in Queensland by statute in 1991. At that time, more than 460 people had been charged under the repealed law. *ABC Premium News*, May 11.

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**BELGIUM** – The Parliament voted on May 24 to approve a new law governing legal gender recognition, establishing a procedure largely based on self-determination and allowing minors to seek a legal change of gender. Minors aged 12 or younger will be able to register a new name in accordance with their gender, but will not have access to full legal gender recognition. Those 16 and under can access full gender recognition, but only with parental authorization and after consultation with a psychiatrist to confirm their gender identity. The law will only allow a person to change their legal gender once. No going back . . . *ILGA-Europe*, May 24.

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**BERMUDA** – Same-sex marriage comes to Bermuda. On May 5, Puisne Judge Charles Etta-Simmons delivered a ruling stating, "On the facts, the

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applicants were discriminated against on the basis of their sexual orientation when the Registrar refused to process their notice of intended marriage.” The applicants are Winston Godwin and his Canadian fiancé, Greg DeRoche, who took their case to the Supreme Court under the Human Rights Act. The judgement holds that the applicants are entitled to an Order of Mandamus compelling the Registrar to act in accordance with the requirements of the Marriage Act and a declaration that same-sex couples are entitled to marry. The government announced that it would not appeal the ruling and would implement necessary steps to insure compliance with the judgment. *royalgazette.com*, May 5 and 10.

**CANADA** – The Immigration and Refugee Board of Canada issued a news release at the beginning of May announcing “Guideline9: Proceedings before the IRB Involving Sexual Orientation and Gender Identity and Expression (SOGIE)” had become effective on May 1. The Guideline is intended to “promote greater understanding of cases involving sexual orientation and gender identity and expression and the harm individuals may face due to their non-conformity with socially accepted SOGIE norms.” It establishes “guiding principles” for adjudicating cases involving SOGIE. \* \* \* The *Calgary Herald* (May 19) reported that a gay man from Ghana had been granted the right to remain in Canada, after having lost all his fingers to frostbite during his winter trek across the U.S./Canadian border into Manitoba. “Seidu Mohammed, who is 24, has had his refugee claim approved five months after he walked across frozen fields near Emerson, Man, in a -30C wind chill,” reported the *Herald*. He had fled Ghana in 2015 to the U.S., and then set off to Canada when his U.S. tourist visa expired. \* \* \* The government of New Brunswick announced May 8

that its new Human Rights Act is now in force, adding “family status” and “gender identity or expression” to the prohibited grounds of discrimination. Bill 51 received royal assent on May 8. *Canadian Government News*, May 8.

**FRANCE** – Three French gay rights groups filed formal charges with the International Criminal Court against Chechen President Ramzan Kadyrov and the Chechen government in connection with allegations of a policy of genocide carried out against gay people in that country. They urged the Court to begin an investigation before Russia’s anticipated withdrawal from the court’s jurisdiction in November. French President Emmanuel Macron confront Russian President Vladimir Putin about this issue during Putin’s recent visit to France, and after initial claims that there was “no evidence” to back up the charges, Putin has indicated that an inquiry by Russia will take place. Kadyrov claims that the charges are bogus because there are no homosexual in his country. *bbc.com*, May 16. \* \* \* The Cour de Cassation, France’s Supreme Court, ruled on May 4 against granting an intersex person the right to be recognized by the state as having a “neutral” sex. Gaetan Schmitt was registered at birth as a man, but claims a sexual identity as neither female nor male, and instituted legal action in 2015 to obtain civil status as “neutral sex.” A regional court in Tours granted him that status, but the government appealed and won a reversal from a regional court in Orleans in 2016. Upholding the Orleans ruling, the court ruled that the distinction between male and female was “necessary to the social and legal organization, of which it is a cornerstone,” and that “recognition of a neutral gender” would have “deep repercussions” on French law and would entail “numerous legislative changes,” according to a May 4 report in the *New York Times*. The government’s position

is that any change in this regard should be made through legislation, not court action. \* \* \* French law allows for posthumous marriages. The Mayor of Paris, Anne Hidalgo, attended a wedding on May 30 of Etienne Cardiles and the late Xavier Jugele, a police officer who was killed in a terrorist attack by a gunman on the Champs-Elysees in April. Former French President Francois Hollande also attended the wedding. Hollande had posthumously honored Jugele by making him a knight of the Legion of Honour. He was the fifth police officer killed in terrorist attacks in France since January 2015.

**INDONESIA** – The world was aghast as two gay men, ages 20 and 23, were subjected to 85 lashes in public pursuant to a Shariah Court ruling in Aceh Province, Indonesia, for having engaged in private consensual sex. According to a report in the *New York Times* on May 17, “News reports said that vigilantes had caught the two men naked in bed, and that the two had pleaded not to be reported to the Shariah police. The two were then beaten, an attack recorded on video, and were late taken to a local police station.” The article noted a report by Human Rights Watch that 339 people were caned in Aceh in 2016 on charges of moral indecency. Ironically, the caning took place on the International Day Against Homophobia, Transphobia and Biphobia, an event not observed in Aceh Province. Just days later, police in Jakarta arrested 141 men in a sauna “on suspicion of having a gay sex party,” the *Times* reported on May 22. Scratch Indonesia from the gay tourism list . . .

**TAIWAN** – In the wake of the Constitutional Court’s marriage equality ruling (see above), the Ministry of Justice announced it would take action in favor of a petition demanding enactment of a gay rights bill that is

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stalled in the legislature. Director-General Pitikan Sithidej of the Rights and Liberties Protection Department at the Justice Ministry said that a petition had been received to activate the bill, and he will push for getting it approved at the earliest possible date. Nearly 60,000 signed the petition for the measure, which was introduced in 2013. *Bangkok Post*, May 30.

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**UGANDA** – Sexual Minorities Uganda has filed a case with the High Court after the Ugandan Registration Service Bureau refused the organization's attempt to register its name, reported *AllAfrica.com English* on May 19. They have been trying to register since 2012. Their lawsuit was sparked by receiving a letter from the Bureau, stating that their chosen name was "undesirable and because homosexuals and same sex relations are illegal in Uganda, the bureau cannot legitimize an illegality." The organization's legal team argues that the decision violates rights enshrined in the country's constitution, including freedom of association, expression, assembly, and the rights of minorities participate in decision-making processes.

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**UNITED KINGDOM** – The Centre of European Law and Transnational Law institute of The Dickson Poon School of Law, King's College, London, announces a conference on July 7 celebrating the 50th anniversary of decriminalisation of gay sex in England and Wales (and other important law reform anniversaries). The title of the conference is LGBTI Human Rights 2017: The European and Inter-American Courts. Among the speakers will be: Sir Terence Etherton, Master of the Rolls, Head of Civil Justice and the most senior judge (after the Lord Chief Justice) in England and Wales; Karen Atala, who won a ruling from the Inter-American Court in her case against

Chile for depriving her of custody of her children; and Roberto Taddeucci and Douglas McCall, who won a ruling from the European Court of Human Rights that Italy had discriminated against them regarding an application for a residence permit for McCall as a family member of Italian citizen Taddeucci.

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## PROFESSIONAL NOTES

On June 1, the New York Commission on Judicial Nomination released its list of candidate recommendations to Governor Andrew Cuomo for appointment to succeed the late Judge Sheila Abdus-Salaam to the state's highest court, the Court of Appeals. The list included two long-time LeGaL members, Appellate Division Justices **ROSALYN RICHTER** and **PAUL FEINMAN**. They are not the first openly lesbian or gay people to be included in such a list, but they are the first openly lesbian or gay sitting Appellate Division justices to be named. If either is nominated and confirmed by the State Senate, they will be the first openly lesbian or gay members of the state's highest court.

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On May 22, New York State Governor Andrew Cuomo announced nine appointments to the Appellate Division of New York State Supreme Court, including two lesbian judges, **CYNTHIA S. KERN** (1st Department) and **JOANNE M. WINSLOW** (4th Department). Justice Kern was elected to the New York City Civil Court in 2000, was designated an Acting Supreme Court Justice in 2008, was reelected to the Civil Court in 2010, and was elected to the Supreme Court in 2011. She practiced as a litigator for 15 years before becoming Principal Court Attorney for Justice Joan B. Lobis in 1992. She is an NYU Law graduate. Justice Winslow

was elected to the Supreme Court in Monroe County in 2008, after spending over 20 years practicing as an Assistant District Attorney. In December she was appointed by Chief Judge Janet DiFiore to serve on the Richard C. Failla LGBTQ Commission, a body that deals with LGBTQ issues in the New York State judiciary, and is named after the first openly gay man to serve as a Justice of the New York Supreme Court (he sat in New York County). The Appellate Division is a branch of the New York State Supreme Court. The governor is empowered to appoint elected Supreme Court Justices to sit on the Appellate Division, but they are required to run for re-election to the Supreme Court when their 14 year terms expire.

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Attorney **BRUCE NICKERSON**, who rode on the lead float next to the grand marshal, his client, at this year's Long Beach, California, Gay Pride Parade, is profiled in the May 31 *Los Angeles Times*. He was widely known as the "toilet lawyer" due to his specialty in representing gay men who were busted in restroom sting operations and the like. According to the article, the first case he took on as a young trial attorney was representing a man who was arrested for "lewd conduct" inside a booth at an adult bookstore by an undercover police officer. He managed to persuade his client to reject a plea deal and go to trial, and he got a hung jury with prosecutors subsequently dropping the case, based on his ingenious argument that conviction on the charge required that the defendant have believed that someone witnessing his conduct would be offended by it. Given the setting, this seemed implausible, and so half the jury was persuaded to acquit. Nickerson, now 75, was off to a "glorious" career, including a victory at the California Supreme Court that "made it easier for defendants to argue that police discriminated against them during an arrest."

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*“Floyd” cont. from page 243*

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Floyd was able to meet his burden of showing that these fingerprint comparison reports were withheld from the defense, and Judge Vance concluded that the withheld reports were “evidence tending to establish Floyd’s innocence of the Hines murder . . . and [were] favorable to Floyd’s defense.” These reports, according to the court, were enough, standing on their own, to entitle Floyd to a new trial. Although the murders took place long ago, apparently the murderer of Robinson was never identified, and it is possible that the murderer(s) are still at large. – *Michael Leone Lynch*

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