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NO MOORE

Alabama Chief Justice Roy Moore Suspended from Office for the Rest of His Term

EXECUTIVE SUMMARY

L G B T LAW NOTES

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Alabama Court of the Judiciary Suspends Chief Justice Roy Moore on Ethics Charges Arising From His Response to *Obergefell*

The Alabama Court of Judiciary, the body charged with rendering decisions on allegations of ethical violations by judges and imposing sanctions where violations are found, unanimously ruled in a lengthy opinion issued on September 30 that Alabama Supreme Court Justice Roy S. Moore was guilty of all six ethics charges preferred against him by the Judicial Inquiry Commission in connection with actions taken by Moore in response to federal marriage equality litigation in the state and the U.S. Supreme Court's decision in *Obergefell v. Hodges*, which held that same-sex couples have a constitutional right to marry under the 14th Amendment of the federal Constitution. However, the Court did not reach a unanimous decision that Moore should be removed from office. By vote of a majority of the Court, Moore was suspended from office for the duration of his elected term, without pay. Although this is tantamount to removal because he will be barred from participating in the court's activities or receiving his salary, because Moore is not being removed, a replacement will not be appointed to sit in his place. An acting chief justice will preside and the court will finish out Moore's term short one justice. Moore's elected term runs through 2019. He will not be allowed to run for a new term because of age limits for judges in the Alabama Constitution. *In the Matter of Roy S. Moore, Chief Justice, Supreme Court of Alabama*, Court of the Judiciary Case No. 46 (Sept. 30, 2016).

When a federal district judge ruled in two cases early in 2015 that Alabama's ban on performing or recognizing same-sex marriages was unconstitutional, Moore quickly denounced the ruling and sent a letter to the governor and the state's probate judges asserting that the ruling was not binding on any probate judges who were not parties to the case and was an illegitimate interpretation of the 14th Amendment. Shortly thereafter, in his role as head of the state court system, he sent an "Administrative Order" to the probate judges, prohibiting them from issue marriage licenses to same-sex couples. A few days later, a petition was filed in the Alabama Supreme Court by a group of probate judges and marriage equality opponents, seeking a declaration that the state's ban on same-sex marriages did not violate the U.S. Constitution, and also seeking a formal order from the court prohibiting probate judges from issuing licenses to same-sex couples, as some probate judges had, on their own decision, begun to comply with the federal district court decision. The next day, the federal court issued an injunction requiring the Mobile County Probate Judge, Don Davis, to issue a license to the same-sex couple in *Strawser v. Strange*, one of the pending cases. (The other case involved marriage recognition.) On March 3, 2015, with Moore recusing himself, the Alabama Supreme Court issued an opinion holding, contrary to the federal district court, that the state's constitutional and statutory bans on same-sex marriage were constitutional, and enjoining all probate judges not to issue licenses for such marriages. The court took the position that the federal district court ruling was binding only on the parties and not on the Alabama courts.

In May 2015, the federal court granted a motion to add all the state's probate judges as co-defendants, and to extend the pending case to a class of plaintiffs of all persons in Alabama who were unable to obtain same-sex marriage licenses. The court enjoined all the probate judges from enforcing the state's ban on same-sex marriage, but stayed its injunction pending a decision by the U.S. Supreme Court in *Obergefell*, which had been argued and was expected to be decided by the end of June. When the U.S. Supreme Court ruled on June 26, 2015, the stay expired and the district court's injunction went into effect. Although the *Obergefell* case arose from four states in the 6th Circuit, Justice Anthony Kennedy's opinion for the Court stated, "The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States," and that all states would have to recognize same-sex marriages performed in other states. Probate judges who were class defendants filed a response in the federal district court to the issuance of a permanent injunction, stating, "Now that confusion about the law has been cleared by the U.S. Supreme Court, there is no indication that the probate judges will violate their oath and refuse to follow what the Supreme Court has established." However, some individual probate judges persisted in shutting the marriage window in their office entirely in order to avoid issuing licenses to same-sex couples. The 11th Circuit Court of Appeals, ruling on an interlocutory appeal filed by one of the probate judges, rejected an argument that the district court's injunction was

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invalid because of the Alabama Supreme Court's March 3 ruling upholding the state's ban and directing the judges not to issue the licenses. The 11th Circuit said that the March 3 ruling was "abrogated" by *Obergefell*.

Despite these developments in the federal courts, the Alabama Supreme Court did not expeditiously vacate its ruling in response to *Obergefell*, instead issuing a call to parties in the case before it to submit briefs on the questions of whether and how *Obergefell* affected its decision. (They were evidently playing dumb, because in light of the Supremacy Clause of the U.S. Constitution, there could be only one answer to that question.) Briefs were submitted, but the Alabama Supreme Court took no action.

Claiming that he had received numerous requests from probate judges for guidance or instructions on how to proceed, Chief Justice Moore, again acting in his administrative capacity as head of the state court system, issued an "Administrative Order" on January 6, 2016, reiterating the Alabama Supreme Court's March 3 Order to the probate judges not to issue marriage licenses to same-sex couples, noting the U.S. Supreme Court's ruling and that court's statement that "these cases come from Michigan, Kentucky, Ohio, and Tennessee," recounting that the Alabama Supreme Court had on June 29 asked the parties in the pending case to address the 'effect of the Supreme Court's decision on this Court's existing orders in this case,'" and highlighting that several probate judges had filed petitions asking the Alabama Supreme Court to take some sort of action. Asserting that "confusion and uncertainty exist among probate judges of this State as to the effect of *Obergefell* on the 'existing orders' from the March 3 ruling," with some judges issuing licenses, some denying them to all couples, and some denying them only to same-sex couples, creating a "disparity" in the administration of justice, Moore stated that he was "not at liberty to provide any guidance to Alabama probate judges" because the matter was pending before the state supreme court. However, seizing upon statements by some federal courts that pending marriage equality cases before them were not mooted by *Obergefell* (in the context, which he omitted to mention, of deciding on continuing requests from plaintiffs for injunctive relief in the face of state resistance to compliance with the Supreme Court's opinion), he asserted that "a judgment only binds the parties to the case before the court" and thus, by implication, *Obergefell* was not binding outside the states of the 6th Circuit. Although the Alabama Supreme Court had not issued a ruling to this effect or taken any action yet in response to the briefs filed after *Obergefell*, he asserted that the Alabama Supreme Court's March 3 orders were still in effect, citing some old U.S. Supreme Court rulings that an order issued by a court must be obeyed by the parties until it is reversed "by orderly and proper proceedings," and concluded: "It is ordered and directed that: Until further decision by the Alabama Supreme Court, the existing orders of the Alabama Supreme Court that Alabama probate judges have a ministerial duty not to issue any marriage license contrary to the Alabama Sanctity of Marriage Amendment or the Alabama Marriage Protection Act remain in full force and effect."

The Alabama Supreme Court waited until March 4, 2016, to issue an order "that all pending motions and petitions are DISMISSED," without any explanation from the full court, but accompanied by numerous opinions by individual justices. Moore, who had not recused himself from this decision, wrote a lengthy statement purporting to justify his decision not to recuse by claiming that the questions pending before the court at this point were different from the ones addressed in the earlier case. He also released an opinion seeking to justify his theory that the U.S. Supreme Court's ruling (and the federal district court's injunction) were not binding on the Alabama courts. In brief, he was ready to fight the Civil War again to assert his view that his conception of Divine Law takes precedence over the U.S. Constitution. (He had been down this road once before, defying a federal court order to remove a Ten Commandments Monument from the lobby of the state supreme court building, resulting in his removal as chief justice in 2003 for the duration of that term. After unsuccessful runs for other offices, he again ran successfully for election to be Chief Justice, a majority of the voters in Alabama evidently feeling, like Judge Moore, that their version of Christianity takes priority over the U.S. Constitution.)

This was the last straw for those outraged by Moore's actions, and ethical complaints were filed against him before the Judicial Inquiry Commission, which preferred the six charges to the Court of the Judiciary, which denied motions by Moore to dismiss the charges and scheduled a hearing. The ruling came just days after the hearing took place. Moore, incredibly, testified that he had not ordered any judge to violate the law, but had only issued his "Administrative Order" on January 6 in response to requests for clarification from the probate judges about what they were supposed to do in light of the conflict between the Alabama Supreme Court's March 3, 2015 order, and the U.S. Supreme Court's June 26 ruling. (Of course, his January 6 "Order" conveniently omitted reference to the 11th Circuit's ruling that the Alabama Supreme Court's decision had been "abrogated" by *Obergefell*, but that was consistent with Moore's view that the federal courts cannot bind the state courts with their constitutional rulings, especially rulings that he deems to be illegitimate.)

The charges on which Moore was convicted were: (1) "willfully issuing [the January 6, 2016, order,] in which he directed or appeared to direct all Alabama probate judges to follow Alabama's marriage laws, completely disregarding a federal court injunction when he knew or should have known every Alabama probate judge was enjoined from using the Alabama marriage laws or any Alabama Supreme Court order to deny marriage licenses to same-sex couples . . . (2) thereby "demonstrating his unwillingness to follow clear law". . . (3) "abusing his administrative authority by addressing and/or deciding substantive legal issues while acting in his administrative capacity". . . (4) "substituting his judgment for the judgment of the entire Alabama Supreme Court on a substantive legal issue in a case then

pending in that Court". . . (5) interfering "with legal process and remedies in the United States District Court and/or the Alabama Supreme Court available through those courts to address the status of any proceeding to which Alabama's probate judges were parties: . . . and (6) placing his impartiality into question on those issue, "thus disqualifying himself from further proceedings in that case; yet he participated in further proceedings" in the case, "after having disqualified himself by his actions."

Only one written opinion emanated from the Court of the Judiciary, containing no explanation why one or more members of the court refused to vote to remove Moore from office rather than suspending him. What seemed eminently clear from the court's lengthy recitation of the history of this matter was that Moore is unwilling to fulfill the requirement to uphold the Constitution of the United States (and, most particularly, the Supremacy Clause, which requires him to uphold U.S. Supreme Court decisions as they bear on the constitutionality of Alabama laws). Perhaps the internal dissent reacted to some of the intemperate statements in the dissenting opinions in *Obergefell*, such as Chief Justice Roberts' insistence that the Court's ruling had "nothing to do with the Constitution." If the Chief Justice of the United States asserts in writing that an opinion of the Court is itself unconstitutional, should a state supreme court justice be removed entirely from his office for agreeing with that view? But, of course, Moore went beyond agreeing, using his administrative authority to tell state officials that they should not comply with the federal court's order. Certainly, his suspension is justified, if only to remove him from a position where he can stir up further defiance of the law of the land.

In a bit of irony, the court noted that Moore's contention that he was not calling on probate judges to defy the *Obergefell* decision was belied by a public statement issued by his own counsel in the case, the egregious Mat Staver, who before being retained to defend Moore in this proceeding had hailed Moore's defiance of the *Obergefell* ruling. ■

N.Y. Appellate Division Applies New Precedent to Find Standing for Gay Dad Seeking Custody

In what may be the first application of the recent New York Court of Appeals decision, *Brooke S.B. v. Elizabeth A. C.C.*, 2016 N.Y. Slip Op 05903 (August 30, 2016), which adopted a new definition of "parent" for purposes of the state's Domestic Relations Law so as to account for cases of same-sex couples raising children, the New York Appellate Division, 2nd Department, based in Brooklyn, ruled on September 6 that a gay man, who was parenting twin children conceived through in vitro fertilization using his same-sex partner's sperm, had standing to seek custody of the children after the men split up. The case, *In re Anonymous*, 2016 N.Y. App. Div. LEXIS 5833, had an interesting additional wrinkle, in that the plaintiff is the biological uncle of the children, because his sister served as the surrogate for their gestation and birth. In a separate opinion issued on September 6, *Matter of Giovonna F. P.-G. (Frank G. – Renee P.F.)*, 2016 N.Y. App. Div. LEXIS 5384, the same Appellate Division panel ruled that the surrogate mother's parental status was not affected by the fact that the conception occurred pursuant to an illegal surrogacy contract.

The two cases consolidated in the *Brooke S.B.* ruling involved lesbian couples who had their children through donor insemination of one of the partners. This new case extends that ruling to a situation where the birth mother, a surrogate, is still the legal parent of the children, and the dispute is between the father who donated the sperm used to conceive the children and his former partner, whose sister bore them.

The two men, identified in the court's opinion by their first names as Joseph P. and Frank G., lived together in New York State from 2009 through February 2014, but did not marry when same-sex marriage became possible in New York. They wanted to raise children together who would be genetically related to both of them, so Joseph took advantage of a long-standing promise by his sister, Renee, who had her own children, that she would bear children for her brother once he met his "life partner." Their understanding was that the two men would be the children's parents, and that Renee would have a continuing role in the lives of any children resulting from this process.

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The three adults executed a written surrogacy agreement in which Renee agreed to become pregnant using Frank's sperm and to surrender her rights as a biological mother so that Joseph could adopt the resulting child or children. They used an in vitro fertilization process ("test tube babies"), in which it is customary to implant more than one fertilized egg to ensure a successful conception. Renee bore fraternal twins, a boy and a girl, in February 2010. It is

likely that Frank and Renee were listed on the twins' birth certificates as the parents, but the court's opinion does not mention this subject.

For the first four years after Renee gave birth, Joseph and Frank raised the children together, sharing parental rights and responsibilities, and the children regarded both of them as their parents. They called Joseph "dada" and Frank "dad." The court's opinion doesn't say what they called Renee, but it does say that she frequently saw them.

Joseph and Frank separated early in 2014. The children continued to live with Frank, but Joseph visited and cared for them "daily," according to the court's opinion, until May 2014. Then Frank suddenly cut off contact between Joseph or Renee and the children. In December 2014, Frank moved to Florida with the children, without giving any notice to Joseph or Renee, and without seeking permission from the court. Although Renee had agreed in the surrogacy agreement to give up any claim of parental rights in order for Joseph to be able to adopt the children, they had never taken that step of adoption, so her parental rights had not been legally terminated. Frank did not seek court permission to remove the children from the state, which would normally be required since he did not have permission from Renee, their legal mother.

After Frank's move, Renee filed an action in the Family Court seeking custody of the children as their biological mother, and Joseph filed an action petitioning to be appointed their legal guardian. Since the New York Court of Appeals had then recently reaffirmed its 1991 ruling, *Alison D. v. Virginia M.*, 77 N.Y.2d 651, under which a person in Joseph's position would not have standing to seek custody, a guardianship appointment would be the next best thing. However, in June 2015 Joseph reconsidered his position, withdrew the guardianship petition, and filed his own action seeking custody as a de facto parent.

Frank then filed a motion to throw out Joseph's case, relying on *Alison D.*'s definition of "parent" as being limited to a biological or adoptive parent, but Orange County Family Court Judge Lori Currier Woods denied the motion, and Frank appealed. The appellate court's opinion does not describe Judge Woods' reasoning for denying Frank's motion.

In its unanimous September 6 ruling, the panel of Justices L. Priscilla Hall, Jeffrey A. Cohen, Robert J. Miller, and Betsy Barros noted that while this appeal was pending, the Court of Appeals had decided *Brooke S.B. v. Elizabeth A.C.C.*, overruling the *Alison D.* decision and adopting a new definition of "parent." The Court of Appeals said that the old definition had "become unworkable when applied to increasingly varied familial relationships." Under the new definition, a partner of a biological parent will have standing to seek custody if the partner "shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together."

In this case, testimony about the verbal agreement between the men was bolstered by the written surrogacy agreement between the men and Renee. This is ironic, since under New York Law the surrogacy agreement is itself against public policy and unenforceable in court. For that very reason, Frank cannot rely on the Surrogacy Agreement in defending the separate custody case brought against him by Renee, since a statutory provision says that a surrogacy agreement cannot be considered by the court in a custody proceeding involving the surrogate mother.

The Appellate Division found that "Joseph sufficiently demonstrated by clear and convincing evidence that he and Frank entered into a pre-conception agreement to conceive the children and to raise them together as their parents." The court also pointed out that the men "equally shared the rights and responsibilities of parenthood, and were equally regarded by the children as their parents." Thus, a straightforward application of the new precedent gave Joseph standing to seek custody.

Frank had also argued, as part of a belated attempt to get permission from the Family Court to relocate the children to Florida, that Renee's parental standing was terminated due to her entry into a surrogacy agreement with the two men. Rejecting this argument, the court said that such rights were not terminated. "Surrogate parenting contracts have been declared contrary to the public policy, and are void and unenforceable," wrote the court. As such, a surrogacy contract has no legal effect. "Moreover," the court observed, "Domestic Relations Law Sec. 124(1) expressly states that 'the court shall not consider the birth mother's participation in a surrogate parenting contract as adverse to her parental rights, status, or obligations.'" The court also noted that a hearing would be required to determine whether it was in the best interest of the children to allow Frank to relocate them to Florida. The court also affirmed the Family Court's award to Joseph of specified visitation with the children while the case is pending.

This ruling does not mean that Joseph will automatically get custody. The case goes back to the Family Court for a determination whether an award of custody to Joseph is in the best interest of the children. Furthermore, although Renee's custody petition is mentioned in the opinion, the appellate court gives no indication what effect its ruling will have on her custody claim. However, because New York law does not provide that a child can simultaneously have three legal parents, the Family Court will have to take account of Renee's continued legal status as the children's parent in making a determination whether to award custody to Joseph, and whether that would require terminating the parental status of either Renee or Frank. This is a complicated business, and the New York State legislature needs to modernize our Domestic Relations Law to sort through the intricacies and provide clear guidance to the courts when dealing with "non-traditional" families. Left to their own devices without such guidance, it is difficult to predict what the courts will do.

Kathleen L. Bloom of New Windsor represents Joseph. Michael D. Meth and Bianca Formisano of Chester represent Frank. Gloria Marchetti-Bruck of Mount Kisco was appointed by the court to represent the interest of the children. Meth Law Offices of Chester, N.Y. (Michael D. Meth and Bianca Formisano of counsel) represent Renee, the surrogate mother. ■

Unanimous New Jersey Appellate Division Panel Throws Out Full Dharun Ravi Conviction

Following the New Jersey Supreme Court having declared a key provision of the bias-intimidation statute that was used to convict Dharun Ravi unconstitutional in 2015, a unanimous three-judge panel of the Appellate Division of the Superior Court of New Jersey in Newark threw out his full 2012 conviction because "constitutionally defective evidence of [Tyler Clementi's] state of mind permeated the State's entire case against defendant." *State v. Ravi*, 2016 WL 4710195, 2016 N.J. Super. LEXIS 122 (N.J. Super. Ct. App. Div. Sept. 9, 2016). Ravi is the former roommate of a Rutgers University freshman, Tyler Clementi, who committed suicide in 2010 after Ravi invited others online to join him in watching Clementi engage in a sexual encounter with another man in their shared dormitory room. Presiding Judge Jose L. Fuentes wrote the opinion, joined by Judges John C. Kennedy and Robert J. Gilson.

Amidst intense international media attention, a New Jersey Superior Court jury convicted Ravi on March 16, 2012 on multiple charges including bias intimidation, invasion of privacy, tampering with physical evidence, witness tampering, and hindering apprehension. The fifteen-count indictment arose from incidents that preceded the September 2010 suicide of Clementi, who jumped off the George Washington Bridge a few days after Ravi had tweeted about having seen Clementi intimately engaged with another man over a webcam in their dorm room that Ravi had remotely activated. Ravi subsequently tweeted about Clementi's request to have their room to himself again two days later, and Ravi invited people to join him for a viewing of the activity, but Clementi, who had frequently viewed Ravi's Twitter postings and had asked for a housing assignment change, made this impossible by shutting off Ravi's computer. Clementi complained about harassment to University officials, who initiated an investigation and questioned Ravi, who then texted an intended apology to Clementi, but it is unclear whether Clementi saw it before committing suicide. Ravi took various steps as the investigation unfolded that led to charges of tampering with evidence and witnesses.

Superior Court Judge Glenn Berman sentenced Ravi on May 21, 2012. He determined that the appropriate sentence for the witness and evidence tampering offenses was thirty days in the county jail, but that a non-prison sentence would be appropriate for the bias intimidation convictions. He ordered 300 hours of community service and three years' probation, mandatory participation in a counseling program on cyberbullying and "alternative lifestyles," an assessment of approximately $11,000 to be donated to victims of bias crimes, and a recommendation against deportation (Ravi was born in India). Ravi ended up serving twenty days in the county jail, receiving ten days' credit for good behavior. He was released in June 2012.

While Ravi's appeal was pending (the prosecutor's office also appealed, arguing the sentence was too lenient), a significant development occurred in another criminal appeal involving the bias-intimidation statute. After the U.S. Supreme Court had struck down New Jersey's previous hate crime law in a landmark decision involving criminal sentencing and the Sixth Amendment right to trial by jury in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the state legislature enacted a new bias-intimidation statute, codified at N.J.S.A. 2C:16-1, that Ravi would later be charged with violating based on what he did to Clementi. Instead of considering only whether the defendant was motivated by bias, the state's new bias intimidation law also penalized a defendant's conduct if the jury decided that a victim, like Clementi, "reasonably believed" that a defendant targeted him or her because of some protected characteristic like his sexual orientation. That meant a defendant could be found guilty of bias intimidation even if he or she had absolutely no intent to intimidate a victim because of his or her identity. As long as a jury concluded, for example, that Clementi "reasonably believed" he was persecuted because of his sexual orientation, Ravi could be (and was) convicted of a hate crime.

In *State v. Pomianek*, 110 A.3d 841 (N.J. 2015), New Jersey Supreme Court Justice Barry T. Albin described subsection (a)(3) as "unique among bias-crime statutes in this nation" because "[i]t is the only statute that authorizes a bias-crime conviction based on the victim's perception that the defendant committed the offense with the purpose to intimidate, regardless of whether the defendant actually had the purpose to intimidate." On March 17, 2015, the New Jersey Supreme Court unanimously struck down that subsection as violating the Due Process Clause of the Fourteenth Amendment of the United States Constitution. A criminal law, the court explained, violates due process when it is "so vague" that a person "of common intelligence must necessarily guess at its meaning" and imposes criminal penalties in the absence of *mens rea*.

With strong evidence to highlight Clementi's reaction to Ravi's actions, the prosecution's major focus at trial was in persuading the jury that Clementi was a sensitive person who clearly communicated to his resident assistant how upset he was by the spying. The prosecution's emphasis would eventually doom the entire conviction; Clementi's belief that he was singled out for being gay permeated the evidence presented by the prosecution, but the Appellate Division held all that evidence inadmissible in light of the New Jersey Supreme Court's *Pomianek* ruling.

It was expected, then, that Ravi's conviction on the bias intimidation

counts would be vacated. The court went further, though, and threw out the entire conviction. "The jury deliberated and returned a unanimous verdict guided by then legally-sound instructions given by the judge. Any attempt to filter out the influence exerted by the evidence pertaining to N.J.S.A. 2C:16-1(a)(3) [the subsection declared unconstitutional in *Pomianek*] would be as futile as using a cloth strainer to remove the adulteration caused when a tablespoon of ink is dropped into a glass of milk. We can never be reasonably confident that the verdict produced was free from the adulterated influence of the inadmissible evidence."

Fuentes, however, did not mince words when it came to expressing disapproval of what Ravi had done. "[T]he social environment that transformed a private act of sexual intimacy into a grotesque voyeuristic spectacle must be unequivocally condemned in the strongest possible way. The fact that this occurred in a university dormitory, housing first-year college students, only exacerbates our collective sense of disbelief and disorientation. All of the young men and women who had any association with this tragedy must pause to reflect and assess whether this experience has cast an indelible moral shadow on their character."

The Appellate Division remanded the case for a possible new trial on the invasion of privacy, tampering with physical evidence, and hindering apprehension counts. In response to the ruling, Acting Middlesex County Prosecutor Andrew C. Carey has filed a motion asking the appeals court to reconsider its decision to overturn the entire conviction. The motion for reconsideration also asks the court to correct alleged factual errors it made in reaching its decision. If that is unsuccessful, Carey will have to decide whether to try Ravi again on the remaining ten charges. – *Matthew Skinner*

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

2nd Circuit Suggests Bias Tainted CAT Hearing of Bisexual Jamaican Man

Suggesting that an Immigration Judge may be biased against gay or bisexual petitioners, the U.S. Court of Appeals for the 2nd Circuit granted a petition by a bisexual man from Jamaica to reopen his case seeking protection under the Convention against Torture (CAT) in *Brown v. Lynch*, 2016 WL 5478977 (Sept. 29, 2016).

Brown had been ordered to be removed from the U.S. based on "controlled substance offenses," so his only possibility for relief from removal was to contend that he would face the possibility of torture or serious harm were he returned as an openly gay man to Jamaica.

His only possibility for relief from removal was to contend that he would face the possibility of torture or serious harm were he returned as an openly gay man to Jamaica.

Wrote the panel, consisting of Circuit Judges Pierre N. Leval and Raymond J. Lohier, Jr., and District Judge Edward R. Korman, "The IJ denied Brown's claim for CAT relief on the ground that Brown was not harmed during the three years he previously lived in Jamaica and had a relationship with a man. But in using Brown's testimony against him in this manner, the IJ disregarded Brown's testimony that he hid his relationship and went to underground meetings where LGBTQ persons discussed how to act in public to avoid discovery, and, further, that he did not intend to conceal his bisexuality if he returned to Jamaica. This testimony, which we assume to be credible [for purposes of this appeal], tends both to explain why Brown was not harmed previously and to show that he may be harmed in the future. That the IJ's denial was based solely on the observation that Brown was never harmed while in Jamaica, without discussion of Brown's testimony about his past concealment, 'compellingly suggests' that this critical testimony was ignored," citing *Xiao Ji Chen v. U.S. Dept. of Justice*, 471 F.3d 315, 356 n.17 (2nd Cir. 2006). "The IJ therefore erred as a matter of law, and the BIA did nothing to rectify this error," wrote the court, granting Brown's petition for review of the final order.

"This is not the first time IJ Michael W. Straus has erred in adjudicating an application for deferral of removal by a gay or bisexual Jamaican man," the panel continued, citing *Walker v. Lynch*, 2016 WL 4191844 (2nd Cir., Aug. 9, 2016), in which the court had granted a petition for review in a case where IJ Straus "'totally overlooked' the record evidence that the Jamaican government acquiesces in the torture of gay and bisexual men." The court continued, "The record in this case also contains examples of conduct potentially indicative of bias. For example, IJ Straus permitted the government to engage in a line of cross-examination asking Brown irrelevant, demeaning questions about, among other things, his genitalia and sexual performance. The BIA might consider, on remand, whether justice, or the appearance of justice, would be served by reassigning the remand to a different IJ."

This case and *Walker* suggest that the 2nd Circuit accepts as well-established what anybody following the issue in the LGBT press would know: that social homophobia there is so intense that Jamaica is an unsafe place for LGBT people, and that failure of Immigration Judges and the Board of Immigration Appeals to recognize this fact will not be acquiesced in by the court. ■

Two Federal Judges Order Public Schools to Let Transgender Students Use Gender-Appropriate Restrooms, While One Dismisses Affirmative Challenge to Title IX Applicability on Jurisdictional Grounds

Within days of each other, two federal district judges have issued preliminary injunctions requiring public schools to allow transgender students to use restrooms consistent with the students' gender identity. U.S. District Judge Algenon L. Marbley of the Southern District of Ohio, based in Cincinnati, issued his order on September 26 against the Highland Local School District on behalf of a "Jane Doe" 11-year-old elementary school student, in *Board of Education v. U.S. Department of Education*, 2016 U.S. Dist. LEXIS 131474, 2016 WL 5239829. U.S. District Judge Pamela Pepper of the Milwaukee-based Eastern District of Wisconsin, issued her order on September 22 against the Kenosha Unified School District on behalf of Ashton Whitaker, a high school student, in *Whitaker v. Kenosha Unified School District No. 1*, 2016 U.S. Dist. LEXIS 129678, 2016 WL 5372349. Jane Doe is a transgender girl, Ashton Whitaker a transgender boy. The Highland school district quickly announced that it would appeal Judge Marbley's ruling to the 6th Circuit Court of Appeals, according to a September 28 article in the *Columbus Dispatch*. The article was not clear about whether the appeal focused on the dismissal of the direct challenge to Title IX's application to gender identity discrimination, the granting of an injunction to the transgender student, or both issues.

Although both cases are important, producing essentially the same results under Title IX and the Equal Protection Clause of the 14th Amendment, Judge Marbley's ruling is more significant because the judge sharply questioned the jurisdictional basis for a nationwide injunction issued on August 21 by U.S. District Judge Reed O'Connor of the Northern District of Texas, Wichita Falls, in *Texas v. United States*, 2016 WL 4426495, which ordered the Obama Administration to refrain from initiating investigations or enforcement of violations of Title IX of the Education Amendments of 1972 based on gender identity discrimination. O'Connor was ruling in a case initiated by Texas in alliance with many other states challenging the validity of the Obama Administration's "rule" that Title IX, which prohibits sex discrimination by educational institutions that receive federal funds, prohibits gender identity discrimination and requires schools to allow transgender students to use facilities consistent with their gender identity. Marbley dismissed the Highland school district's challenge to the Education Department's policy on jurisdictional grounds.

Neither the Highland nor Kenosha cases were affected by O'Connor's order in any event, since these cases were already under way before O'Connor issued his order and they involved district court complaints filed by the individual plaintiffs, not by the Department of Education.

The *Doe v. Highland Local School District* case before Judge Marbley is in part a clone of the Texas case pending before O'Connor. When a dispute arose about the school's refusal to allow a transgender girl to use the girls' restrooms and the Department of Education became involved in response to a complaint by the girl's parents, the school district, abetted by Alliance Defending Freedom (ADF), the "Christian" law firm that is also providing representation to other challengers of the Administration's position, rushed into federal district court to sue the Department of Education and seek injunctive relief.

As the case progressed, Jane Doe's parents moved on her behalf to intervene as third-party plaintiffs against the school district. ADF pulled in many of the states that are co-plaintiffs in the Texas case and a clone case brought in federal district court in Nebraska, and moved to make them amicus parties in this case. At the same time, pro bono attorneys from Pillsbury Winthrop Shaw Pittman LLP, a large firm based in Washington, D.C., together with local counsel from Columbus, Ohio, organized an amicus brief by school administrators from about twenty states in support of Jane Doe. After being allowed to intervene as a plaintiff, Doe moved for a preliminary injunction to require the Highland Schools to treat her as a girl and allow her to use appropriate restrooms.

Judge Marbley first confronted the federal government's argument that the court did not have jurisdiction over the Highland school district's attack on the Administration's interpretation of Title IX. Unlike Judge O'Connor in Texas, Judge Marbley concluded that the government was correct. If a school district wants to attack the government's interpretation of Title IX, he found, it must do so in the context of appealing an adverse decision by the Department of Education ordering it to comply with the interpretation or risk losing federal funding. Marbley pointed out that under the administrative process for enforcement of Title IX, no school would lose funding before a final ruling on the merits is rendered, a process that would involve administrative appeals within the Department followed by an appeal to the U.S. Court of Appeals with a potential for Supreme Court review of a final ruling by the court. Thus, the school district had no due process argument that it stood to lose funding without being able to seek judicial relief if it were deprived of the ability to sue directly in the district court. Marbley found that there was no authorization under the statute or the Administrative Procedure Act (APA) for a school district to file a lawsuit directly in federal district court challenging an interpretation of Title IX.

Part of ADF's argument in its lawsuits challenging the Obama Administration's guidance to the school districts is that by not embodying this interpretation in a formal regulation, the Administration had improperly evaded judicial review, since the APA authorizes challenges to new regulations to be filed promptly in federal courts of appeals after final publication of the regulation in the Federal Register. ADF argued that the Guidance was, in effect, a regulation masquerading as a mere "interpretation." Judge O'Connor bought the argument, but Judge Marbley did not.

Marbley was dismissive of Judge O'Connor's determination that he had jurisdiction to hear the Texas case. "The Texas court's analysis can charitably be described as cursory," he wrote, "as there is undoubtedly a profound difference between a discrimination victim's right to sue in federal district court under Title IX and a school district's right to challenge an agency interpretation in federal district court. This Court cannot assume that the first right implies the second." Marbley went on to discuss in detail Supreme Court rulings on the question whether there was a private right of action under various federal statutes that did not expressly authorize lawsuits in the district courts, and the circumstances under which such authorization can be found by implication, as the courts have done to allow students to file Title IX lawsuits. Marbley rejected the Highland school district's argument that once Jane Doe had intervened, she would provide a basis for the court to assert jurisdiction over the school district's claim. Actually, he pointed out, the school district could raise its arguments against the Obama Administration's interpretation of Title IX in response to Jane Doe's lawsuit, and need not maintain a lawsuit of its own. Thus, he concluded, the school district's complaint should be dismissed on jurisdictional grounds.

In both cases, the attorneys for the transgender students argued alternatively under Title IX and under the Equal Protection Clause. In both cases, they argued that because gender identity discrimination is a form of sex discrimination, the Equal Protection analysis should receive the same "heightened scrutiny" that courts apply to sex discrimination claims, which throws the burden on the government to show that it has an exceedingly important interest that is substantially advanced by the challenged policy.

Here the cases diverged slightly in the judges' legal analysis. Both judges found that the transgender plaintiffs were likely to succeed on the merits of their claims under both Title IX and the Equal Protection clause, that they were suffering harm as a result of the challenged policies, and that any harm the school districts would suffer by issuance of preliminary injunctions was outweighed by the plaintiffs' harm if injunctions were denied. In addition, both judges found that the injunctions were in the public interest. But Judge Marbley additionally found that heightened scrutiny applied, while Judge Pepper, more conservatively, reached her conclusion by applying the rational basis test. In either case, however, the judges found that the school districts' justifications for their exclusionary policies lacked sufficient merit to forestall preliminary relief against them.

Significantly, Judge Marbley's conclusion that heightened scrutiny applied to this case drew support from the Supreme Court's marriage equality ruling, *Obergefell v. Hodges*. He used *Obergefell* to question the continuing relevance of prior court of appeals analyses of equal protection "in light of *Obergefell*'s emphasis on the immutability of sexual orientation and the long history of anti-gay discrimination. Like the district courts that examined suspect classification based on sexual orientation," he continued, "this Court will proceed to conduct its own analysis of the four-factor test to determine whether heightened scrutiny applies to a transgender plaintiff's claim under the Equal Protection Clause." Marbley based his analysis of the four-factor test on a district court ruling last year in New York, *Adkins v. City of New York*, 143 F. Supp. 3d 134 (S.D.N.Y. 2015), which found all factors to be satisfied to justify heightened scrutiny, including a finding that "transgender people have 'immutable and distinguishing characteristics that define them as a distinct group" for purposes of analyzing their equal protection claims.

Significantly, both judges accorded great weight to the Obama Administration's Guidance, and both judges also found persuasive the Richmond-based 4th Circuit Court of Appeals' ruling in the Gavin Grimm case, *G.G. v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016), that district courts should defer to the Administration's interpretation due to the ambiguity of existing regulations about how to deal with transgender students under Title IX. In light of such ambiguity, the federal administrators would enjoy deference so long as they adopted an interpretation of the statute and regulations that is not inconsistent with the purpose of the statute. The judges rejected the argument that because Congress in 1972 did not intend to ban gender identity discrimination, administrators and judges decades later could not adopt such an interpretation of "discrimination because of sex."

Although the Supreme Court has stayed the injunction issued by the district court in the Gavin Grimm case while the Gloucester (Virginia) school district's petition for review of the 4th Circuit's ruling is pending before the Supreme Court, Judge Marbley pointed out that the stay does not affect the status of the 4th Circuit's decision as a persuasive precedent. He also pointed out the unusual step taken by the Justice Stephen Breyer of writing that he had agreed to provide the necessary fifth vote for a stay to "preserve the status quo" as a "courtesy" to the four conservative justices. *See* 136 S. Ct. 2442 (2016). The Highland school district argued that the stay "telegraphed" that the Supreme Court was going to grant review of the 4th Circuit's decision, but, wrote Marbley, "even if Highland has somehow been able to divine what the Supreme Court has 'telegraphed' by staying the mandate in that case, this Court unfortunately lacks such powers of divination." Furthermore, he wrote, "This Court follows statements of law from the Supreme Court, not whispers on the pond."

Judge Marbley also accorded great weight to the amicus brief filed on behalf of school administrators from around the country. In this brief, they explained how they had implemented the policies required by the Education Department to accommodate transgender students. They pointed out that allowing transgender students to use appropriate facilities had not created any real problems. They argued that this was a necessary step for the mental and physical health of transgender students, and did not really impair the privacy of other students. Furthermore, in the more than twenty school districts joining in this brief, the new policy had not in any case led to an incident of a sexual predator gaining access to a restroom under the pretext of the policy and harming any student. Thus, while acknowledging that school districts can be legitimately concerned about the health and safety of students, the courts could conclude that any such risk was conjectural and not borne out by experience. This or a similar brief should be introduced in all the pending transgender restroom cases!

The judges also noted other district court decisions over the past year ordering schools to allow transgender students to use appropriate facilities, including a recent ruling in one of the North Carolina cases, requiring the University of North Carolina to ignore H.B.2, that state's infamous "bathroom bill," and allow the three individual transgender plaintiffs to use appropriate restrooms at the university while the case is pending before the court.

Judge Marbley's in-depth analysis of the jurisdictional issues provides a roadmap for a challenge before the Houston-based 5th Circuit Court of Appeals to Judge O'Connor's nationwide injunction. The Texas lawsuit attempted to short-circuit the requirements of the Administrative Procedure Act by dragging an interpretive dispute into the federal district court when the relevant statute provides an administrative forum for hearing and deciding such issues before appealing them to the Courts of Appeals.

Judge Marbley was appointed to the district court by President Bill Clinton. Judge Pepper was appointed by President Barack Obama. ■

Gay Rite Aid Employee Loses Sexual Orientation Discrimination Claim

On September 12, U.S. District Judge Jeffrey Alker Meyer (D. Conn.) granted the employer's motion for summary judgment, ruling against plaintiff Mark Dieterle, a gay man, who claimed he was discriminated against by the employer because of his sexual orientation. *Dieterle v. Rite Aid Pharmacy*, 2016 U.S. Dist. LEXIS 122971, 2016 WL 4750180.

Dieterle's claim stemmed from an incident which took place four years prior to his termination. In 2008, a co-worker pinned a photograph of Dieterle to a bulletin board. The photograph had been altered such that it appeared Dieterle was wearing a dress, and it had a heart drawn around his head with the word "sweetheart." Dieterle complained to his immediate supervisor, claiming sexual orientation harassment, and the supervisor informed a human resources manager. The co-worker took responsibility and was warned and transferred to another store location.

Dieterle's complaint alleged he had started receiving disparate treatment from his immediate supervisor beginning in 2011 when Dieterle's partner died of cancer. Dieterle believed he started receiving negative treatment from his supervisor because of his sexual orientation. The following year, another co-worker complained against Dieterle to his immediate supervisor, claiming that he had criticized the way she was stocking a shelf and tapped her on the arm twice with a pack of candy bars. The same human resources manager was informed of the incident. Dieterle was then investigated for engaging in a pattern of "inappropriate physical contact" with various employees in violation of workplace violence policy and was ultimately terminated in 2012.

Dieterle filed his sexual orientation discrimination suit in state court in 2014 under the Connecticut Fair Employment Practices Act. He claimed that the adverse employment action taken against him was because of his sexual orientation and was in retaliation for his 2008 complaint against the colleague who published the altered photograph of Dieterle on the store bulletin board. The employer removed the case to federal district court pursuant to diversity jurisdiction and filed a motion for summary judgment.

Judge Meyer asked whether there was a genuine issue of material fact as to whether the employer's reason for terminating Dieterle was pretext for sexual orientation discrimination, the third prong of the *McDonnell-Douglas* test for alleging a prima facie case of discrimination. The court found no evidence of anti-gay comments or displays of anti-gay prejudice, and that quick action was taken by Dieterle's immediate supervisor and the human resources manager following his 2008 complaint. The court also noted that any leniency towards the co-worker who posted the photograph could not support an allegation of bias at the time of Dieterle's termination four years later. Although some may believe his conduct may not have warranted termination, the employer had a right to terminate Dieterle for violating a company policy.

With respect to the retaliation claim, the court found that there was no evidence of a causal connection between Dieterle's 2008 complaint of sexual orientation harassment and his 2012 termination. Even in viewing the facts in the light most favorable to the plaintiff in this case, Dieterle's claims were insufficient to make out a case for sexual orientation discrimination or retaliation. Simply put, the court found no link between any adverse employment action against the plaintiff and the plaintiff's sexual orientation, and granted the employer's motion for summary judgment. – *James Castle*

James Castle is an assistant district attorney in the Kings County District Attorney's Office. Any views or opinions expressed herein are those of the author and do not represent the views of the Kings County District Attorney's Office or the People of the State of New York.

Vermont Supreme Court Finds Civil Union Dissolution Statute Still Relevant After *Obergefell*

Responding to the difficulties encountered by same-sex couples who entered into Vermont civil unions (and, beginning in 2009, same-sex marriages) and then lived in other states where their legal unions were denied recognition for purposes of dissolution or divorce, Vermont amended its divorce and annulment law in 2012 to provide that couples legally united in Vermont and living elsewhere who sought to dissolve their unions but had no vehicle to do that in the courts of their domiciliary state could obtain a dissolution in Vermont without meeting any residency requirement there. (Traditionally, states have required that at least one spouse be a resident of the state in order to seek a divorce in its courts.) In *Solomon v. Guidry*, 2016 VT 108, 2016 Vt. LEXIS 111, 2016 WL 5338492 (September 23, 2016), the court unanimously ruled that this law remains relevant, even though the result of *Obergefell v. Hodges* is that all states must recognize legally contracted same-sex marriages, because there is still no uniformity about interstate recognition of civil unions.

Melissa Solomon and Jane Guidry entered into a civil union on July 24, 2001, in Brattleboro, Vermont, shortly after Vermont became the first state in the nation to provide civil unions for same-sex couples. They currently reside in Wake County, North Carolina. They separated by May 2014. They have no children. In 2015, they agreed to dissolve their civil union to avoid any legal complications from its continued existence, and filed an uncontested complaint in the Vermont Superior Court, Windham Division, accompanied by a stipulation as required by the amended divorce statute. Judge Karen R. Carroll dismissed the complaint, finding that "the parties failed to produce evidence that they attempted to obtain a dissolution of the civil union in North Carolina." Judge Carroll opined that if they first sought such a dissolution in the North Carolina courts and were turned down, "the proper appeal should be taken here." Carroll asserted that if the Vermont courts "continue to accept these filings and allow courts in other states to ignore precedent [set by *Obergefell*], the situation will never be resolved."

Solomon appealed the dismissal, arguing that the court had exceeded its constitutional authority by imposing a requirement not specifically required by the statute, which was reversible error, by incorrectly applying *Obergefell*, which does not deal with the recognition of civil unions across state lines, and by misconstruing the plain language and legislative intent of the statute, which was intended to provide a way for out-of-state couples who entered civil unions in Vermont to be able to dissolve them if they lived in states that did not recognize them.

Surveying the legislative history of the statutory provision in question, 15 Vt. Stat. Ann. Section 1206(b), the court noted that the purpose of the amendment passed in 2012 was "to provide access to a civil union dissolution or a divorce to nonresident couples joined in a Vermont civil union or Vermont marriage who are legally barred from dissolving the union in their state of residence." The Legislature specifically noted: "While an opposite-sex out-of-state couple who marries in Vermont can get divorced in the state of residence of either party, most same-sex out-of-state couples joined in a Vermont civil union or marriage do not have this option," since at that time most states recognized neither civil unions nor same-sex marriages. Of course, *Obergefell* changed this situation respecting same-sex marriages as of June 26, 2015, but the U.S. Supreme Court did not address the issue of civil unions, which was not presented in the context of the marriage equality litigation.

Under the Vermont statute, a nonresident civil union can be dissolved by the Family Court in the county where the civil union certificate was originally filed if the following criteria are met: the civil union was established in Vermont, neither party's state of legal residence recognizes the Vermont civil union for purposes of dissolution, there are no minor children who were born or adopted during the civil union, and the parties file a stipulation together with a complaint that resolves all issues in the dissolution action. The exclusion of couples who have children is likely due to the fact that a Vermont court would not have jurisdiction over non-resident children for the purposes of deciding issues of their custody and visitation. This process is not available for contested dissolutions that would involve litigation over property disposition, for example, since a Vermont court would not have jurisdiction to allocate property rights of non-residents, either. Both parties have to sign the stipulation, submitted under oath, which has to attest that all these criteria are met, including the criterion that their domiciliary states do not recognize the civil union or provide a legal mechanism for its dissolution.

Wrote Justice Marilyn Skoglund for the court, "Because civil marriage and civil unions remain legally distinct entities in Vermont and because *Obergefell* mandated that states recognize *only* same-sex marriages, uncertainty remains as to whether *Obergefell* requires other states to recognize and dissolve civil unions established in Vermont. For that reason, Section 1206(b) is still necessary to remedy the issue originally addressed by the Legislature in 2012." In this case, the parties followed the requirements of that statute to the letter, and went even further by submitting an affidavit from a North Carolina attorney whose practice is "dedicated to providing services to the lesbian, gay and transgender community, including domestic relations, estate planning, and life planning." In this affidavit, the attorney attested that while North Carolina "grudgingly" follows *Obergefell* and recognizes same-sex marriages for divorce proceedings, "it will accord no recognition to a 'civil union' or 'domestic partnership' for [dissolution] purposes."

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Federal Judge Rejects Constitutional Claims against New York Police Officers and the City for Disrespectful Treatment of Transgender Citizen

In a decision notably lacking in empathy for transgender people and the slights and humiliations they suffer on a regular basis, U.S. District Judge Gregory H. Woods granted New York City's motion to dismiss a complaint by Marlow White, self-identified as a man of transgender experience, that his 14th Amendment rights were violated by NYPD officers and the City when the police failed to respond to the continued verbal harassment of White by Napoleon Monroe, a man who frequented the neighborhood where White lived and made various threats against him as well as subjecting him to verbal harassment. *White v. City of New York*, 2016 WL 4750180 (S.D.N.Y., Sept. 12, 2016).

According to the court's summary of the factual allegations, the police officers who were summoned by White when he was continually accosted by Monroe were blatantly transphobic, treating him as somebody unworthy of respect and suggesting that until somebody was seriously injured, they would not lift a finger to help him. Among other things, Judge Woods' opinion concludes that in the absence of a 2nd Circuit ruling holding that gender identity is a suspect classification (or, as the judge phrases it, that discrimination against transgender people is a form of sex discrimination and thus subject to heightened scrutiny review, as the 11th, but not the 2nd Circuit has held), the refusal of police officers to take White's complaints or do anything to stop Monroe's harassment of him is subject only to rational basis review. Under that standard, Woods found that the discretionary decision by police officers not to arrest somebody who had yet to commit a violent crime against the complainant was not so arbitrary as to lose them the shield of qualified immunity.

Furthermore, the judge found that under Due Process jurisprudence the police officers had no obligation to prevent one citizen from subjecting another to verbal harassment and threats, so long as the police were not enabling or encouraging actual harm to the complainant. He found that White's allegations of past incidents involving the police and their dealings with transgender people were not sufficient to document some sort of official NYPD policy of disparate treatment of transgender people that would be necessary to impose municipal liability, or of a failure to properly train the police about how to interact with transgender people. One suspects that transgender rights organizations could supply a panoply of evidence about police disrespect for the human rights and dignity of transgender people, but unfortunately the evidence presented in response to this dismissal motion seems to have been minimal.

"White's conclusory allegations regarding the City's alleged failure to train its police officers fail to state a claim," wrote the judge. "He states that 'adequate training regarding issues peculiar to persons of trans experience will make it substantially less likely that the rights of persons of trans experience will be violated. But the facts in the Amended Complaint do not plead a pattern of similar constitutional violations, such that the City was on notice that different, or additional, training was needed." Quoting a Supreme Court ruling, *Connick v. Thompson*, 563 U.S. 51, 62 (2011), Woods wrote, "Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights." Judge Woods found that White "has failed to establish a history of NYPD officers mishandling situations involving persons of trans experience such that the City was deliberately indifferent by failing to provide the unspecified training that he desires. Accordingly, because White has failed to allege either a widespread practice or a failure-to-train claim, his *Monell* claim is dismissed without prejudice."

White is represented by Donald Robert Dunn, Jr., of the Bronx. The dismissal without prejudice suggests that he could come back with a new complaint on the municipal liability issue if he can put together a more complete factual record of the NYPD's failure to provide non-discriminatory law enforcement protection to transgender citizens. But we suspect that if top management officials in the NYPD, the Corporation Counsel's office, and the De Blasio Administration took the time to read Judge Woods' summary of White's factual allegations, they might quickly conclude that it would be prudent to provide appropriate training at the precinct level to NYPD officers on how to deal sensitively with such issues, as a matter of good public policy, if not constitutional obligation. After all, the articulated goal of the New York City administration is to improve the quality of life of NYC residents by cultivating a collaborative relationship between the citizenry and the law enforcement community. Furthermore, the NYPD adopted several years ago, as part of the slogan imprinted on its police cars, that "respect" for citizens was one of its goals. And, it is possible that the 2nd Circuit will eventually decide that gender identity discrimination is a form of "sex discrimination," as the 11th Circuit, the EEOC, and other federal agencies have concluded, and the activities of the NYPD in this regard will be subjected to heightened scrutiny in appropriate cases. ■

Judge Woods found that the discretionary decision by police was not so arbitrary as to lose them the shield of qualified immunity.

Kentucky District Court Assumes Possibility of Sexual Orientation Discrimination Claim under Title VII

Federal trial judges remain sharply divided on the issue of whether a claim for sexual orientation discrimination under Title VII may survive summary judgment. At the center of this debate is *Baldwin v. Foxx*, a 2015 decision issued by the EEOC, which ruled that sexual orientation discrimination is a form of sex discrimination; therefore, such claims should fall within Title VII's protection against discriminatory employment practices. The administrative ruling is still not binding on federal courts, and many federal trial judges have chosen to dismiss sexual orientation discrimination claims until their respective circuit courts comment or issue binding decisions.

Judge Tatenhove concluded that she had not provided sufficient evidence of discrimination to survive summary judgment.

U.S. District Judge Gregory F. Van Tatenhove differs in this respect. In *Vinova v. Henry County Board Of Education*, 2016 U.S. Dist. LEXIS 125563, 2016 WL 4993389 (E.D. Ky., Sept. 15, 2016), Judge Tatenhove acknowledged that the Sixth Circuit has not commented on the *Baldwin* decision, yet he continued to assess whether a lesbian plaintiff's claim for sexual orientation discrimination may withstand summary judgment—not because her claim fell outside Title VII's protection, but because she failed to prove any genuine issue of material fact such that a jury could find in her favor. Amanda Vinova, a former fourth-grade teacher at New Castle Elementary, claimed that she was wrongfully terminated and discriminated against on the basis of her gender, sexual orientation, and her same-sex marriage. Ultimately, Judge Tatenhove granted the Board of Education's motion for summary judgment, but this case still represents one small step towards the federal court system's recognition of sexual orientation discrimination as a form of sex discrimination.

Vinova worked at New Castle Elementary between the 2010-2014 school years, and married fellow teacher Lauren Hale in May 2013. Prior to their wedding, interim principal Staci Hoene made a public announcement in January 2013 about the engagements of the school's other teachers. Hoene later apologized for omitting the couple's engagement, stating it was due to her lack of knowledge. Still, Vinova contended that this incident was the first of many others evincing discrimination due to her sexual orientation. Vinova claimed that: (1) she was required to submit new social security cards to get her married name on the payroll, even though she believed other teachers were not asked to do so; (2) she received a name plate using the term "Ms." while other married teachers' nameplates used "Mrs."; (3) she was omitted from a website announcement about an award-winning project she contributed to; (4) she was terminated by Tim Abrams, Superintendent of the Board, despite her good reviews and qualifications; and (5) she was not selected to interview for a first-grade teaching position once it became available.

In response to Vinova's accusations, the Board argued that Hale and three other married women received the same e-mail regarding the social security cards. Furthermore, Principal Eric Davis had apologized for and fixed the inadvertent omissions after being told by Vinova. The Board also disclosed that it did not renew the contracts of Vinova and one other teacher—a woman married to a man—because it anticipated a drop in enrollment. Lastly, Vinova's application for the first-grade teaching position was passed over in favor of the woman who had previously taught the same students in kindergarten. Vinova's failure to respond to the Board's arguments was interpreted as a waiver of opposition to them. Subsequently, the Board motioned for summary judgment because no genuine issue of material fact existed such that a jury could find in the plaintiff's favor.

Judge Tatenhove concluded that even if Vinova was able to bring her sexual orientation claim under Title VII as sex or gender discrimination, she had not provided sufficient evidence of discrimination to survive summary judgment. In light of the Board's undisputed arguments, her allegations fell short of the direct evidence required to show that unlawful discrimination was at least a motivating factor for the Board's decision to not renew her contract. Judge Tatenhove held that a jury could not reasonably find that unlawful discrimination was a factor at all in the Board's decision.

Furthermore, Judge Tatenhove concluded that Vinova failed to allege sufficient circumstantial evidence to establish a prima facie case of discrimination. In order to do this, Vinova was required to show that: (1) she was a member of a protected class, including women; (2) she was subjected to an adverse employment action; (3) she was qualified for the position at issue; and (4) she was treated differently than similarly-situated male and/or nonminority employees for the same or similar conduct. Though she had met the first three requirements, she failed

to show she was treated differently than not just one, but three groups of similarly situated employees: men married to women, women married to men, and women married to women.

Firstly, Judge Tatenhove examined whether Vinova was treated differently than other male teachers. Vinova even insisted that the basis for her gender discrimination was that she was treated differently as a woman married to a woman, than if she had been a man married to a woman. The problem with this assertion however is that New Castle Elementary did not employ male teachers with similar annual contracts at the time. Thus, this type of comparison was impossible.

Judge Tatenhove then compared Vinova's treatment to that of female teachers who were married to men, acknowledging that the Sixth Circuit allowed some flexibility for gender discrimination cases in which all employees were female. Again, this comparison failed to support Vinova's claim because the Board had also chosen not to renew the contract of a female teacher who was married to a man.

Lastly, and maybe the most fatal to Vinova's sexual orientation discrimination claim, Judge Tatenhove examined whether other lesbian teachers were treated similarly to her. The only teacher to compare Vinova with was her own wife, whose contract was renewed for the 2014-2015 school year. Perhaps Judge Tatenhove realized this made for a good twist, which explains why he waited to reveal this fact much later in his opinion.

Despite the ultimate outcome of this case, it is once again worth noting that it is one recent example of a rising number of cases in which federal trial judges are willing to assess sexual orientation discrimination claims on their facts, as opposed to universally dismissing them until higher courts resolve Baldwin's implications. Furthermore, a judge appointed by George W. Bush—in the same state that gave us Mitch McConnell, Rand Paul, and Kim Davis—issued this decision. – *Timothy Ramos, NYLS '19*

Wisconsin Transgender Inmate Who Waited Over a Year for Evaluation for Hormones Loses Summary Judgment on Failure to Treat Damages Claims

Transgender inmate Roy Mitchell cannot get her day in court on claims that criminal justice defendants violate her rights to medical care. Like many, she has been released and re-incarcerated multiple times since her teens. She sued about denial of transgender medical treatment during a 2011-12 incarceration, but she was paroled. Although parole officials forced her to live in a shelter for men and refused to recognize her transgender needs, U.S. District Judge William M. Conley declined to allow her to add parole defendants to the lawsuit. She appealed, but she was again back in prison ("second" prison period, discussed below). The Seventh Circuit affirmed on mootness grounds (but without prejudice, in case she is paroled again), in *Mitchell v. Wall*, 2015 WL 9309923 (7th Cir., December 23, 2015), reported in *Law Notes* (January 2016 at page 34). She is currently incarcerated in a county jail.

Now, in *Mitchell v. Kallas*, 2016 U.S. Dist. LEXIS 114603 (W.D. Wisc., August 26, 2016), Judge Conley grants summary judgment against her in a damages case against the state prison psychiatric director (Kevin Kallas) and supervising psychologist who allegedly prevented transgender treatment during her incarceration in 2011-12. A few days earlier, Judge Conley denied Mitchell's procedural applications to join the state correctional commissioner and to appoint counsel. 2016 U. S. Dist. LEXIS 109762 (W.D. Wisc., August 17, 2016).

Wisconsin has a particular history regarding transgender inmates. Ten years ago, the legislature passed a statute barring all transgender treatment in prisons. A federal judge held the statute unconstitutional after trial in *Fields v. Smith*, 712 F.Supp.2d 830 (E.D. Wisc., 2010). The state appealed, and the Seventh Circuit affirmed. 653 F.3d 550 (7th Cir. 2011).

Mitchell requested hormonal treatment later that year. Her request was referred to a transgender treatment committee ["the committee"], which requested a "consultation" with an "outside" specialist: Cynthia Osborne, a masters-level assistant professor at John Hopkins, who has appeared as an expert for correctional systems in other cases. *See Kosilek v. Spencer*, 774 F.3d 63, 91-92 (1st Cir. 2014) (court finds no Eighth Amendment claim in denial of sex reassignment surgery because professionals disagreed about treatment plan). It took Ms. Osborne six months to interview Mitchell in person (behind Plexiglas), and another six months to provide an opinion. By this time, Mitchell was within weeks of release, and officials refused to start hormones under a rule requiring that such care not be initiated unless the inmate had over six months incarceration remaining.

In a case now limited to damages, Judge Conley found that the defendants were entitled to qualified immunity on claims of unconstitutional delay in reaching a treatment decision or in refusing to initiate treatment on these facts, since neither *Fields* – nor any other Seventh Circuit or Supreme Court decision – had clearly established the illegality of such delays or refusal in 2012. That would have been understandable, but he also ruled unnecessarily on the Eighth Amendment claims in this *pro se* case, making it more difficult for transgender inmates to challenge use of a forensic "expert" as a gatekeeper for treatment.

Judge Conley found that the transgender treatment "committee" was "created" in 2011. In fact, it was started in 2002, with Dr. Kallas as a member. In 2005, Dr. Kallas testified before

the legislation against restricting the discretion of the committee in the bill that was overturned in *Fields*, where he also testified for the transgender plaintiffs, emphasizing the importance of the "committee's" discretion for individualized patients. 712 F.Supp.2d at 846-7, 849-52. Judge Conley does not question whether Dr. Kallas' (and the other doctors') post-*Fields* deference to a masters-level forensic "expert" in Baltimore was genuine or the product of a chastened "committee." Dr. Kallas even wrote as to Mitchell's "second" incarceration that there was no time to start hormones because there were fewer than six months left during that imprisonment; and, in any event, the "committee" would need a new Osborne report, since the delayed one was now "too outdated."

The dissenters in *Kosilek* found Ms. Osborne's report merely an attempt to create a difference of opinion regarding transgender treatment: "the divergence of opinion as to Kosilek's need for surgery—only resulted from the DOC disregarding the advice of Kosilek's treating doctors and bringing in a predictable opponent to sex reassignment surgery. It is no stretch to imagine another department of corrections stealing a page from this play book, i.e., just bring in someone akin to Osborne." 774 F.3d at 107 (dissenting opinion).

Osborne's report itself runs 27 pages and refers to Mitchell as "Inmate Mitchell" throughout. It documents gender dysphoria in records since 2008 and anecdotally since childhood, even writing: "There is no diagnostic uncertainty." The report is dated September 27, 2012, but it contains information from October. There is no discussion of earlier drafts. Judge Conley also does not question why Osborne did not see Mitchell for months after the referral, why the community "contacts" were necessary, or why this took five months. (The opinion refers to two community contacts, but only one is in the "report" – Mitchell's mother, who "validated" his childhood history in all respects).

Judge Conley upholds Wisconsin's "no hormones within six months of release" rule without subjecting its premise to contrary opinion. Yet, the inability of the corrections department to maintain continuity of case relationships with community providers is a long-standing problem. *See* National Commission on Correctional Health Care, *The Health Status of Soon-To-Be-Released Inmates: A Report to Congress* (2002). Judge Conley found that, even if wrong, the decision not to start treatment did not amount to deliberate indifference.

Judge Conley found that counsel for Mitchell would not have made a difference. This write disagrees. *Compare Konitzer v. Frank*, 711 F.Supp.2d 874 (E.D. Wisc., 2010), where both Dr. Kallas and Ms. Osborne were deposed and the District Judge denied summary judgment. Kallas and Osborne are also both defendants in the Wisconsin transgender prisoner litigation in *Gulley-Fernandez*, reported repeatedly in *Law Notes* (January 2016 at page 38, April 2016 at page 167, and Summer 2016 at page 309).

In this procedural posture, adjudication of Mitchell's Eighth Amendment claim – and its adoption of the *Kosilek* standard – is gratuitous and damaging to development of transgender jurisprudence for prisoners in Wisconsin. A holding on qualified immunity should have sufficed in this *pro se* case. As Justice Breyer observed in *Morse v. Frederick*, 127 S. Ct. 2618, 2641-2 (2007): "if it is not necessary to decide more, it is necessary not to decide more" – quoting Roberts (now Chief Justice) in *PDK Labs, Inc. v. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004). – *William J. Rold*

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

CIVIL LITIGATION

U.S. COURT OF APPEALS, 3RD CIRCUIT – On September 1, ruling in *Moran-Castillo v. Attorney General*, 2016 U.S. App. LEXIS 16190, 2016 WL 4547198, the 3rd Circuit denied a petition to reopen an adverse ruling by the Board of Immigration Appeals against a man from Guatemala who asserted that since the Board's prior ruling in his case he had newly discovered that he is bisexual and is seeking to remain in the United States on that basis. The petitioner, who arrived in the U.S. "without inspection" in 2004 and was ordered removed in absentia shortly thereafter, had applied for asylum, withholding of removal, and protection under the Convention against Torture, an application denied by an Immigration Judge in 2008. At that time, the petitioner alleged that if he were returned to Guatemala he would be in danger from gang members "whose recruitment efforts he had resisted." His appeal was dismissed by the Board of Immigration Appeals in 2009, and he did not seek judicial review. But it appears that he is still in the U.S., or at least the 3rd Circuit's opinion does not specify where he is located, but states that he filed a motion to reopen his case in November 2015. Claiming that he had recently discovered his bisexuality, he alleged fear of persecution in Guatemala because of his sexual orientation and, on reflection, that "the gang members in Guatemala had persecuted him not because he had refused to join their gang but because he is bisexual." The BIA denied his motion to reopen the case, pointing out that it was untimely (he missed the 90 day deadline for filing such a petition by more than five years!) and that he had failed to present any evidence about changed country conditions in Guatemala that would justify reconsidering the earlier ruling. Furthermore, his "allegation that he has recently realized that he is bisexual represents a change in *personal* circumstances that, standing alone, does not warrant reopening." The 3rd Circuit echoed the BIA's reasons for refusing to reopen, pointing out that relevant State Department reports on conditions in Guatemala reflect no change in the treatment of gay people over the intervening years. Thus, there was no abuse of discretion by the BIA. "In light of this conclusion," wrote the court, "we need not reach the BIA's alternative ruling that Moran-Carrillo failed to show that his bisexuality is a new fact that is supported by new evidence."

U.S. COURT OF APPEALS, 5TH CIRCUIT – David Grisham, an evangelical Christian with decidedly anti-gay views who likes to distribute Bible tracts at Gay Pride events assisted by his wife and daughter, was upset that police officers forced him to move away from the vicinity of the Tarrant County Gay Pride Week Association Festival in 2014, being held in General Worth Square in downtown Fort Worth. The event was free and open to the public, but nonetheless the police compelled Grisham and family to vacate the park and stand across the street. Grisham sued, seeking to vindicate his 1st Amendment rights, and the city negotiated a settlement, under which he received nominal damages of $1 and a consent order and injunction under which Grisham's right to distribute his literature on public property was recognized. "Defendant City agrees to notify permittees of an outdoor event on public property that speakers will be allowed to exercise constitutionally-protected expression at any event that is free and open to the public," said the consent decree, which also provided that the city would "not enforce a policy or act in any other manner that would unlawfully ban or interfere with constitutionally protected expression of David Grisham or other third-party speakers on public sidewalks and streets in downtown Fort Worth, Texas during public events." The consent decree authorized Grisham to file an attorney fee application, which he did in the amount of $79,074.36. The district court refused to award fees, reasoning that although Grisham had obtained a "technical victory" by being awarded nominal damages, the fees he was demanding were clearly excessive, so the court would exercise its discretion to deny the application. The 5th Circuit reversed, finding that as long as Grisham was the prevailing party and had won not only nominal damages but vindication of his position and an agreement by the city not to interfere with his 1st Amendment activities in the future, he was entitled to reasonable fees, and their outright denial was an abuse of discretion. The district court need not grant the entire fee award, but it was wrong to focus only on the award of nominal damages. "He obtained the relief he sought," wrote the 5th Circuit panel, "nominal damages in recognition that his rights were violated, and injunctive relief prohibiting the City from violating his rights again." The court pointed out that under its precedents, nominal damages should not be a basis for denying a fee award unless money damages were the primary objective of the plaintiff filing suit. "Enshrining rights in a consent decree changes the parties' legal relationship," said the court, and was not merely symbolic. If the district judge believed, as stated in the original ruling on the fee application, that plaintiff's counsel was billing for too many hours, then the proper response "is to reduce, to a reasonable amount, the number of hours to be compensated for a specific task, not to deny all fees." The case was remanded for calculation of a fee award. *Grisham v. City of Fort Worth*, 2016 U.S. App. LEXIS 7118 (5th Cir., Sept. 19, 2016).

U.S. COURT OF APPEALS, 11TH CIRCUIT – The 11th Circuit has reversed District Judge Paul C. Huck's dismissal of a lawsuit challenging the constitutionality of Miami-Dade

County's Lauren Book Child Safety Ordinance's residential restrictions as applied to persons convicted of sex offenses prior to the ordinance's passage, under the ex post facto law prohibition of the Constitution. *Doe v. Miami-Dade County*, 2016 WL 5334979 (Sept. 23, 2016). Florida has a state law that prohibits persons convicted of various sex offenses against children from living within 1,000 feet of any school as long as they are subject to sex offender registration, but Miami-Dade decided to be more restrictive, passing the ordinance extended the distance to 2500 feet and making it applicable for life. The plaintiffs include three "John Doe" plaintiffs and the Florida Action Committee, Inc. The individual plaintiffs were convicted of offenses covered by the ordinance prior to its enactment. Two of them specifically alleged that by application of the ordinance they were rendered effectively homeless, as there was no affordable rental housing available to them that was not within 2500 feet of a school and they were relegated to living in homeless encampments. They raised a variety of constitutional claims, but the only part of the dismissal order they appealed dealt with their claim that the ordinance was an unconstitutional ex post facto law, imposing new punishment on them for crimes for which they were convicted before the ordinance was passed. Writing for the court, Circuit Judge Charles Wilson found that the plaintiffs' allegations should have been deemed sufficient to withstand a motion to dismiss, as the complaint "sufficiently alleged that the County's residency restriction imposes a direct restraint on [the plaintiffs'] freedom to select or change residences" that, as they alleged, "drastically exacerbated transience and homelessness," and was "excessive in comparison to its public safety goal of addressing recidivism." Indeed, they presented evidence that recidivism rates for the offenses for which they were convicted are historically very low, and that residential restrictions directly undermine the goal of public safety," since they detract from the kind of desirable stable environment that would support successful reentry into civil society after the sex offender has served his prison term. Indeed, they alleged, the transience and homeless caused by the restriction make it more difficult for the plaintiffs and others like them "to secure residences, receive treatment, and obtain and maintain employment." The court found that even if the enactment was not intended to impose new punishment, these allegations "stated a plausible claim that the County's residency restriction is so punitive in effect as to violate the ex post facto clauses of the federal and Florida Constitutions." The case was remanded to allow the plaintiffs to proceed with discovery. The plaintiffs are represented by attorneys from the ACLU and the ACLU Foundation of Florida.

ALABAMA – It is reasonably well established in the 11th Circuit that a gay male plaintiff can assert a Title VII sex discrimination claim if he can plausible allege sex stereotyping or gender identity discrimination, so it is not surprising that the parties in *Ashford v. Danberry at Inverness*, 2016 WL 4615782, 2016 U.S Dist. LEXIS 119835 (N.D. Ala., Sept. 6, 2016), do "not dispute whether Plaintiff belongs to a protected group based on his claim of sex discrimination" because, wrote Judge R. David Proctor, "it is well-settled that Title VII's protections against sex discrimination extend to a bar against discrimination based on gender stereotyping," and reviewing the factual allegations of the complaint, the court agreed that statements by the plaintiff's supervisor "implicate stereotyping by gender," so the court "assumes that with respect to his harassment claim, Plaintiff is in a protected category." Bobby Ashford worked at Danberry at Inverness, a retirement community, as a resident assistant and assistant sitter in the Health Care Department and as a Server in the Dining Room. His main problem, apparently, was with the Dining Room Manager Daniel Vest, who allegedly made frequent comments to Ashford that could easily ground a hostile environment charge based on sexual orientation or gender identity or, as the court found, gender stereotyping. (The court made clear that a straightforward sexual orientation discrimination claim may not be asserted under Title VII, but a gender stereotyping or gender identity discrimination claim can be made. Despite several references in the opinion to gender identity, there is no allegation reported in the opinion that Ashford is or claims to be transgender, and he is identified in the opinion as "an openly gay man.") Ashford was discharged by the employer's Director of Dining Services, purportedly over attendance issues that appear to have arisen from misunderstandings and poor communications about Ashford's response to a new footwear policy, but Judge Proctor found that a jury could conclude that this was pretext for discrimination, and that Ashford is entitled to a trial of his termination claim. However, Ashford's hostile environment claim was found to fall short on several grounds, as Judge Proctor found his allegations insufficient to show the kind of severe or pervasive harassment necessary to make out a Title VII claim, and that he never filed a formal grievance with the personnel designated in the company's anti-discrimination policy to receive such claims. Consequently, the company could not be held liable. Proctor's analysis of the factual allegations on harassment suggest that LGBT employees are required to put up with quite a bit of negative chatter in the workplace before they can expect to be protected by Title VII. Ashford is represented by a team of attorneys including Charity Gilchrist-Davis, Lee David Winston, Roderick T. Cooks, and Sherive M. Carter, all of Birmingham.

CIVIL LITIGATION

ARIZONA – Maricopa County Superior Court Judge Karen A. Mullins refused to dismiss an action by an artists' studio seeking a declaratory judgment that a Phoenix ordinance prohibiting discrimination because of sexual orientation violates the 1st Amendment rights of the plaintiffs, but at the same time denied the plaintiffs' request for a preliminary injunction barring enforcement of the ordinance against them while the court determines the case on the merits. *Brush & Nib Studio L C v. City of Phoenix*, No. CV 2016-052251 (Sept. 26, 2016). This is yet another lawsuit filed by Alliance Defending Freedom (ADF) as part of its ongoing campaign to invalidate public accommodations laws that prohibit sexual orientation discrimination by arguing that such laws violate the religious freedom rights of for-profit business owners. There has been no enforcement activity under the ordinance against any business on charges that a business is denying services to same-sex couples in connection with their marriages. The City argued in support of its motion to dismiss that there was no case or controversy until some kind of enforcement activity takes place. Rejecting this argument, Judge Mullins found the plaintiffs' intention to put a notice on their website indicating that they would not provide services for same-sex weddings was sufficient to show a "plan to violate the ordinance" which would be sufficient to ground standing to sue for declaratory relief. However, she found upon reviewing the growing case law on this issue that the plaintiffs had not shown the likelihood of success on the merits necessary to get a preliminary injunction against enforcement of the ordinance while the case is pending. The court found that neither the "compelled speech" theory nor any burden on free exercise propounded by the plaintiffs were likely to produce an ultimate ruling on the merits for plaintiffs. So far, courts have generally found that requiring purveyors of goods or services in connection with weddings to treat same-sex couples equally with different-sex couples does not constitute "compelled speech" and does not impose an undue burden on the business person's practice of their religion. "The requirement under the ordinance that Plaintiffs transact business without regard to sexual orientation is not sufficient to create a Free Exercise Clause violation," wrote the judge, "even if this Court were to assume that strict scrutiny applies. Proselytizing, preaching and prayer *are* protected by the Free Exercise Clause. However, the sale of wedding invitations free of the names of same-sex couples is not the exercise of religion, and certain is not a burden on the free exercise of their religion. Nothing about the ordinance has prevented the Plaintiffs from participating in the customs of their religious beliefs or has burdened the practice of their religion in any way."

CALIFORNIA – For the first time in the United States, as far as anyone can tell, a court has issued a "Decree Changing Name and Gender" that recognizes a person as having a "non-binary" gender. On September 26, Judge Robert B. Atack of the Santa Cruz Superior Court signed such a Decree on behalf of Kelly S. Keenan. The form provides a series of boxes for the judge to check under the heading "The Court Finds." Checking the "other findings (if any)" box, Judge Atack wrote: "The gender of Kelly S. Keenan is changed from female to non-binary." Under the heading "The Court further orders," Judge Atack checked the box that signifies that a person's gender is changed from female to male, but has crossed out male and written in non-binary. Thus, by order of the Santa Cruz Superior Court, Kelly S. Keenan became legally "non-binary" with respect to gender as of Sept. 26, 2016. At the top of the form, it is indicated that petitioner, presenting "In pro per", is Sara M. Keenan, who petitions for a change of name and gender.

CALIFORNIA – U.S. Magistrate Judge Barbara A. McAuliffe affirmed a decision by the Social Security Administration to deny disability benefits to a transgender man whose treating physician had attested that the plaintiff was disabled due to various physical and psychological ailments and conditions. *Copeland v. Colvin*, 2016 WL 4597619 (E.D. Cal., Sept. 6, 2016). We have largely stopped reporting on routine denials of social security disability benefits involving gay or HIV-infected claimants, but this case raises an interesting issue, because in appealing the administrative law judge's decision, the plaintiff argued that the ALJ "failed to address his gender dysphoria." We have not seen claims that gender dysphoria is, in general, a disabling condition that would qualify an individual for disability benefits under the Social Security system. In responding to this, Judge McAuliffe pointed out that under 9th Circuit case law, when the ALJ has resolved in favor of the claimant the assertion that they have a severe impairment, "any error in designating specific impairments as severe does not prejudice a claimant at step two . . . . Here, the ALJ found that Plaintiff had some severe impairments and resolved step two in his favor. Therefore, any error in failing to find that Plaintiff's alleged gender dysphoria was severe is harmless at step two." We could take issue with the word "alleged" in that sentence, since there was evidence presented that the plaintiff, designated female at birth, was undergoing transition and had begun testosterone therapy and obtained a name change, as reflected in the caption of the case and the court's use of male pronouns throughout its opinion in referring to the plaintiff. The ALJ did find that the plaintiff's various other impairments

prevented him from performing his previous jobs, but a vocational expert testified that in light of his present physical and mental capabilities, there were various jobs that he was capable of performing. The demanding standard for Social Security disability benefits is that the applicant is so disabled that they are not capable of performing any jobs that are available in sufficient quantity in the national economy. The expert testified, and the ALJ found, that Copeland was capable of performing various kinds of sedentary work, and the ALJ found that Copeland's treating physician's report was conclusory and failed to include relevant treatment notes providing documentation for the conclusions he had checked off on the reporting form. The ALJ made adverse findings about Copeland's credibility in testifying about his physical and mental condition in light of contradictions between the testimony and the medical records presented in the case. Ultimately, the court found that the ALJ's decision was supported by substantial evidence in the record, and upheld the denial of benefits.

CALIFORNIA – U.S. District Judge Phyllis J. Hamilton has granted a motion by the government to dismiss a facial challenge to a 2016 federal statute that would require that U.S. passports carry information about the passport holder's status as a registered sex offender under federal or state law, in *Doe v. Kerry*, 2016 U.S. Dist. LEXIS 130788, 2016 WL 5339804 (N.D. Cal., Sept. 23, 2016). Judge Hamilton rejected the plaintiffs' argument that placing such information in the passport would be "compelled speech" in violation of the 1st Amendment, as she found that passports are actually the property of the federal government, not the individual to whom they are issued, and that their contents constitute government speech, not individual speech. She also rejected due process and equal protection arguments, citing 9th Circuit authority that "individuals convicted of serious sex offenses do not have a fundamental right to be free from sex offender registration and notification requirements. Nor is there any fundamental right for a convicted sex offender to avoid publicity, or the transmission of accurate information regarding such conviction or registration to authorities in a foreign country to which such individual wishes to travel." Judge Hamilton noted Supreme Court authority that any stigma attaching to the individual is not attributable to the notification mechanism but rather to the actions for which they were convicted. Finding no fundamental right involved, the court concluded that any challenge would be evaluated under the rational basis test, and that under existing 9th Circuit precedent, it was rational to extend identification and notification requirements to passports in order to alert foreign countries that an U.S. passport holder who seeks to enter their country has been convicted of a sex crime. "Congress rationally concluded that the notifications are necessary to protect children and others from sexual abuse and exploitation," she wrote. Indeed, she found that the challenged law and regulations would even withstand heightened scrutiny, although she rejected the plaintiffs' argument that heightened scrutiny should apply to this case. In rejecting an argument that application of the statutory and regulatory requirement to persons who were convicted prior to their passage and implementation constituted an unconstitutional ex post facto law, the court concluded that these measures were not on their face intended to be punitive, as they "constitute communications from the U.S. Government to foreign authorities of accurate information regarding individuals' criminal history, which is already public information" since they apply to people who are already required to register as sex offenders in directories that are made available to the public on-line. The plaintiffs protested that they "deny individuals the right to travel internationally to visit family members and to conduct business" and could "subject travelers to a risk of physical harm," but the court agreed with the government that these assertions were just that, assertions, and that no authority supported the argument that these allegations rendered the new requirements unconstitutional.

DISTRICT OF COLUMBIA – U.S. District Judge Colleen Kollar-Kotelly found in *Hammel v. Marsh USA Inc.*, 2016 U.S. Dist. LEXIS 119698 (D.D.C., Sept. 6, 2016), that the plaintiff, Marnie Hammel, an attorney who had worked for Marsh USA Inc., a subsidiary of Marsh & McLennan Companies, in their Chicago and Washington DC offices, had provided sufficient evidence to withstand the employer's summary judgment motions regarding most of Hammel's claims under Title VII and the DC Human Rights Act for discrimination because of her sex, sexual orientation, marital status, parental status and pregnancy. Hammel, a lesbian who married her same-sex partner and then bore children during the period of her employment, had a long-running negative relationship with Andrea Lieberman, a managing partner to whom she reported in the Chicago office and with whom she had continuing assignments after her transfer to D.C. As summarized by the judge, "Plaintiff alleges that Ms. Lieberman specifically targeted Plaintiff because she is a lesbian and alleges that she did not fit within Ms. Lieberman's conception of a female subordinate employee. Plaintiff alleges that Ms. Lieberman made disparaging comments and belittling facial gestures when Ms. Hammel discussed her same-sex partner and that Ms. Lieberman made comments regarding Ms. Hammel's status as a gay woman. On one occasion, Ms. Lieberman allegedly

referenced Ms. Hammel's sexual orientation by asking if a friend who was visiting in the office was gay, and when Ms. Hammel responded that the individual was not gay, Ms. Lieberman allegedly responded, "no offense, but why would she be friends with you then." Plaintiff also alleges that Ms. Lieberman routinely made fun of Ms. Hammel's style and manner of dress and made comments regarding Ms. Hammel's athleticism, allegedly stating in front of clients and co-workers, "that's how you are, people like you" – which Ms. Hammel interpreted as a reference to her status as a lesbian. Plaintiff also alleges that upon her nomination for a 'superstar of the month' award, Ms. Lieberman asked Plaintiff whether the person who had nominated her for the award was gay." This quotation encompasses only a portion of the allegations against Ms. Lieberman, but is illustrative. Hammel made frequent complaints and a grievances, and claims she suffered retaliation as a consequence, particularly when Ms. Lieberman was notified about the complaints. On learning about one such complaint, Hammel alleges, "Ms. Lieberman allegedly called Plaintiff into her office, looked Plaintiff in the eye, and said that Plaintiff had 'some fucking nerve complaining about a managing director in this company,' and that she put her hands on her desk, stood up, and yelled, 'I'm your manager and I can be a bitch if I want to.'" (This is 21st Century America? Marsh USA provides no human relations training to its managerial employees?) Hammel alleges wrongful denial of salary increases and promotions, a hostile environment, and discrimination concerning her pregnancy. Although the judge found some of the claims time-barred, particularly those covered only by the D.C. Human Rights Act, the bulk of Hammel's claims survived summary judgment and will go to trial unless Marsh comes up with a great settlement offer, which would be advisable because this will be tried before a District of Columbia jury that is likely to be outraged if the court's summary of the evidence on this motion is credibly presented at trial. They really should not want to have their management officials testifying in open court subject to cross examination, judging by the tenor of the plaintiff's evidentiary allegations and the company's responses, as summarized by the judge. We smell possible punitive damages here . . . . Hammel is represented by Cathy Ann Harris and Juliette Markham Neihuss, of Kator, Parks, Weiser & Harris PLLC, Washington, D.C.

DISTRICT OF COLUMBIA – Todd Ladson was discharged from a position as a campus police officer at George Washington University after a fellow officer accused him of making inappropriate comments about her sexual orientation and activities and an investigation by the University determined that he had violated its policy against sexual harassment and created a hostile environment for his colleagues. In this lawsuit, Ladson claims that the University's investigation was one-sided and unfair, and that the real reason he was terminated was his race and age. He alleged that younger, white officers who engaged in similar or more egregious conduct were not discharged. Ruling on September 1 in *Ladson v. George Washington University*, 2016 U.S. Dist. LEXIS 118031, 2016 WL 4574635 (D.D.C.), District Judge Amit P. Mehta granted the defendant's motion for summary judgment. Judge Mehta found that Ladson had not sustained his burden of showing that the university did not have a legitimate non-discriminatory reason for discharging him. To his assertion that he was fired based on "subjective criteria," she said, "Defendant's consideration of Plaintiff's well-documented boorish and crude behavior is not the kind of 'subjective consideration' that is cautioned against" in prior case law. "The uncontested evidence shows that, following a wide-ranging investigation, Plaintiff was fired because he was found to have repeatedly made offensive and inappropriate sexual comments to multiple colleagues, while occupying a supervisory role." As to his argument that the investigation was "unfair" and "one-sided," the court pointed out that the "wide-ranging" investigation produced testimony by numerous individuals against Ladson, but that he had elected to put on no witnesses at all in his defense. "Plaintiff has not pointed to any deviation from Defendant's established policies in this case that would give rise to an inference of pretext," wrote the judge. She also rejected his claim of selective enforcement, finding that "not one of the three GW campus police officers identified by Plaintiff is a valid comparator." Indeed, found Judge Mehta, "Plaintiff has not offered a shred of evidence that would allow a reasonable jury to conclude that he was terminated because of racial discrimination, rather than due to the numerous acts of sexual harassment that this employer found him to have committed." Furthermore, she found that plaintiff had not even addressed his age discrimination claims in responding to the motion for summary judgement, so she concluded that he was conceding that the age claim lacked merit and, in any event, the court had already concluded that the University had a legitimate non-discriminatory reason to fire him.

FLORIDA – Want to be confused and outraged? Read U.S. District Judge Cecilia M. Altonaga's decision in *Boutaleb v. Louis Vuitton North America, Inc.*, 2016 U.S. Dist. LEXIS 125765 (S.D. Fla., Sept. 14, 2016). The plaintiff, a gay Muslim male of Middle Eastern origin named Ali Boutaleb, is claiming that his employer violated Title VII and the Florida Civil Rights Act by

subjecting him to hostile environment harassment and discrimination because of his religion and sexual orientation, mainly through the actions of a manager named Luis Sanchez. The "Background" section of Judge Altonaga's opinion sets forth a summary of Boutaleb's factual allegations which, if true, would indicate that the Louis Vuitton store where he was employed suffers from radically incompetent management, subjecting an employee to outrageous harassment and mistreatment because of his gender and ethnicity. (It is hard to understand why any employer would hire somebody and then treat them in such an outrageous manner. Is the employer not interested in making money through the efforts of productive employees who are motivated to fulfill the employer's business goals? Then why blow off the employees' complaints about egregious mistreatment as a "joke"? Why delay for three months after receiving a complaint to investigate? Why punish an employee for making "false allegations" when another employee admits having fabricated a complaint against the grievant under threat of termination by management? This sounds like a very dysfunctional workplace, if Boutaleb's allegations are true.) That's enough to get one angry, but this reader became even more disturbed by seeing how the judge handled the employer's motion to dismiss. Angry, at least in part, because perhaps her opinion accurately reflects the bizarrely confusing situation concerning how a gay employee subjected to outrageous workplace sex-related harassment has to torture and twist his factual allegations to fit into one of the euphemistic theories that a federal district court within the 11th Circuit might accept in order to entertain a Title VII sex discrimination suit on his behalf. And this isn't even a *pro se* case, where one could blame the grant of summary judgment on the failing efforts of a lay plaintiff to deal with an unduly complicated pleading requirement. Boutaleb is represented by counsel, Brody Max Shulman and Jason Saul Remer of Remer & Georges-Pierre, PLLC, of Miami. Happily, Judge Altonaga dismissed some of the Title VII claims without prejudice, giving Boutaleb a week from the summary judgment grant on September 14 to submitted a third amended complaint, stating, "Especially given the egregious allegations regarding Sanchez's harassment, it would be unfortunate to deny Boutaleb the chance to pursue Title VII relief simply because his counsel failed to appreciate the difference between disparate treatment and hostile work environment claims." (Of course, a hostile work environment claim *is* actually a kind of disparate treatment claim, isn't it? It is based on intentionally discriminatory conduct by a supervisor in this case, not on "facially neutral rules" that have a disparate impact. Title VII does not, on its face, provide a cause of action for "sexual harassment" or "hostile environment;" these are just different theories of liability developed under the disparate treatment branch of employment discrimination case law. But we digress . . .) According to the court's on-line docket, Boutaleb's counsel met the court's short deadline and filed a third amended complaint on September 20. It will be interesting to see if they were able to rearrange their factual allegations to fit into the formalistic pleading requirements that Judge Altonaga employed to justify rejecting a complaint that, on its face, had sufficient factual allegations to meet the pleading requirements for several varieties of unlawful sex discrimination, so long as they were properly categorized and labeled. This unfortunate situation is due, at least in part, to the Supreme Court's misguided decisions on civil pleadings (*Iqbal* and *Twombly*) that have so distorted the notice pleading requirements of the Federal Rules of Civil Procedure that it is almost impossible for *pro se* employment discrimination plaintiffs to produce complaints sufficient to withstand dismissal motions, a problem that might get sorted out if the next few Supreme Court appointments are not drawn from the ranks of ultra-conservative opponents of employment discrimination law and some 5-4 decisions get reversed. The judge also granted summary judgment on the Florida Civil Rights Act claims, but on timeliness grounds. Indeed, Boutaleb almost lost his Title VII case on timeliness grounds as well, but he was able to document the incompetence of the US Postal Service, which took more than a month to deliver the EEOC's right to sue letter to him, thus bringing his complaint well within the requirement of being filed 90 days within receipt by the complainant. Perhaps, even though it is a government agency, the EEOC should use United Parcel rather than the US Postal Service to deliver its right-to-sue letters, to ensure more timely deliveries. (The EEOC's own records showed that it didn't even mail a copy of the letter to Boutaleb's attorney until three days *after* Boutaleb received his copy.) The judge was appointed by President George W. Bush; her biographical information hails her as the first Cuban-American woman to be appointed a federal district judge.

FLORIDA – Maurice McGriff and Terry Rigby were domestic partners. Rigby named McGriff as sole beneficiary on an insurance policy issued on Rigby's life by Prudential Insurance Company. On February 28, 2015, according to the opinion in *Stephenson v. Prudential Life Insurance Company*, 2016 U.S. Dist. LEXIS 121352 (M.D. Fla., September 8, 2016), by U.S. District Judge Susan C. Bucklew, "there was a physical altercation between McGriff and Rigby. According to McGriff, he acted in self-defense when he caused Rigby to fall and hit his head. Rigby eventually died from his injuries. McGriff was investigated for his role in Rigby's death,

but the State Attorney determined that the facts and circumstances did not support prosecution of McGriff for Rigby's death." McGriff filed a death benefit claim with Prudential, as did Rigby's surviving sister, Theresa Rigby Harding, who asserted that McGriff could not receive the proceeds because he killed Rigby. Harding claimed she was proceeding on behalf of Rigby's Estate, but while these claims were pending Harding's authority to act on behalf of the Estate "was revoked, and Robert Pope, Esq., was named the Curator of Rigby's Estate." Prudential decided to let claimants fight it out and did not pay the claim to either. McGriff filed this lawsuit against Prudential, seeking a declaration of his right to the proceeds. Prudential moved to implead Harding and Pope (as representative of the Rigby Estate) and McGriff as third party defendants, seeking the court's direction about who should get the money. McGriff then died and Karen Stephenson, the personal representative of his estate, was substituted as plaintiff. Stephenson moved to dismiss Harding from the case for lack of standing. In denying that motion in this opinion, Judge Bucklew pointed out that the Beneficiary Rules under the life insurance policy provided that if proceeds were not payable to the designated beneficiary, they would go to relatives in a particular order, and only lastly to the estate of the insured! Thus, Harding, as a surviving sibling, actually outranks the Rigby Estate in the default beneficiary line, if the court concludes that McGriff's Estate is not entitled to the insurance proceeds because of McGriff's actions leading to Rigby's death. The amount involved – $466,000 – is worth litigating over, but perhaps a settlement will ensue. Lisa A. Hoppe is counsel for the McGriff Estate, and Robert Pope, Esq., represents the Rigby Estate. Harding is represented by Russell Kirk Boring, and Prudential by Emilia A. Quesada. May the negotiations ensue!

ILLINOIS – This is an unusual one. Three women returning home from a gay pride parade in Chicago in June 2007 got into an "altercation" with an off-duty Chicago police officer, William Szura, eventually involving several other officers, and leading them to sue Szura, the city, two other Chicago police officers and three state police officers in a Section 1983 action before District Judge Sara L. Ellis in the Northern District of Illinois. From this opinion by Judge Ellis, it appears that the trial was very contentious, and Judge Ellis finds that the plaintiffs' lead counsel, Dana Kurtz, as well as her co-counsel and the plaintiffs, engaged in such egregious misconduct as to justify setting aside a jury verdict, which had awarded one of the plaintiffs $260,000 in compensatory damages on a claim of excessive force exerted by Officer Szura. *Fuery v. City of Chicago*, 2016 U.S. Dist. LEXIS 135086 (Sept. 29, 2016). Indeed, to defend against the defendants' post-trial motion for a new trial, plaintiffs substituted counsel and Kurtz and her co-counsel withdrew from the case. Judge Ellis's account of trial counsel's misconduct is too lengthy and detailed to include here, but suffice to say it is not a great idea to try aggressively to get around a trial judge's rulings on motions *in limine* by questioning witnesses on forbidden subjects. "The continuous, contumacious course of conduct pursued by Kurtz, and on several occasions aided by each of her clients and her co-counsel, rises to the level of severity where a sanction of judgment for the City and Szura is appropriate," wrote Judge Ellis. "The record established numerous instances of misconduct that prejudiced Defendants in fairly presenting their case. Kurtz, her clients, and the expert witness made numerous inappropriate statements in front of the jury that prejudiced Defendants." The court particularly mentioned numerous sidebars that erupted when Kurtz attempted to elicit testimony on issues that Judge Ellis had previously ruled inadmissible, particularly pertaining to the Police Department's internal investigation of the charges made by the plaintiffs against Officer Szura. The judge opined that these repeated arguments about admissibility, etc., had distracted defense counsel and the jury.

ILLINOIS – U.S. District Judge Robert M. Dow, Jr., rejected the employer-defendant's motion to set aside a jury verdict and a damage award of more than $2 million dollars to Robert Smith, an African-American butcher formerly employed in the defendant grocery's meat department, who was constructively discharged after he filed a complaint of hostile environment sexual harassment and race discrimination with the EEOC and the Illinois Department of Human Rights. *Smith v. Rosebud Farmstand*, 2016 WL 4720015 (N.D. Ill., Sept. 9, 2016). The evidence relates to Smith's employment between 2003 and 2008. Reading the court's summary of the facts that could be found by the jury, it is difficult to believe that any employer would tolerate the level of harassment of an employee recounted here, but Smith alleged, and the jury evidently believed, that the employer was unresponsive to his complaints, leading him finally to take his complaints to government agencies. Anybody who says we live in a post-racial society where racism and sexism are no longer workplace issues seems to be blissfully ignorant of the reality in some American workplaces, as this case well documents. Of most direct relevance to *Law Notes* is the analysis of Smith's same-sex harassment claim. The court applies *Oncale v. Sundowner Offshores Services*, 523 U.S. 75 (1998), and finds, as to the most critical inquiry, that both men and women were employed at the store, but only Smith was singled out for harassment of a sexual nature. "Plaintiff testified for two days regarding countless incidences in which his coworkers touched, grabbed, and fondled his private parts

during work hours. He testified about how these touches were unwelcome, about how they affected him physically and emotionally, and about how his complaints and protestations regarding this harassment fell on deaf ears. The evidence was vast. Despite Defendants' attempts to impeach the credibility of Plaintiff's testimony and to minimize the alleged severity of this constant touching categorizing it as 'horseplay or goofing around,' Defendants' argument that no reasonable jury could conclude that Plaintiff was subject to unwelcome harassment is a nonstarter." Because the touching included Smith's genitals, the court concluded that it was of a sexual nature, and "female employees were not subject to this sort of touching." The court found that a jury could reasonably conclude the harassment was sufficiently severe and pervasive to "create a hostile or abusive atmosphere" and lead to "constructive termination." And, Smith showed that supervisors participated in this and the company was aware of it, sufficiently place liability on the company. On the race discrimination county, the jury credited Smith's testimony about the frequent voicing of detestable racial slurs in his presence, and the court rejected the argument that this evidence should be rejected because there was no corroborating testimony. Smith said most of these comment were spoken softly as employees passed near him, and the court found that the jury could find Smith's testimony credible in the context of the overall case. The jury also found for Smith on his charge of a violation of Illinois' Gender Violence Act, which added to his damage award.

INDIANA – The Indiana Code (Section 34-28-2-2.5(a) (5)) prohibits non-citizens of the state from obtaining a legal name change in the courts of Indiana. Despite the progress that the movement for transgender rights has made over the years, Indiana officials are still standing on the view that it does not harm individuals to be denied a name change and that the law, enacted in 2010, is perfectly all right. But the law poses a particular inconvenience to the state's transgender residents, among whom one, calling himself "John Doe, formerly known as Jane Doe," is seeking to put things right through litigation in federal court. *Doe v. Pence*, Case 1:16-cv-02431-JMS-DML (filed Sept. 13, 2016, S.D. Indiana). Doe seeks a declaratory judgment that the challenged provisions and their enforcement violates his 14th Amendment Equal Protection and Due Process Rights, as well as Freedom of Speech. (That is, what business is it of the state to tell me what my name is?) Doe also seeks an injunction barring enforcement of the statutory restriction. Doe is represented by Barbara J. Baird of Indianapolis and staff and pro bono attorneys from the Mexican American Legal Defense & Education Fund and the Transgender Law Center.

LOUISIANA – Governor John Bel Edwards, a Democrat, issued an executive order last spring that in addition to prohibiting sexual orientation and gender identity discrimination in the executive branch of the state government, also requires those contracting with the state to have policies prohibiting such discrimination in their companies. Attorney General Jeff Landry, a Republican, has been using his authority to review proposed state contracts to block contracts from going into effect if they contain language to comply with the governor's executive order, so the governor has taken him to court. According to a September 30 story posted to *nola.com*, a court hearing has been scheduled for October 17. Said the governor at a press conference, "He basically told me that if I wanted him to approve those contracts that I would have to sue him." Commentators differ as to the likely outcome of the lawsuit. Some have suggested that the government's executive order went too far in requiring contractors to adopt non-discrimination policies when state law does not forbid such discrimination in the private sector. Others have suggested that Landry is stretching the power of the attorney general, which has not previously been thought to include a right to withhold approval of contracts based on these kinds of issues. The news report did not include the formal title of the case or identify the court in which it is pending, but we are assuming it is a state trial court in the capital, Baton Rouge.

MINNESOTA – A group of parents of students in the Virginia, Minnesota, Public Schools have collected sued the school district, using the organizational name "Privacy Matters," seeking an injunction against enforcement of a restroom access policy for transgender students, claiming that implementation of the policy would endanger and violate the right of privacy of their children. Not surprisingly, the Alliance Defending Freedom, an anti-LGBT "religious" law firm, is behind the case, according to *AP State News*, Sept. 9. The newspaper report doesn't indicate whether there are any transgender students in the district who have actually attempted to use restrooms pursuant to the policy that had been adopted by the school board in compliance with guidance from the U.S. Departments of Education and Justice.

NEBRASKA – U.S. Magistrate Judge Cheryl R. Zwart granted a motion by Rodney Thompson, a gay man, to amend his Fair Labor Standards Act (FLSA) complaint against a hospital to add a claim of sex discrimination under Title VII. *Thompson v. CHI Health Good Samaritan Hospital*, 2016 U.S. Dist. LEXIS 132331 (D. Neb., Sept. 27, 2016). This claim had not been part of the original FLSA complaint because Thompson was awaiting a right to sue letter from the Equal Employment

Opportunity Commission when he filed the original complaint. "Plaintiff's proposed amended complaint alleges several new claims," wrote Judge Zwart, "including a claim alleging the defendant violated Title VII of the Civil Rights Act and the Nebraska Fair Employment Act." (The Nebraska Act, like Title VII, forbids sex discrimination but not, expressly, sexual orientation discrimination.) "Specifically, Plaintiff alleges he was discriminated against 'for not conforming to sex stereotypes about how men are expected to present themselves' and that he suffered disparate treatment because he was a homosexual male." The employer argued that the amendment should not be allowed because "sexual stereotype is not a recognized type of discrimination" and the amended complaints fails to allege facts sufficient to meet the demanding federal civil pleading requirements. Judge Zwart responded that under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and 8th Circuit cases applying that decision, the courts "have recognized that sex stereotyping can violate Title VII when it influences employment decisions. To state a sex stereotyping claim," she continued, "the plaintiff must plead facts showing his non-conformance to sex stereotypes was a motivation for the adverse employment action." In this case, Thompson's allegations, which Judge Zwart found sufficient to raise a sex stereotyping claim, were that: "He is a male who does not conform to sexual stereotype regarding how men present themselves in physical appearance, actions, and behaviors; he was subjected to discriminatory and stereotypical language and treated poorly after appearing at a social event with a male rather than a female; his employment was terminated shortly after these events; his performance was satisfactory during his employment with the defendant." In a footnote, Judge Zwart says that the complaint alleged that "he appeared at a social event with his same-sex partner" and comments: "While this allegation could be attempting to raise a discrimination claim based on sexual orientation – which does not exist [i.e., is not an actionable claim under Title VII or the Nebraska statute] – the underlying fact (appearing at events with a male instead of a female guest) may also support a sexual stereotype claim." She also allowed the addition of a COBRA claim (failure to afford Thompson the right to continuation health insurance coverage under the hospital's employee benefit plan) and a defamation claim, finding that the liberal policy on amending complaints would allow these added claims where existing prejudice to the employer would outweigh the plaintiff's right to have the new facts and claims hear on the merits. The original complaint was filed in March 2016, and the judge found that the minimal passage of time before the amended complaint was proposed did not prejudice the employer in preparing a defense. The opinion does not recite any of Thompson's factual allegations beyond those noted above.

NEW JERSEY – Sebastian Arevalo's attempt to get his sexual orientation employment discrimination case sent back to state court failed when U.S. Magistrate Judge Tonianne J. Bongiovanni denied his motion to add a non-diverse defendant to the case, which would have required a remand in *Arevalo v. Brighton Gardens*, 2016 U.S. Dist. LEXIS 126261, 2016 WL 4975199 (D.N.J., Sept. 16, 2016). Arevalo alleged that he was subjected to sexual orientation discrimination and hostile work environment harassment because of his sexual orientation, in violation of the New Jersey Law against Discrimination, which expressly forbids sexual orientation discrimination. He also asserted various state common law claims arising from the same facts. In his initial complaint, he identified the supervisor alleged to be responsible for some of the discrimination and harassment as "John Doe" and named several other John Doe defendants on the state law common law claims. The employer, incorporated in another state, removed the case to federal court under diversity jurisdiction and moved to dismiss. Magistrate Judge Bongiovanni found that the sexual orientation discrimination claim should be dismissed by applying the demanding federal civil pleading standards, concluding that the factual allegations were insufficient to create a plausible claim of sexual orientation discrimination, but gave leave to amend. On the amended complaint, Arevalo sought to add a new named defendant, his "John Doe" supervisor, which, he argued, would destroy diversity and require a remand to state court. The judge was unpersuaded, finding that the amended factual allegations still fell short of meeting the pleading standards for the employment discrimination claim, although she found that the pleadings were adequate to keep the hostile environment claim alive. (The main pleading problem was a failure to allege differential treatment as measured against appropriate comparators. Arevalo complained about being treated from "colleagues," but did not provide sufficient facts, in the opinion of the judge, to show that those "colleagues" were appropriate comparators for discrimination purposes.) But the judge refused to allow an amendment to turn the John Doe supervisor into a named defendant, finding that this was likely a strategic move to destroy diversity, and ultimately failed on the four-factor test that the 3rd Circuit has approved for making these joinder of new defendant decisions. (She opined, among other things, that Arevalo could still assert various claims against the supervisor in a separate state court action.) The bottom line was that the sexual orientation discrimination claim falls out of the case, the supervisor remains a John Doe defendant (and

thus not taken into account in deciding on complete diversity), but the hostile environment claim remains alive. (Allegations against the John Doe supervisor, identified in the motion to amend as Frank R. Evegan, play a key role in the hostile environment case.) However, the judge agreed with the defendants that all the other state common law claims were preempted by the New Jersey anti-discrimination law, which specifically provides for such preemption as to remedies. So the case is sharply narrowed going forward. Arevalo's counsel is Steven Harlan Wolff of Denville, N.J.

NEW YORK – Title VII of the Civil Rights Act of 1964 does not create "protected classes" but rather identifies "forbidden grounds" for employment discrimination. Thus, for example, both women and men are protected against discrimination "because of sex," so everybody, regardless of their sex, is protected against employment discrimination "because of sex" under the statute, as long as their employer has at least 15 employees to satisfy the statutory definition of an employer. Now that the Equal Employment Opportunity Commission (EEOC) and some federal courts have accepted the arguments that discrimination "because of sex" or "because of gender identity" may include discrimination "because of sexual orientation," non-LGBT people may assert claims that they were discriminated against because they are not gay or trans! And so we now have *Mikell v. Cutting Edge Elite*, 2016 U.S. Dist. LEXIS 133732, 2016 WL 5415095 (S.D.N.Y., Sept. 28, 2016), in which Lamont Mikell alleges that a catering service for which he had worked part-time had stopped sending him assignments "due to me not being a transsexual and not a part of the gay community." Mikell, proceeding *pro se*, seeks to sue both the catering company and various of its owners and officials under Title VII. In this ruling, U.S. Magistrate Judge James C. Francis IV recommended to District Judge Laura Taylor Swain that she grant a motion to dismiss the complaint as it relates to one an individual named defendant, and to deny Mikell's motion to add more individual named defendants. Judge Francis pointed out that Title VII imposes liability *only* on the employer entity, not on individual management or supervisory employees who make hiring decisions on behalf of the employer. However, the defendants did not move to dismiss the case against the company, so nothing is said as to the merits. The 2nd Circuit has yet to issue a precedential ruling affirming the EEOC's contention that Title VII always extends to sexual orientation and gender identity discrimination claims, and district judges in the circuit are divided on the question. Thus far, 2nd Circuit precedent only goes so far as to allow gay or trans plaintiffs to assert Title VII claims based on allegations that the employer had engaged in sex stereotyping, and was not discriminating based on sexual orientation or gender identity as such. The 2nd Circuit has yet to accept the argument, which has been embraced by some district judges, that anti-gay or anti-trans discrimination always involves sex stereotyping by the employer.

NEW YORK – Two U.S. Magistrate Judges in the Northern District of New York, employing similar language, have recommended to their respective district judges that they dismiss, with leave to amend, *pro se* Title VII complaints filed against three different employers by Shaun P. Garvey, a gay man who claims to have suffered employment discrimination from each of the defendants. Two of the cases, *Garvey v. Connect Wireless*, 2016 U.S. Dist. LEXIS 123352 (N.D.N.Y., Sept. 9, 2016), and *Garvey v. GMR Marketing*, 2016 U.S. Dist. LEXIS 123353 (N.D.N.Y., Sept. 9, 2016), were assigned to District Judge Brenda K. Sannes, who referred them to Magistrate Judge David E. Peebles for screening. In both complaints, Garvey alleged that he was employed at an event for either of these two companies in the spring of 2015 and was "wrongfully terminated . . . based on reports that he committed sexual misconduct and harassment," but he claimed that he was "fired because he is a homosexual and has a history of 'defending transgendered people,'" and was actually terminated "because he complained to his employer that his manager was insulting homosexuals and transgendered persons." The third case, *Garvey v. Childtime Learning Center*, 2016 U.S. Dist. LEXIS 124170 (N.D.N.Y., Sept. 12, 2016), was assigned to District Judge Thomas J. McAvoy, who referred it to Magistrate Judge Andrew T. Baxter for screening. In this case, Garvey alleged that the defendant refused to hire him because he is gay. Both magistrates pointed to *Simonton v. Runyon*, 232 F. 3d 33 (2nd Cir. 2000), as controlling precedent that discrimination because of a person's sexual orientation "is not proscribed by Title VII." Judge Peeble's discussion is more cursory, while Judge Baxter's discussion is more extended, but both note that there have been developments outside the 2nd Circuit since 2000, including U.S. Supreme Court decisions such as *Windsor* and *Obergefell*, that have substantially changed the law, but as far as either of these magistrate judges could determine, the construction of Title VII within the 2nd Circuit has not changed in this regard, but neither of them mentions the EEOC's *Baldwin* decision from July 2015 holding that sexual orientation discrimination is "necessarily" discrimination because of sex. Both magistrate judges recognized the development of sex stereotyping theories under which some gay plaintiffs have been allowed to proceed, while noting that *Simonton* had drawn a line between sexual orientation and sex

stereotyping and would not recognize them as essentially the same theory of relief. Judge Peebles said, in a footnote, that he had scoured the complaint for allegations that might support a sex stereotyping claim, but could not find sufficient allegations for that. Both magistrates recommended that Mr. Garvey be afforded an opportunity to file an amended complaint rather than be subjected to dismissal of his claim without prejudice. If he can summon facts sufficient to suggest that he was the victim of sex stereotyping, he might yet be able to maintain his lawsuits, if the district judges accept these recommendations from the two magistrate judges. But given the state of things in district courts within the 2nd Circuit at this point, he seems unlikely to succeed. Which raises the question why he didn't file in state court under the N.Y. Human Rights Law, which expressly forbids sexual orientation discrimination? Perhaps his *pro se* status explains this, since gay people who are generally ignorant of the law seem to share the widespread misconception that federal law already bans sexual orientation discrimination in the workplace. The EEOC thinks so, and some federal district judges share that belief, but we are still waiting for definitive rulings in from the circuit courts of appeal or the Supreme Court.

NORTH CAROLINA – The North Carolina legislature reacted to the advent of marriage equality there on October 10, 2014 (through a federal court declaration that the state's ban was unconstitutional in response the Supreme Court denying cert in Virginia's appeals of a marriage equality ruling by the 4th Circuit) by subsequently enacting Senate Bill 2, which allowed Magistrates and Registrars of Deeds who were involved in local administration of marriage laws to recuse themselves from performing such duties based upon "any sincerely held religious belief." The immediate prompt for passage of the bill was a directive to the magistrates and registrars from the Administrative Office of the Courts instructing them to accord equal treatment to same-sex couples seeking marriage licenses and the performance of marriage ceremonies. The legislature was determined to facilitate the ability of religious objectors to continue their employment, even if they refused to perform those parts of their job duties. Governor McCrory's veto statement asserted that "no public official who voluntarily swears to support and defend the Constitution and to discharge all duties of their office should be exempt from upholding that oath; therefore, I veto Senate Bill 2." Within days the legislature had overridden the veto, but just a few weeks later the Supreme Court decided *Obergefell v. Hodges*. The legislature did not make any change in S.B. 2 in response to *Obergefell*. The plaintiffs in this case sought to attack the constitutionality of S.B. 2 as taxpayers, pointing out that due to recusals by magistrates and clerks the state was spending money to dispatch magistrates across county lines in order to fulfill the mandate of the law that there be officials available to issue licenses and conduct marriage ceremonies in place of the recusants. Thus, reasoned the plaintiffs, the state was spending money in violation of the Establishment Clause of the 1st Amendment to facilitate the religious refusal by some government employees to do their jobs. On September 20, U.S. District Judge Max Cogburn granted a motion by the state defendants to dismiss the case, in *Ansley v. Warren*, 2016 U.S. Dist. LEXIS 128081, 2016 WL 5213937 (W.D.N.C.). While rejecting the defendants' argument that the matter should be dismissed for lack of personal and subject matter jurisdiction and improper venue, Cogburn found merit to the argument that plaintiffs lacked Article III standing to bring the action, as they had no interest different from any other taxpayer to assert in this case. None of them were same-sex couples who had been denied services in a magistrate's office due to the recusal activities authorized under the statute. More pertinently, found Cogburn, "Plaintiffs have not pointed to the establishment of any specific appropriation of funds by the legislature to implement the allegedly unconstitutional purpose of S.B. 2. The funding provisions that Plaintiffs challenge here – travel expenses for magistrates and retirement contributions – are not 'expenditures made pursuant to an express [legislative] mandate and a specific [legislative] appropriation,' but are 'incidental expenditures of tax funds in the administration of an essentially regulatory statute,' which is not sufficient for the purposes of standing.'" Furthermore, he wrote, "The court also finds that Plaintiffs lack standing by virtue of the fact that their claims are merely generalized grievances with a state law with which they disagree, which cannot confer standing," citing to a Supreme Court ruling rejecting taxpayer plaintiff standing based on a theory that as taxpayers they "have a continuing, legally cognizable interest in ensuring that those funds are not used by the Government in a way that violates the Constitution." Since plaintiffs had not established personal injuries as a result of the law's application, and failed to come within the narrow taxpayer standing window established in Supreme Court precedent, the court dismissed their complaint, without taking any position as to the constitutionality of S.B. 2.

NORTH CAROLINA – The North Carolina Court of Appeals ruled in *Breedlove v. Warren*, 2016 WL 5030387 (Sept. 20, 2016), that the court lacked jurisdiction over a lawsuit brought by two former magistrates who had resigned rather than have to perform same-sex marriages. The magistrates argued that their resignations were

provoked by a guidance memorandum sent out to all the magistrates after the federal courts had finally determined that same-sex couples have a constitutional right to marry, advising the magistrates that they should begin performing same-sex marriages, as the refusal to do so could be the basis of an equal protection claim against them and ultimately could cost them their jobs. The two plaintiff magistrates assert that performing same-sex marriages would impose an unconstitutional burden on their freedom of religion. They sued the Administrative Office of the Courts and the person who was then serving as the Director of that Office, which had sent out the memorandum. Wake County Superior Court Judge George B. Collins, Jr., had granted a motion to dismiss, finding that the defendants had no authority to terminate the magistrate's employment, so there was no proper case and controversy grounding jurisdiction of the lawsuit. The court of appeals agreed with this analysis. Judge Ann Marie Calabria wrote for the court, "Although AOC is entrusted with statutory authority to establish and evaluate judicial compliance with regulations, rules, and procedures, the statutes cited above clearly show that AOC lacked the power, its memoranda notwithstanding, to sanction, suspend, or remove plaintiffs. As such, we hold that defendant slacked any authority to sanction, suspend, or remove plaintiffs." As a result, they were not proper defendants for this action. The court pointed out that the power to appoint and dismiss magistrates lies with the Chef District Court Justice in each county, under the general supervision of the Chief Justice of the North Carolina Supreme Court.

OHIO – Timothy Scott McKeny, a former assistant professor at Ohio University, claims he was denied tenure because he is gay. He sued various university officials and the institution in federal district court for state law claims of breach of contract, sex discrimination, civil conspiracy and infliction of emotional distress and federal claims under Title VII of the Civil Rights Act of 1964 (sex discrimination) and the Equal Protection Clause. *McKeny v. Middleton*, 2016 U.S. Dist. LEXIS 126499, 2016 WL 4944763 (S.D. Ohio, Sept. 16, 2016). In this ruling on pre-trial motions, District Judge James L. Graham agreed with the individual defendants that the state law claims against them are barred by official immunity, that 11th Amendment immunity requires dismissal of state law claims in federal court against the university, and that a prior action brought by McKeny in the Ohio Court of Claims bars state law claims against the individual defendants as well. In addition, the court noted that McKeny could not maintain his action under Title VII against individual defendants, only the institutional employer. The main event here, of course, will be the Title VII claim, specifically whether the court will allow McKeny to pursue what is in reality a sexual orientation discrimination claim under Title VII's ban on sex discrimination. McKeny sought to flesh out the claim and bring it within 6th Circuit jurisprudence by asserting he was a victim of gender stereotyping, even though, as he agrees with the defendants, his claim "is one for discrimination based upon his sexual orientation. But," notes Judge Graham, "he emphasizes that an aspect of his claim (and a means of proving it) will be how the individual defendants perceived his non-conformity with gender stereotypes to be an indication of his sexual orientation." Graham found that McKeny had exhausted his administrative remedies regarding this claim. "And plaintiff views his allegations of gender non-conformity not as a stand-alone Title VII claim [as in *Vickers*, a case where the 6th Circuit had rejected an attempt by a gay plaintiff to sue under Title VII for "gender-stereotyping" as such, see *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757 (6th Cir. 2006)], but as supporting his sexual orientation claim. Further, there is no dispute that plaintiff is not asserting a traditional gender discrimination claim." The defendants argued that the Title VII claim was time-barred, a matter of contention, and that "sexual orientation is not a protected category." There is a separate motion for summary judgment pending on these issues, and Graham said he would "defer addressing" them until he rules on that motion. Similarly, Graham reserved judgment on the equal protection claim for now. Graham did agree, however, that by filing his separate action in the Ohio Court of Claims, McKeny had waived his Section 1983 (Equal Protection) claims against the *individual* defendants in their individual capacities. Thus, although defendants were able to get a substantial portion of the case dismissed, McKeny's suit under Title VII and Section 1983 against the university and individual defendants in their official capacities remains alive, pending a ruling by Judge Graham on the outstanding motion for summary judgment. McKeny is represented by Beverly Joy Farlow and Chelsea L. Berger of Farlow & Associates, LLC, Dublin, Ohio.

OREGON – A continuing issue in recent years has been the claim by religious observers who are opposed to homosexuality that they suffer illegal discrimination in counseling degree programs, where the professional orthodoxy rejects traditional religious views of homosexuality. This issue plays out differently in court depending on the statutory framework, the forum, and the way the issues come up. In *Vejo v. Portland Public Schools*, 2016 WL 4708534 (D. Ore., Sept. 6, 2016), Margarita Vejo, "a Russian-born orthodox Christian" with decidedly conservative cultural views about

homosexuality, was enrolled in a program at Lewis & Clark College's Graduate School of Education and Counseling in Portland, Oregon. Part of the program involved internship placement in the public schools of Portland. Vejo's internship at Madison High School was terminated at the request of some school officials when they concluded, based on her statements about homosexuality, that they could not allow her to provide counseling to students unsupervised. In one incident in particular, she advocated contacting the parents of a student for permission before referring the student "who was struggling to make social connections" to the school's Gay-Straight Alliance, which led to a conversation with a school official about Vejo's views on homosexuality. As a result of her termination from the internship, she was not able to graduate with a degree in counseling from the L&C program as she had planned. The faculty provided her with alternative options, one of which would require extending her academic program and another, which she elected, to change her academic major. She brought this lawsuit against the Portland Public School District and some of the school officials involved in terminating her internship as well as against the college, which is a public institution. She alleged constitutional and statutory claims against both. While District Judge Ann Aiken dismissed some of Vejo's claims, she found that Madison High School was a place of public accommodation under the state's anti-discrimination law, and that the factual allegations would support a claim of discrimination because of Vejo's religion and nationality, finding that a jury might decide either way when presented with the evidence. (Part of the claim was that Vejo was subjected to stereotypes about Russian and orthodox Christian views of homosexuality because of her background.) Judge Aiken also found that Vejo could continue to pursue a breach of contract claim against the university, based on its own non-discrimination policy concerning religion and national origin which the judge found could be considered part of a contract between the college and its students. The judge found that the public school officials enjoyed qualified immunity on a Section 1983 claim, since it was "not obvious" that their actions violated Vejo's constitutional rights. The judge rejected Vejo's argument that Lewis & Clark was itself a place of public accommodation, finding that its selective admission policy excluded it from the statutory definition.

RHODE ISLAND – In *Bellisle v. Landmark Medical Center*, 2016 WL 4987119 (D. R. I., Sept. 15, 2016), U.S. District Judge John J. McConnell, Jr., granted the employer's motion for summary judgment on a claim that the plaintiff, Kayleigh Bellisle, was discharged and subjected to a hostile work environment because of her sexual orientation, and also granted summary judgment to her union, which had been charged with failing to properly represent her in the grievance procedures that followed disciplinary actions against her. As part of the ruling, Judge McConnell found that controlling 1st Circuit precedent holds that "Title VII does not proscribe harassment simply because of sexual orientation," citing *Higgins v. New Balance Athletic Shoe, Inc*., 194 F.l3d 252 (1st Cir. 1999), one of those old circuit court rulings that stand in the way of district courts in the circuit being able to entertain arguments that recent developments at the EEOC on this issue justify rethinking that position. However, Rhode Island's state anti-discrimination law does cover sexual orientation, and the plaintiff asserted a supplementary state law claim. As to that, "Ms. Bellisle has met the first three elements of the prima facie case. There is no dispute that, as a lesbian, she is a member of a protected class and the several claims of mistreatment and harassment, when taken in her favor, arguably meet the second and third elements. Where Ms. Bellisle's claim falters is upon examination of the record evidence on the fourth element – whether the harassment was sufficiently severe or pervasive." After briefly summarizing the evidence, the judge found that it failed to meet the high bar set by the 1st Circuit for a finding of unlawful hostile environment. One might question whether an objective observer reading through the court's summary would agree that this was insufficiently hostile or pervasive conduct to violate the state anti-discrimination law, but these are fact-specific judgment calls, difficult to overturn on appeal. The court also ruled against Bellisle on several other claims under federal and state law for a variety of reasons. Plaintiff's counsel is Michael F. Drywa, Jr., Sims & Sims LLP, Brockton, MA.

SOUTH CAROLINA – The *Anderson Independent Mail* reported on September 10 that an Anderson County jury had awarded $4.6 million in damages to a local woman who suffered a needlestick injury from a hypodermic needle that her daughter picked up in the parking lot of a Target store. The plaintiff suffered the needlestick injury when she tried to knock the needle out of her 8-year-old daughter's hand. The case went to the jury after the plaintiff, Denise Garrison, rejected a low settlement offer. After suffering the needlestick, Garrison was treated at AnMed Health, and was tested for HIV and HBV, but she tested negative for those pathogens so far. According to her allegations, Garrison was sickened and bedridden as a result of taking medication to prevent HIV infection from developing. State statutory limits on tort damages may result in her damage award being adjusted downwards in as a result of a post-trial motion by the defendant.

CIVIL LITIGATION

TENNESSEE – Fifty-three Republican state legislators, represented by the Constitutional Government Defense Fund, the litigation arm of the Family Action Council of Tennessee, announced that they had filed a motion to intervene in the pending appeal of *Witt v. Witt*, a ruling by Knox County Circuit Court Judge Greg McMillan that a same-sex spouse has no rights to seek custody or visitation with the girl who was born during her marriage to the girl's biological mother. The judge decided that the gendered language in the custody statute made clear that husbands, but not wives, would be deemed the legal parents of children born to their female spouses. The motion suggests that the legislators seek to intervene in support of Judge McMillan's ruling. *Knoxville News-Sentinel*, Sept. 13.

TEXAS – On September 2, Texas Supreme Court Justice John P. Devine issued a dissent from the court's denial of a petition to review a decision by the Texas Court of Appeals, which had vacated a temporary injunction against the provision by the city of Houston of employee benefits to the same-sex spouses of public employees. *Pidgeon v. Sylvester*, 2016 Tex. LEXIS 799, 2016 WL 4938006 (Tex. Sup. Ct., Sept. 2, 2016). The Court of Appeals ruling in *Parker v. Pidgeon*, 477 S.W. 3d 353 (Tex. App., 14th Dist., July 28, 2015), had, in addition to vacating the temporary injunction, remanded the case to the Harris County District Court, for that court to reconsider its preliminary decision that a Houston charter provision barred payment of employee benefits to same-sex spouses of city employees, in light of the U.S. Supreme Court's ruling in *Obergefell v. Hodges* (June 26, 2015), and the 5th Circuit's subsequent ruling in *DeLeon v. Abbott* (July 1, 2015), striking down the Texas ban on same-sex marriage. The genesis of this lawsuit was a 2001 referendum amendment to the Houston City Charter, which prohibits the city from "providing employment benefits, including health care, to persons other than employees, their legal spouses and dependent children." At that time, same-sex marriage was not available anywhere in the United States. Given its timing, this charter amendment was clearly inspired by the passage of the Vermont Civil Union Law in 2000 and a lawsuit then pending before the Massachusetts Supreme Judicial Court seeking same-sex marriage in that state, and the expectation that at some point same-sex couples would win the right to marry in some states. This expectation was fulfilled, with the first same-sex marriages performed in Massachusetts in May 2004, and several other states coming into line thereafter. In November 2013, the city, in recognition of the fact that some of its employees had married same-sex spouses in other jurisdictions, began to extend benefits eligibility to those spouses, based on a city attorney determination that comity should be extended to those marriages and, as such, the charter amendment would not bar paying them the same benefits that other spouses of Houston employees received. Two anti-gay Houston taxpayers filed suit against the City to enforce the charter amendment prohibition, arguing that Texas law prohibited the recognition of same-sex marriages performed out of state. The trial court granted a temporary injunction against payment of the benefits, and the city's openly-lesbian mayor, Annise Parker, the named defendant, appealed. While the appeal was pending, the U.S. Supreme Court decided *Obergefell* and the 5th Circuit decided *DeLeon v. Abbott*, 791 F.3d 619 (July 1, 2015). Under those rulings, Texas was required to allow same-sex couples to marry and to recognize same-sex marriages contracted in other states. After summarizing the holdings in *Obergefell* and *DeLeon*, the court of appeals said, "Because of the substantial change in the law regarding same-sex marriage since the temporary injunction was signed, we reverse the trial court's temporary injunction and remand for proceedings consistent with *Obergefell* and *DeLeon*." In considering Judge Devine's dissent, it is noteworthy that the court of appeals did *not* expressly state that the same-sex spouses are entitled to receive the benefits or that the charter amendment is voided by the federal court rulings. But Judge Devine argues in dissent that the equal protection analysis used by the Supreme Court in *Obergefell* (and echoed in *DeLeon*) did not compel a conclusion that same-sex spouses are entitled to the same benefits as opposite-sex spouses as a matter of federal constitutional law. He pointed out that the Supreme Court did not find sexual orientation to be a suspect classification, and had applied strict scrutiny to state marriage bans based on its conclusion that the right to marry is a fundamental right. Consequently, argued Devine, *Obergefell* is narrowly focused on the right to marry, and although the Supreme Court incidentally mentioned the various rights and benefits that flow from marriage, it did not expressly hold that there was a fundamental right to all of those rights and benefits. He reasoned that no fundamental right is involved in the receipt of employee benefits, and thus any equal protection challenge to differential benefits for same-sex and different-sex spouses of city employees would be subject only to rational basis review. Furthermore, he argued, the city charter provision, which could be construed (in light of its legislative history and the state of marriage law at the time it was enacted) as prohibiting the city from providing benefits – particularly health benefits – to same-sex spouses, might be supported by a rational basis and thus constitutional. He pointed out that the U.S. Supreme Court has actually upheld various statutory schemes that provide differential benefits that might be analogous. Perhaps the point of his dissent is to send a message to the

Harris County District Court that on remand it need not necessarily find that the charter amendment can be ignored by the city or construed, contrary to the assumed intention of its framers and the voters who ratified it, to ban these benefits. However, his reasoning seems a bit strained, as the amendment on its face *allows* the city to pay benefits to all legal spouses of its employees and does not mention the same-sex/different sex distinction that the plaintiffs pushed in 2013. In other words, the *Obergefell* decision retroactively ratifies the opinion of the Houston city attorney that the city must extend comity to same-sex marriages performed elsewhere, in which case these spouses would not be blocked from eligibility for benefits under the clear language of the charter amendment because they must be regarded as legal spouses under the law.

WISCONSIN – Granting summary judgment to plaintiffs, a married same-sex female couple who sought to have both women listed on their child's birth certificate, U.S. District Judge Barbara Crabb ruled that the state had discriminated unlawfully by treating this same-sex married couple differently from different-sex married couples. *Torres v. Seemeyer*, 2016 WL 4919978, 2016 U.S. Dist. LEXIS 124736 (W.D. Wis., Sept. 15, 2016). Chelsea and Jessamy Torres were married in New York in 2012. In 2014, they conceived A.T. through donor insemination, Chelsea becoming pregnant, using an anonymous donor. In 2015, after same-sex marriage became legal in Wisconsin as a result of marriage equality litigation, Chelsea gave birth to A.T. However, although at that point Wisconsin was required to recognize out-of-state same-sex marriages, the Department of Health Services issued a birth certificate that listed Chelsea as the sole parent. The department defended by arguing that under state law in order to get both parents listed in such a case of donor insemination, there would have to be a written consent by the non-biological parent at the time of the insemination. But Judge Crabb found that undisputed facts showed that the Department was not enforcing the written consent requirement against "different-sex married couples" until May 2, 2016, well after A.T.'s birth, when the Department "changed the forms that parents of newborn babies must complete." Since there was no policy justification for the unequal treatment, the Torres family is entitled to a proper birth certificate listing both parents, and since Judge Crabb had certified a class action of all married same-sex couples who had children through donor insemination during the relevant time period, her ruling extends to others similarly-situated. Lambda Legal had originally brought this case seeking a much broader class certification, but Judge Crabb had agreed with the Department's argument that a narrower certification should be made because the named plaintiffs did not present the same issues as would same-sex partners who had children after May 2, 2016, when the Department's policy changed, or same-sex partners who had written consents for the insemination. However, the judge noted that the Department has not altered its publications to make clear that it has changed the policy. It has not updated its forms "to be inclusive of same-sex couples and it has not provided any instructions to hospital staff regarding what they should do when a mother identifies her female spouse as a second parent on a birth certificate form. In fact," she commented, "the department has failed to identify any *internal* policies or memoranda instructing department staff what to do when they receive a request for a birth certificate from two parents of the same sex." Consequently, in light of this equal protection ruling, the department is setting itself up to be sued again if mistakes are made and people are wrongly denied appropriate birth certificates. "The department identifies no reason why it has failed to make the changes that even it acknowledges are necessary to comply with federal law, wrote Judge Crabb. "Same-sex marriage has been legal in Wisconsin since 2014, so there is little excuse for the department to be dragging its feet so long. If the department's inaction continues, it seems inevitable that more lawsuits will follow, bringing along with them the potential for large bills for attorney fees and even damage awards. The department should now act to prevent these lawsuits, minimize confusion and provide the equal treatment that same-sex couples are entitled to receive under the law." But, hey, reflexively anti-gay Scott Walker is the governor, so we're not holding our breath about voluntary change by Wisconsin's executive branch. The court ordered the department to employ a gender-neutral construction of Wis. Stat. Sec. 891.40(1) to ensure that "female married couples" do not suffer discriminatory enforcement of the law concerning parental status and identification of parents on birth certificates, and gave the parties a few weeks to submit a joint memorandum and proposed injunction to govern the issuance of two-parent birth certificates to "appropriate class members." Counsel for plaintiffs include Camilla Bronwen Taylor, Christopher R. Clark, Kyle A. Palazzolo of Lambda Legal, Chicago, IL, Clearesia Lovell-Lepak, Lovell-Lepak Law Office, Tamara Beth Packard, Cullen Weston Pines & Bach LLP, Madison, WI.

WISCONSIN – In a rare female same-sex harassment ruling that draws on the Supreme Court's decision in *Oncale v. Sundowner Offshore Services* (1998) for its legal analysis, U.S. District Judge Pamela Pepper ruled that the plaintiff had not presented evidence sufficient to sustain her claim of same-sex harassment in violation of Title VII, but that she could survive

the summary judgment motion on her claim of retaliation. *Brown v. Wisconsin Department of Corrections*, 2016 WL 5121756 (E.D. Wis., Sept. 20, 3016). The plaintiff was assigned as a phlebotomist at Racine Correctional Institute, an all-female prison. Her working environment consisted entirely of women as co-workers, supervisors and managers. She alleged that the manager in charge of monitoring her performance and attendance had subjected her to hostile environment harassment, included unwanted touching and kissing, and various comments of a sexual nature directed at her. Other female employees joined in, and the plaintiff complained about the conduct to which she was being subjected, which made her uncomfortable and interfered with her ability to do her job. She alleges that after she complained, she was subjected to adverse personnel actions, ending with her termination on pretextual charges of poor attendance and performance. She supported this claim through the testimony of her direct supervisor, who was on medical leave during the time when she was terminated, and who stated that when she returned from leave and learned about the termination, "I was shocked" because she considered the plaintiff a good worker and did not consider her attendance to be a problem. On her direct discrimination claim, plaintiff suffered a problem endemic to same-sex harassment cases where there is not clear evidence that the harasser is gay and sexually desires the plaintiff: lack of a comparator in a single-sex workplace that would demonstrate that she was treated differently from men. "The evidence does not support the plaintiff's claim that she was exposed to unwelcome words and behaviors because she was female, or that the alleged offenders treated her differently than they treated males," wrote Judge Pepper. "On this record, there is no way to tell whether the DOC or its employees . . . treated the plaintiff differently than they treated men, because there is no evidence at all of how they treated men." Title VII is not a harassment statute, rather it is a discrimination statute, and as the Supreme Court *emphasized* in *Oncale*, the plaintiff's burden is to show that she was subjected to discriminate *because of her sex*. It is not enough to show that the harassment she suffered was of a sexual nature. "Accepting, for the purposes of this motion, that the work environment the plaintiff describes was offensive, and that the offensive environment was severe or pervasive, the plaintiff has not alleged facts demonstrating that the behaviors were because of her sex. The behaviors the plaintiff describes can be characterized as crude, explicit, and unwanted – and thus, offensive to the plaintiff – but the plaintiff does not explain how they are specifically offensive or degrading to women," wrote the judge. "Title VII is meant to target wrongful conduct motivated by sex/gender, not to police general conduct in workplaces . . . While the behavior was related to sexual activity, the Supreme Court made clear in *Oncale* that harassment is not 'automatically discrimination because of sex merely because the words used have sexual content or connotations." However, the timing of her termination in relation to the complaints she made to management about the conduct to which she was subjected, together with the possibly pretextual nature of the citation of her attendance and performance as the reasons for the discharge, supported her retaliation claim, found Judge Pepper. It is not unusual for employers to escape liability for discrimination through pretrial motions but to still be held to account for retaliation because of the clumsy way that retribution is directed against an employee who complains about the way she is being treated. Here, Judge Pepper saw a "convincing mosaic of circumstantial evidence" that the plaintiff was discharged because she complained that she was being subjected to sexual harassment. Judge Pepper found that the plaintiff "has presented sufficient circumstantial evidence to allow a jury to reasonably conclude that the defendants strategically decided to terminate the plaintiff because of her complaints about sexual harassment, waited until [her supervisor] was out on medical leave so that she could not contest the decision, and then terminated the plaintiff on the pretext that she was being fired due to absenteeism and poor performance." Because the defendants challenged only the causation element of the retaliation factors, they had, at least as to this motion, waived the argument that her complaints were not protected activity because she could not meet the substantive test for establishing discriminatory harassment. In any event, an employee who could reasonably believe that they are being subjected to unlawful discriminatory conduct may claim statutory protection for filing a complaint about it, even if the complaint is ultimately found to be non-meritorious, because Congress wanted to protect the process of investigating allegations of discrimination by shielding employees who asserted complaints through an employer's grievance process.

CRIMINAL LITIGATION NOTES

FLORIDA – A state court jury in Fort Myers convicted Terry Brady of second-degree murder in the death of Yaz'min Schancez, a transgender woman. Brady fired half a dozen close range gunshots into Schancez and then attempted to set her body on fire. Sentencing before a Lee County judge was scheduled to take place on October 31. Prosecutors "didn't offer a clear motive for the homicide," reported the *Orlando Sentinel* on September 25, but the newspaper also reported that investigators "noted that two people told them they thought Brady had a sexual relationship with Schancez." The penalty for this conviction could range up to life imprisonment.

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GEORGIA – A Gwinnett County jury convicted James Allen Propes of reckless conduct by an HIV-infected person after he had sex with at least two women without telling them he was HIV-positive, according to a press release from Chief Assistant District Attorney Dan Mayfield reported in the *Gwinnett Daily Post* on September 9. Judge Tom Davis sentenced Propes, 24, to ten years in prison, calling him a "clear and present danger" to potential sexual partners. On September 13, the *Atlanta Journal and Constitution* reported that Propes had met his sexual partners through Craigslist, and that his victims had filed police reports after reading an article online about Propes having been charged and convicted of similar conduct in a different state.

KENTUCKY – The Supreme Court of Kentucky upheld the murder conviction of a transgender woman who had stabbed to death a man who was sexually accosting her during a New Year's Eve party. *Smith v. Commonwealth of Kentucky*, 2016 WL 5247712 (September 22, 2016). The defendant-appellant, Maddie Smith, is referred to by the court as a "transgendered individual," who is referred to as "she" throughout the opinion. Smith was in the process of transition when the murder occurred, but was presenting as female. She had been hesitant to attend the party because at a prior party the victim, Eric Schreiber, had made unwanted sexual advances to her, but "intent on letting 'bygones be bygones'" she attended the New Year's Eve party. As long as her hosts were awake, Schreiber behaved himself. But, according to Smith, the only living witness to what happened, after the host went to be, "Smith noticed an immediate change in Schreiber's demeanor. At the stroke of midnight, Schreiber approached Smith, wanting a New Year's kiss. Smith declined, and Schreiber became agitated." Smith claimed that Schreiber's unwanted advances "became more overt" and that at 5:30 am "Smith was in the kitchen washing dishes when she felt Schreiber approach her from behind, place both hands on her hips, and press himself into her lower back. Smith pushed Schreiber away and became very afraid. She grabbed a couple of knives from the counter and went outside. Once outside, she realized that she had left her keys and cell phone inside the house on the couch. Smith tried to reenter the house, but Schreiber blocked her entrance and attempted to kiss her. According to Smith, she then ran into the yard before tripping and falling, while Schreiber ran after her. Schreiber grabbed Smith, pinned her down, and attempted to remove her pants, at which point, she reached for the knives she had taken from the kitchen and flailed against Schreiber." She later admitted to Schreiber's wife, Vanessa, that she had killed Schreiber. Vanessa called the police, who found Schreiber's body on the lawn with 72 stab wounds, and Smith in the house washing blood from her hands and arms. "Smith had no defensive wounds and admitted to witnesses at the Longs' that she had stabbed Schreiber." The jury convicted her and sentenced her to forty years in prison. On appeal, Smith raised a variety of objections concerning evidence admitted or excluded, but the court found no merit to any of them. For example, Smith contended at trial that "she was not comfortable with her gender transition and was hesitant to go places for fear of abuse" and that because of this, "she was reasonably more prone to react violently toward male encroachment of her personal space." But she had posted on a social media a photo showing her standing with her arm around a man with both smiling "casually" at the camera. Smith objected to admission of the photo, but the court found it to be relevant to her argument, concluding that "the photo presents precisely the contention for which the Commonwealth offered it: Smith was comfortable with her transition and with men in her personal space." Smith also objected to exclusion of certain testimony by her expert character witness, the doctor who diagnosed her gender dysphoria and was prepared to testify about "hypervigilance" that transgender women have around sexually aggressive men. The court held that this was properly excludable on relevance grounds, because, "regardless of his opinion concerning hypervigilance in transgendered individuals generally, Dr. Noelker did not relate that opinion to Smith specifically." The court also rejected Smith's objection that she was limited to three out of her proposed character witnesses on the subject of her "character for non-violence," and that the trial judge improperly excluded evidence about the victim's prior alleged instances of violence and sexual misconduct. The supreme court pointed out that neither of the proposed witnesses' "testimony on avowal was consistent with what Smith contended it would be," as the conduct described was not similar to what Smith claimed had occurred on the night in question. Furthermore, the court found no error in the trial judge's admission of witness testimony about Smith's statements to the witnesses that she had stabbed Schreiber. Although the court agreed with Smith that there were some improper questions during her cross-examination, it found that Smith had not preserved her objects at trial, and the court found that the errors were not "palpable" and the jury received enough untainted evidence to support the verdict. Smith was represented on appeal by Assistant Public Advocate Julia Karol Pearson.

LOUISIANA – A gay "drifter" and sometime prostitute from the New Orleans French Quarter who was convicted of the murders of two gay men in a 1982 bench trial has been able to convince U.S. District Judge Sarah S. Vance to reject a magistrate's recommendation to deny his petition for

a writ of habeas corpus in *Floyd v. Cain*, 2016 U.S. Dist. LEXIS 124660, 2016 WL 4799093 (E.D. La., Sept. 14, 2016). No physical evidence linked John Floyd to either murder. "No weapon or other inculpatory item was found in Floyd's possession, and no coherent motive has ever been suggested," wrote Judge Vance. "Rather, Floyd's conviction was based entirely on his own statements: a signed confession and an alleged barroom boast." In seeking a writ of habeas corpus, Floyd presented later-analyzed forensic evidence (including DNA evidence) making it almost impossible that he committed the two murders. Furthermore, wrote Judge Vance, "The credibility of Floyd's confession is further undermined by new evidence supporting Floyd's consistent allegation that NOPD officers beat him to coerce his confession, and new evidence of Floyd's vulnerability to suggestion and limited mental capacity." In other words, under pressure to solve two murders, the NOPD detectives may have picked out a notorious local gay street person of limited mental capacity and beaten him into confessing to the crimes. Indeed, this sounds like a plausible characterization of criminal justice in New Orleans at that time, considering various press reports about the dysfunction of the local law enforcement establishment as well as some other cases cited by Judge Vance, including one in which a court was convinced that one of the detectives involved in Floyd's case had beaten a suspect in another case in order to obtain a confession. In reviewing testimony about the detectives involved in the case, it appeared that they most likely got Floyd drunk upon encountering him at a French Quarter bar, then subjected him to prolonged interrogation that included physical abuse, and then got him to sign a detailed confession as to both murders (which they wrote) that is unlikely to have been produced by a drunken, beaten man of his intellectual capacities. Taken together with the mismatch between his DNA and DNA evidence recovered at the scenes of both murders, it seems highly likely that Floyd, with competent legal representation, could make a strong case of actual innocence. Judge Vance headed one section of her analysis: "The Combined New and Old Evidence Excludes the Possibility That Floyd Killed Robinson in the Manner Described in his Confession and Strongly Suggests that Floyd Did Not Kill Robinson at All." Another is headed "The Combined New and Old Evidence Greatly Undermines the Persuasive Weight of Floyd's Confession and Evidence of his Boast in the Hines Murder." Furthermore, she concluded that "No Reasonable, Properly Instructed Juror Would Likely Vote to Convict Floyd of Murdering Hines Based on Only His Confession and Alleged Boast," which would be the only evidence, since there is no eyewitness or forensic evidence tying Floyd to the murder. Judge Vance remanded the case back to the magistrate judge for a proper consideration of Floyd's petition, which the magistrate had recommended be dismissed as untimely on the ground that he hadn't made an adequate case of actual innocence as required under Supreme Court precedents on habeas corpus, most recently *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013). Judge Vance's opinion reads like an advanced detective novel. Compliments to the New Orleans Innocence Project, Emily L. Maw, lead attorney, who put together the evidentiary showing that Judge Vance found so overwhelmingly convincing.

MASSACHUSETTS – In *Commonwealth v. Murphy*, 2016 Mass. App. Unpub. LEXIS 885 (Appeals Ct. of Mass., Sept. 15, 2016), John Murphy appealed his jury conviction on several charges of child abuse concerning two sons of his former girlfriend. The court used pseudonyms in referring to the sons, Leo and Mark. At the time of the alleged sexual abuse of Leo, Leo was over the age of sixteen and thus not considered a minor under Massachusetts law, leading Murphy to argue that he was improperly prosecuted because this was consenting adult sex. Leo denied that he consented, and rather argued that he had been raped by Murphy. The court's summary of the evidence at trial relates, "In June, 2009, the defendant took Leo to a motel in Saugus where he beat and raped him. Similar incidents occurred regularly until Leo moved out of the house in April, 2010. About one year later, close in time to Leo's nineteenth birthday, Leo sent a text message to his mother stating that the defendant had raped him. Leo was with his girlfriend, Jenny [also a pseudonym], when he sent the text message and then began to cry. He showed the message ('He raped me') to Jenny and subsequently told her that the rape occurred in Revere. Leo's mother did not respond to the text message and at trial she testified that she did not recall receiving it." Jenny testified at trial, after the court determined that the mother's lack of recollection disqualified her as a first witness. After Leo moved out of the house, Murphy began abusing Mark, who disclosed the abuse to his teacher after Murphy's relationship with the mother ended and he moved out of the house. On appeal, Murphy sought to bolster his consent argument regarding Leo by seeking admission of evidence from Leo's MySpace page, which "consisted of the following statement" contained within a URL: www.myspace.com/im_gay_with_my_dad." "During a voir dire conduct at the beginning of the trial," wrote the court, Leo testified that he did not create the statement and did not become aware of it until some point in 2008, before he met the defendant." The trial judge excluded it, ruling that it "was not probative of Leo's alleged consent. Rather, at best, the judge explained, the statement was probative of Leo's sexual orientation or propensity to engage in a certain type of sexual activity. As a result, the evidence was barred under the rape shield law." On appeal, Murphy

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continued to argue that the statement was relevant to his defense of consent, even though his main defense theory was that the allegations of sexual abuse were "fabricated." The court found no error in the exclusion of the URL. "Even if we were to assume that Leo created or adopted the statement and that the statement was relevant to show that Leo was open to being involved in a sexual relationship with a father figure (which we do not believe)," wrote the court, "the evidence was barred under the rape shield statute."

MICHIGAN – U.S. District Judge Paul L. Maloney denied a petition for a writ of habeas corpus filed by Jason Algra, pro se, who was convicted on criminal sexual misconduct with a teenage boy is serving five concurrent terms of imprisonment of 5-15 years following his jury conviction. *Algra v. Jackson*, 2016 U.S. Dist. LEXIS 126211 (W.D. Mich., Sept. 16, 2016). Algra, who was coaching swimming at the then-17-year old complainant's high school, was actually charged with also having sex with another student, then 15-years-old, but that student's reputation for exaggeration and hyperbole led the jury to resolve credibility issues against him and acquit Algra on the charges related to the younger complainant. Algra's conviction as to the 17-year-old was upheld by the state court of appeals, and the state's supreme court denied leave to appeal. Algra did not petition the U.S. Supreme Court to review this decision, instead filing for a writ of habeas corpus. Judge Maloney pointed out that under the Antiterrorism and Effective Death Penalty Act of 1996, the district court has very limited scope to upset a state court criminal jury conviction, putting the burden on the petitioner to show that the trial "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States or resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding," a standard that the Supreme Court has called "intentionally difficult to meet." It would be rare for a pro se petitioner to meet such a standard, and Judge Maloney found that Algra fell far short of the mark, rejecting his claims of prosecutorial misconduct and improper evidentiary rulings by the trial judge. Even though Maloney might fault some of the evidentiary rulings, he found that none of them were likely to have affected the outcome of the trial, given the clear evidence that Maloney had, indeed, had sex with a seventeen-year old student at the school where he was teaching on at least five occasions. In announcing that he would not grant Algra a certificate of appealability, Maloney wrote, "The Court finds that reasonable jurists could not conclude that this Court's dismissal of Petitioner's claims was debatable or wrong. Therefore, the court will deny Petitioner a certificate of appealability."

NEW YORK – Kings County Supreme Court Justice Danny Chun has convicted Mayer Herskovic, allegedly part of a neighborhood patrol of Satmar Chassidic Jews in Williamsburg, Brooklyn, of second degree assault, first-degree unlawful imprisonment, and menacing, in a 2013 attack on a gay black man who was left blind in one eye by the assault. Approximately twenty men are alleged to have been involved in the assault on Taj Patterson, but Herskovic's prosecution was successful because of DNA evidence confirming that he had touched Patterson. Two other members of the "patrol" had previously pleaded guilty to the unlawful imprisonment charge, and charges against two others were dropped. Herskovic's refusal to enter into plea bargaining led to his trial, which began on August 29. *Gay City News*, Sept. 23. Still pending is a separate lawsuit filed by Patterson against the city of New York, three police officers involved in the initial investigation (which was reportedly botched by the city), the five men who were charged in the criminal action and a sixth man who was not charged. The suit alleges that the city has looked the other way from misdeeds by the Chassidic neighborhood watch, and that the local precinct "closed" the investigation promptly without obtaining the testimony or evidence that was used at the trial after a hate crimes unit revived the investigation and determined to prosecute the case.

NEW YORK – Justice Arlene Goldberg of New York County Supreme Court has sentenced Bayna-Lekheim Al-Amin to nine years in prison and three years of post-release supervision for assaulting two gay men in the Dallas BBQ restaurant in Chelsea in 2015. El-Amin claimed he was acting in self-defense against Jonathan Snipes and Ethan York-Adams, who were then partners but are no longer together. Prosecutors claim that although at first El-Amin was defending himself, he continued to assault the two men after they had ceased to be belligerent, and ended up hitting the men with a heavy wooden chair when their backs were to him. Initial press reports stimulated claims that this was a hate crime. Then it turned out that El-Amin is also gay, and that the story related to the press by Snipes was incomplete. Ultimately, El-Amin received moral support at the sentencing hearing from about thirty gay people who wore armbands to signify their position. *Gay City News*, Sept. 15.

TEXAS – In *Arias v. State of Texas*, 2016 WL 4772352 (Ct. App. Texas – San Antonio, Sept. 14, 2016), the court rejected a 24-year-old defendant's argument that the state's Romeo & Juliet law was unconstitutional because it did not protect him from a statutory

rape charge when his sexual partner was a teenager who, he alleged, he thought was of an age to consent. Under the Texas law, a 24-year-old can never legally have sex with a person younger than seventeen, regardless whether he plausibly believes his consenting sexual partner is at least 17. The court rejected the defendant's argument that this violates his 14th Amendment rights, specifically rejecting his attempt to use *Lawrence v. Texas*, the U.S. Supreme Court decision that struck down the Texas Homosexual Conduct Law on due process grounds. Arias claimed that the law burden a fundamental right, but the Supreme Court never said in *Lawrence* that all consenting sex is protected as a fundamental right, explicitly limiting its ruling to adults and never describing the conduct protected as involving a fundamental right. (Argument continues in legal scholarly circles about what the standard of review was in *Lawrence*, but Justice Scalia, in dissent, observed that the Court had not labelled gay sex as a "fundamental right" and Justice Kennedy's opinion for the Court did not expressly refute this.) The court found that the state's justification of protecting minors from sexual exploitation by adults was sufficient under rational basis review to reject the defendant's equal protection and due process arguments, and found plenty of precedent supporting the proposition that the state's interest in protecting minors was sufficient to justify making this a strict liability defense where the defendant's argument that he believed his sexual partner was old enough to consent was essentially irrelevant.

PRISONER LITIGATION NOTES

ARKANSAS – In 2015, *Law Notes* wrote about HIV+ inmate Alan Doering's lawsuit regarding his medical care and segregation in the Sebastian County Jail (Ft. Smith) in *Doering v. Hollenbeck*, 2015 WL 4940622 (W.D. Ark., 2015), reported September 2015 at page 409, where U.S. Magistrate Judge Mark E. Ford dismissed claims against a mental health defendant. Now, Judge Ford issues a Report & Recommendation ["R & R"] in *Doering v. Hollenbeck*, 2016 WL 5380938 (W.D. Ark., July 29, 2016), that summary judgment be entered against Doering on all remaining claims. Before doing so, Judge Ford took the unusual step of taking live testimony about his claims from Doering (which proved to be a mixed blessing). During approximately 2-½ months in the jail, Doering alleges that he was denied HIV medication and placed in a strip cell, without pain medication or enough to eat, and forced to share the cell part of the time with a "disturbed" inmate who threatened him and gave him hepatitis-C. (Upon probing, Doering testified that this inmate was only in his cell with him for a few minutes and ever actually assaulted him.) Judge Ford found that Doering did not exhaust claims by filing grievances about protection from harm or conditions in the "suicide" cell. (Doering testified that he requested segregation but that he was not a danger to self, only to others, and that he needed protection). On the HIV medication, Judge Ford found that the physician defendant and nurse had been responsive and that Doering did receive HIV medication after two weeks (when his mother dropped it off at the facility, according to Doering). Doering was not able to say how his HIV status (first diagnosed in 1994) was affected by the delay. Even if his HIV condition was serious, Doering failed to show deliberate indifference to it by the physician or nursing defendants. Although Doering did not receive pain medication until he reached the state prison system, Judge Ford found the denial was not deliberate indifference because Doering was seen medically in the jail and was given anti-anxiety medication. In this regard Judge Ford judicially notices a Harvard website and the Merck Manual. Judge Ford also found contradictions between Doering's statements and his medical records. Doering also failed to show supervisory liability against the county sheriff or jail supervisor in any alleged civil rights violations – generalized allegations of "policies" not being following was insufficient. The R & R cites voluminous Eighth Circuit law on deliberate indifference under *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); but, although it seems apparent that Doering has mental health issues, Judge Ford earlier dismissed the only mental health defendant in the case and does not challenge the decision to manage Doering in a strip cell. *William J. Rold*

CALIFORNIA – Last April, U.S. Magistrate Judge Sandra M. Snyder dismissed transgender inmate Damien D. Olive's *pro se* challenge to cellmate assignments as discriminatory in *Olive v. Reynoso*, 2016 U.S. Dist. LEXIS 53077 (E.D. Calif., April 20, 2016), reported in *Law Notes* (May 2016 at page 205), finding lack of standing, mootness, and absence of personal involvement by the defendant – primarily because Olive was no longer at the substance abuse facility where the claim arose. Now, Olive is back in court again, still *pro se*, with allegations about the same substance abuse facility and about the California Department of Corrections and Rehabilitation ["CDCR"], in *Olive v. Harrington*, 2016 U.S. Dist. LEXIS 125128 (E.D. Calif., September 14, 2016), challenging policies about housing, showering, and strip searching of transgender inmates. A different magistrate in the same court (U.S. Magistrate Judge Barbara A. McAuliffe) screens this case and dismisses again. (There is no mention of the earlier dismissal or why this case should not be limited to CRDC defendants who now confine Olive). Judge McAuliffe finds it fatal that Olive did not allege that the challenged

actions ever happened to her (or even explicitly that she is transgender, despite the earlier case and decision). "Plaintiff is limited to seeking relief for herself, and may not pursue claims on behalf of other inmates," McAuliffe wrote, citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Olive also failed properly to allege supervisory liability of executive officials in any constitutional violation, and she incorrectly relied on the Prison Rape Elimination Act, since it has no private cause of action. "Plaintiff has not alleged that any Defendant instituted a deficient policy, or shown that such a policy was the moving force behind a deprivation of her constitutional rights, or that her injury could have been avoided with proper policies." Judge McAuliffe notes that, assuming the plaintiff can allege that her rights were violated, Olive "is not required to allege a named official's personal involvement in the acts or omissions constituting the alleged constitutional violation. Rather, a plaintiff need only identify the law or policy challenged as a constitutional violation and name the official within the entity who can appropriately respond to injunctive relief" – citing *Hafer v. Melo*, 502 U.S. 21, 25 (1991); *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). On the Eighth Amendment allegations of Cruel and Unusual Punishment, Judge McAuliffe dismisses allegations of "a practice of routinely placing transgender inmates in cells with non-transgender inmates, [and] a practice of uniform shower times and of invasive bodily searches" as "broad brush generalizations of potential scenarios not founded in concrete facts." Although inmates have a "limited right to bodily privacy," citing *Michenfelder v. Sumner*, 860 F.2d 328, 333 (9th Cir. 1988), Olive failed adequately to allege "repetitive and harassing searches" or "sexual abuse," under the standard of *Schwenk v. Hartford*, 204 F.3d 1187, 1196-1197 (9th Cir. 2000). If Olive can identify particular instances of violation of Equal Protection as to her, she may be allowed to proceed to have such claims evaluated against legitimate penological interests under intermediate scrutiny, citing *SmithKlineBeecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir.2014); and *Norsworthy v. Beard*, 87 F.Supp.3d 1104, 1119 (N.D.Cal.2015). Judge McAuliffe grants leave to amend. Unlike the previous screening dismissal, the instant opinion seems designed to help Olive pitch a ball across the plate in her third attempt, at least as to the CRDC defendants. *William J. Rold*

KENTUCKY – *Pro se* inmate James Tripp ordered *Night Hawks* and *Wicked Dreams* from a prison-approved vendor, which called the books "homoerotic." Tripp said they were "a collection of visually stimulating, mostly full-color, photographs of the male nude form." Kentucky's literature committee called them "pornography"; the warden said they "created a threat within a male institution." (They are on the internet, so non-incarcerated readers can decide for themselves.) In *Tripp v. Ky. Dep't of Corrections*, 2016 Ky. App. Unpub. LEXIS 658, 2016 WL 5335514 (September 23, 2016), Judge Debra Hembree Lambert, for herself and Judges Allison Jones and Irv Maze, upheld their suppression in prison under a First Amendment challenge of a regulation that authorized disapproval of "sexually explicit material which poses a threat to the security, good order, or discipline of the institution," including those "which depict: homosexuality, sadism, masochism, bestiality, and sexual acts or nudity with children." The opinion relies primarily on *Thornburgh v. Abbott*, 490 U.S. 401 (1989), finding it "sufficiently similar to "merit identical treatment." *Thornburgh* (in which this writer submitted an *amicus* brief) addressed the standard for review of all prison literature censorship under the First Amendment. It addressed sexually explicit materials only in a footnote, the point of the decision being the adoption of the deference to prison officials' penological judgment standard of *Turner v. Safley*, 482 U.S. 78, 89 (1987), against First Amendment challenges. The court quoted from *Thornburgh*: "[P]risoners may observe particular material in the possession of a fellow prisoner, draw inferences about their fellow's beliefs, sexual orientation, or gang affiliations from that material, and cause disorder by acting accordingly." 490 U.S. at 412-3. Nevertheless, the regulation in *Thornburgh* was actually more permissive than the one sustained here. It allowed exclusion of depictions of "homosexual acts" (as opposed to depictions of "homosexuality" under the Kentucky rule), and it allowed receipt of homosexual material that is "not sexually explicit" or does not "pose a threat to the institution." 490 U.S. at 405, n. 6. The Court also cited the pre-*Thornburgh* case of *Espinoza v. Wilson*, 814 F.2d 1093, 1098-99 (6th Cir. 1987), which upheld a general ban on homosexual publications. Oddly, it also cited *Rogers v. Martin*, 84 F. App'x 577, 579 (6th Cir. 2003), which upheld censorship only where alternatives were allowed, such as "nude photographs that do not depict sexual acts." Although the court noted that Kentucky had amended the regulations during the appeal (June 2, 2016) – omitting "homosexuality" entirely, making the standard sexual orientation neutral, and requiring that the banned material depict actual or simulated sexual acts – it said that its analysis of the new regulation under the First Amendment was "the same." *William J. Rold*

MICHIGAN – *Pro se* inmate Roy Bourne sued an officer and certain supervisors for violation of his civil rights after the officer allegedly falsely accused Bourne of performing oral sex on another inmate and denounced Bourne as "gay and sick" to others in nearby cells. Chief U.D. District Judge Robert J. Jonker dismissed the claims on screening under

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28 U.S.C. §§ 1915(e)(2) and 1915A in *Bourne v. Awomolo*, 2016 WL 4771240, 2016 U.S. Dist. LEXIS 124426 (W.D. Mich., September 14, 2016). Bourne lost a grievance after officials watched a videotape that did not corroborate his account. Judge Jonker dismissed as defendants the officials involved in the grievance denial because liability under § 1983 "may not be imposed simply because a supervisor denied an administrative grievance or failed to act based upon information contained in a grievance," citing *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999). He found that the officer's conduct, if true, was "extremely unprofessional," but it did not rise to the level of an Eighth Amendment violation, because Bourne did not allege that he "ever touched him or had any form of physical contact with him. Acts of verbal sexual harassment, standing alone, are insufficient to state a claim under the Eighth Amendment," he wrote, citing a string of cases. Judge Jonker also found no violation of Bourne's right to be protected from harm stemming from the officer's statements to other inmates because there was no "reasonable fear" of harm (Bourne did not even allege threats), and there was no "inferential connection" between the statements and a threat of violence, citing *Thompson v. County of Medina, Ohio*, 29 F.3d 238, 242-43 (6th Cir. 1994). Judge Jonker found that any appeal would be frivolous under 28 U.S.C. § 1915(g). *William J. Rold*

MICHIGAN – *Pro se* prisoner Floyd E. Kohn's odyssey as a black, LGBT inmate in Michigan's archipelago was reported previously in *Law Notes – see Federal Judge Allows Some Claims to Proceed by Gay Inmate Subjected to Hostile Environment* re *Kohn v. Unknown Myron*, 2015 U.S. Dist. LEXIS 1165 (W. D. Mich., Jan. 7, 2015) – reported Feb. 2015 at pages 55-6. Now, Kohn's new 32-page complaint (with 337 pages of exhibits) is screened by U.S. District Judge Robert Holmes Bell in *Kohn v. Unknown Ernst*, 2016 U.S. Dist. LEXIS 131200, 2016 WL 5349076 (W.D. Mich., September 26, 2016), where Kohn makes numerous allegations against over 40 defendants from several correctional facilities. Judge Bell allows Kohn to proceed on three causes of action: Eighth Amendment failure to protect, First Amendment retaliation, and Fourteenth Amendment Equal Protection. The opinion presents the factual background in exhausting detail, which should be read for a full flavor of the environment. Kohn suffered persistent racial and homophobic/transphobic hostility and slurs, which are not actionable by themselves ("although unprofessional and deplorable") – *see Johnson v. Dellatifa*, 357 F.3d 539, 546 (6th Cir. 2004; *Ivey v. Wilson*, 832 F.2d 950, 954- 55 (6th Cir. 1987). Judge Bell also found that a strip search prompted by genital speculation was also not actionable – *see Second Federal Judge Dismisses Claim that a Transgender Inmate Was Forced to Strip as Sport*, *Law Notes* (May 2015 at 203). The environment may matter, however, when it extends beyond words to other kinds of behaviors. Kohn pleads a violation of the right to be protected from harm under *Farmer v. Brennan*, 511 U.S. 825, 832 (1994), by alleging that officers bribed another inmate to beat her and deliberately assigned her a cellmate who had previously assaulted her. The First Amendment retaliation claims that are allowed to proceed involve actions taken to punish Kohn for filing grievances about her harassment. *See Smith v. Campbell*, 250 F.3d 1032, 1037 (6th Cir. 2001). They include framing her with bogus disciplinary charges (resulting in segregation) and placing her in a cell with noxious fumes for eleven days. While Michigan prison hearing officers have absolute immunity from civil rights claims (because they have a unique administrative law judge status wholly separate from the corrections system under Michigan law) – *see Shelly v. Johnson*, 849 F.2d 228, 229 (6th Cir. 1988) – the officers who retaliated can be sued, including here, for conspiracy. *Hensley v. Gassman*, 693 F.3d 681, 695 (6th Cir. 2012); *Hooks v. Hooks*, 771 F.2d 935, 943-44 (6th Cir. 1985). On Equal Protection, Judge Bell applied strict scrutiny to the race allegations and rational basis to the sexual orientation claims, citing *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 294 (6th Cir. 1997). [Note: The Sixth Circuit has adhered to this Equal Protection standard post-*Obergefell*. *See Ondo v. City of Cleveland*, 795 F.3d 597, 609 (6th Cir. 2015).] Judge Bell found that defendants were allegedly openly discriminating on the basis of both race and sexual orientation and that the claims that certain defendants took "action against [Kohn] on the basis of . . . race and sexual identity" could proceed, including against those who "told Plaintiff that because he was a homosexual, he was unmanageable." *William J. Rold*

NEBRASKA – Transgender inmate Riley Nicole Shadle (convicted as Dillon Shadle) has settled her lawsuit against the medical director of the Nebraska Department of Corrections, according to the *New York Times* (September 2, 2016), 2016 WLNR 26818177, based on reporting first appearing in the *Lincoln Journal Star*. According to court records, the case, *Shadle v. Kohn*, 15-cv-03132 (D. Nebr.), was settled on August 29, 2016, with an "agreed treatment plan" (terms not specified) and dismissal of the suit without prejudice by Senior United States District Judge Joseph F. Bataillon. When Shadle originally sued seeking hormone treatment for gender identity disorder, the state had denied her any-gender identity-related treatment as unnecessary "elective" care, according to grievance decisions. The court allowed the case to proceed under the Eighth Amendment and

appointed counsel: Jeanelle R. Lust of the Knudssen Bertheimer Law Firm, Lincoln. Ms. Lust stated: "I can tell you that Riley does have a serious medical condition that the prison is agreeing to treat as is its obligation to treat any serious medical condition." Spokespeople for the Nebraska Attorney General and Department of Corrections declined to state whether the settlement would create a path for how the state's prisons will deal with medical requests by transgender inmates going forward. *William J. Rold*

PENNSYLVANIA – In a Report and Recommendation ["R & R"] that reads like a law school civil procedure survey memorandum, U.S. Magistrate Judge Martin C. Carlson screened and recommended dismissal of Rodger Williams' *pro se* complaint alleging sexual orientation and gender identity discrimination in *Williams v. Harry*, 2016 U.S. Dist. LEXIS 115181 (E.D. Pa., August 25, 2016). Williams, who was incarcerated at the subject prison for one month this year, sought damages and a preliminary injunction, but he named only the prison superintendent, without allegations supporting personal involvement or supervisory liability. Williams alleged that officers "verbally harassed him" and did the following on one occasion each: left him outside in the rain; denied him toilet paper; and inappropriately touched his breast. [Note: Judge Carlson does not indicate that Williams is transgender; and he uses male pronouns throughout the R & R.] The failures to name proper defendants or support supervisory liability and the isolated nature of the acts should have been enough to justify the R & R, but Judge Carlson expansively continues, with dozens of cumulative cases and extraneous dicta. He discusses at length: screening standards, injunctive mootness caused by transfer, supervisory liability, consequences of not naming proper defendants, and the absence of an implied cause of action under the Prison Rape Elimination Act, 42 U.S.C. § 15602. The R & R also discusses the general rule that "verbal harassment alone" does not violate the Eighth Amendment, citing some dozen cases, without mentioning that some in the string have been qualified (if not directly overruled) by more recent decisions. *See Crawford v. Cuomo*, 2015 WL 4728170 (2d Cir., August 11, 2015), reported in *Law Notes* (September 2015 at 353-4) (distinguishing *Boddie v. Schneider*, 105 F.3d 857, 861 (2d Cir.1997) and holding that sexual harassment need not include "severe and repetitive" conduct if done with intent to humiliate); and *Beal v. Foster*, 2015 U.S. App. LEXIS 17338 (7th Cir., October 2, 2015), reported in *Law Notes* (November 2015 at 516-7) (holding that verbal harassment "alone" can suffice under certain facts). Williams' facts, as pleaded, however, seem insufficient even under these decisions. Judge Carlson recommends dismissal without prejudice and "one final" chance to replead. *William J. Rold*

TEXAS – *Pro se* inmate Jaime Covarrubias filed a 90-page Complaint alleging some 19 causes of action, which occupied at least two federal magistrate reports and a district judge *de novo* review. In *Covarrubias v. Foxworth*, 2016 U.S. Dist. LEXIS 125268, 2016 WL 4836864 (E.D. Tex., September 14, 2016), United States District Judge Ron Clark adopted a consolidated report finding most of the claims to be frivolous. Only the claims about strip searches warrant mention in this *Law Notes* report. Judge Clark permitted Covarrubias to proceed on a claim that a female officer, in a group of 2-3 other male officers, directed him to strip to his shorts and then open them (front and back) to reveal his genitals and buttocks. Discovery would presumably be permitted on whether the female officer's actions were covered by legitimate security concerns. Covarrubias maintained, however, that further privacy rights should have been recognized, given the "presence of criminally minded homoerotic persons" in the prison and the "prevalence of homoeroticism" in the Unit. Judge Clark observed: "No case has held that the possible presence of homosexuals, whether inmates or staff, gives rise to heightened privacy rights," and he found Covarrubias' objections in this regard "without merit." *William J. Rold*

VERMONT – A *pro se* transgender inmate sued the Vermont corrections commissioner and the superintendent of her prison for violation of her civil rights because: (1) other inmates harassed her, including opening a shower curtain and ogling her (after which she was required to shower alone when other inmates were locked down); and (2) for excluding her from participation in work camp because she identifies as female, resulting in loss of good time credits. In a Report and Recommendation ["R & R"] in *Cameron v. Menard*, 2016 WL 5017390 (D. Vt., August 24, 2016), U.S. Magistrate Judge John M. Conroy recommended dismissal of the Complaint, which sought damages and restoration of good time. First, Cameron's Complaint concedes she did not exhaust administrative remedies under the Prison Litigation Reform Act ["PLRA"], 42 U.S.C. § 1997e(a). She only sent her grievance directly to the Commissioner, omitting the intermediate steps, "because of fear of retaliation." Cameron also failed to proffer a "valid excuse" from exhaustion under *Ross v. Blake*, 136 S. Ct. 1850 (2016), by not alleging one of the following three recognized excuses: "dead end" futility; "opaque" remedies that are "practically speaking, incapable of use"; or prison officials' "thwart[ing]" of the grievance mechanism "through machination,

misrepresentation, or intimidation." 136 S. Ct. at 1859, 1860; *see also Williams v. Correction Officer Priatno*, 2016 WL 3729383, at *3 (2d Cir. July 12, 2016). Here, while Cameron mentioned "fear," she did not attribute the "thwarting" to state officials – as opposed to other inmates – as required. The showering allegation also did not allege "physical injury" – and the showering incident was not a covered "sexual act" under PLRA's incorporation of 18 U.S.C. § 2246 – as required by 42 U.S.C. § 1997e(e) of the PLRA. Cameron also failed to show how the commissioner and the superintendent were personally involved in the alleged constitutional violations. In this writer's view, the work camp claim may rise to the level of actionable policy, but the R & R found it "conclusory." Turning to the merits, *arguendo*, the R & R found insufficient seriousness of the showering claim to support an Eighth Amendment violation. As to the denial of participation in work camp, the R & R framed an Equal Protection claim on behalf of a class of "transgender individuals who identify as female" while other inmates are permitted work camp. The R & R referred to "intermediate scrutiny," citing *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (an illegitimacy and gender case); and *Adkins v. City of N.Y.*, 143 F. Supp. 3d 134, 138 (S.D.N.Y. 2015) (a transgender detainee case), but it found the Complaint too "vague and conclusory" to sustain the argument. The R & R recommended leave to amend, and the problems with the Equal Protection claim can probably be cured with more specificity about "selective treatment." *William J. Rold*

LEGISLATIVE & ADMINISTRATIVE

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT – Following the trend of rulings by other administrative agencies in recent months, the Department of Housing and Urban Development published a final rule on September 21, intended to "ensure that all individuals have equal access to many of the Department's core shelter programs in accordance with their gender identity," according to HUD's official news release about the rule, which was published in the Federal Register and will appear in the Code of Federal Regulations. The rule adds a new Section 5.106 to 24 CFR part 5, which is the existing Equal Access Rule for shelter programs operated with federal funding and thus subject to regulation by HUD.

U.S. HOUSE OF REPRESENTATIVES – Rep. Mike Honda (D-Calif.) has introduced H.R. 6254, which would amend the Communications Act of 1934 "to prohibit schools and libraries that receive universal service support from blocking Internet access to lesbian, gay, bisexual, transgender and queer resources." The bill, introduced on September 28, has 11 House co-sponsors, all Democrats. As such, it doesn't have a snowball's chance in hell of receiving a committee hearing, much less a floor vote, in the Republican-controlled House before the end of the current session.

CALIFORNIA – As September ended, Governor Jerry Brown signed into law several measures that had been championed in the legislator by LGBT rights advocates, among them: a bill requiring that all businesses, government buildings and places of public accommodation that have single-occupancy restrooms make them universally accessible by all genders by March 1, 2017; a measure restricting official state travel to states in which anti-LGBT discrimination is the law, such as North Carolina; a measure requiring counseling about prophylactic medication to prevent HIV transmission to be offered to all those who get HIV testing and test negative; and a measure requiring higher education institutions that receive public funds to disclose whether they have been granted a religious exemption from compliance with Title IX of the federal Education Amendments Act by the U.S. Department of Education, and thus may discrimination because of sex, sexual orientation or gender identity without violating the federal law. This last measure is premised on the argument that students deciding where to apply or enroll for higher education should be informed whether the institutions they are considering discriminate on these grounds.

INDIANA – The City of Auburn's Common Council voted on Sept. 20 to reject an amendment to the city's fair housing standards ordinance that would prohibit discrimination because of sexual orientation or gender identity. The ordinance forbids housing discrimination because of race, color, religion, sex, handicap or national origin. The Council unanimously passed the ordinance without the rejected amendment. *Vincennes Sun-Commercial*, Sept. 25. * * * Tippecanoe County commissioners voted unanimously to amend the county's anti-discrimination ordinance to add "gender identity" to prohibited grounds for discrimination, with a unanimous vote on second reading on Sept. 19. Other Indiana communities that ban such discrimination by ordinance include the cities of Lafayette and West Lafayette. *jconline.com*, Sept. 19. The Lafayette amendment adding gender identity to that city's ordinance (together with age and veteran status as the other new categories of prohibited discrimination) came in a unanimous vote on September 6, reported *AP State News*, Sept. 7. Also see *Journal & Courier*, Sept. 7.

LEGISLATIVE / LAW & SOCIETY

INDIANA – The State Department of Health has declared a public health emergency in Lawrence County, allowing the county health department to set up a needle-exchange program to stymie the spread of HBV and HIV. A non-profit that runs Monroe County's needle-exchange program will provide the same services in Lawrence County. State legislation authorizes this exception to the general ban against distribution of syringes without a medical prescription when a public health emergency is declared in a county due to the incidence of new infections by blood-borne pathogens. *Herald-Times*, Oct. 1, 2016.

MASSACHUSETTS – The Massachusetts Family Institute claims that it has collected enough petition signatures to place a measure on the state ballot in 2018 to repeal the recently enacted law adding gender identity as a prohibited ground for discrimination in public accommodations to the state's Law against Discrimination. Opponents of the measure call it a "bathroom bill" and assert that it will violate the privacy rights of Massachusetts citizens by requiring them to use restroom facilities that are also being used by transgender people, thus freaking them out. MFI claims that city and town clerks have certified more than 32,375 signatures of registered voters, more than enough to put the measure on the ballot, thus threatening to set-off a statewide fracas about transgender restroom rights. *AP Alerts*, Sept. 28.

MICHIGAN – The Michigan Board of Education voted 6-2 on September 14 to approve a set of guidelines intended to protect LGBTQ students. The guidelines include allowing students to use restrooms consistent with their gender identity, requiring training of staff on issues faced by LGBTQ students, and supporting students who want to form Gay-Straight Alliances at their schools. Republican state legislators were critical of the guidelines, with some suggestion that legislative override might be attempted. *Battle Creek Inquirer*, Sept. 15.

NEBRASKA – The Omaha Board of Education voted to add gender identity or expression to the district's anti-discrimination policy on September 7. The vote was unanimous, reported *AP State News* (Sept. 8), but, continued the report, "The newly revised policy does not contain guidance on restrooms and locker rooms. The board has discussed crafting a policy to address those issues but so far hasn't."

PENNSYLVANIA – Overruling the school administration, the Pine-Richland School Board voted 5-4 on September 12 to adopt a policy requiring students to use bathrooms corresponding to their biological sex, or unisex restrooms. Prior to the vote, transgender students in the Pine-Richland district had been allowed to use bathrooms consistent with their gender identity. The Associated Press report on this vote on September 13 did not mention whether any particular incident had precipitated the vote, but pointed out that the U.S. Department of Education has advised school boards that their districts might lose federal funding if they refused to allow transgender students to use bathrooms consistent with their gender identity. A majority of the board appears to have decided to test the resolve of federal administrations to back up their threats with action.

UTAH – The Ogden City Council voted unanimously on September 13 to create a Diversity Commission for the city, to serve as an advisory body to the mayor and the council on issues of concern to minorities in the city, including LGBTQ people. *Standard-Examiner*, Sept. 15.

WYOMING – The city council in Gillette, Wyoming, has passed a symbolic resolution "affirming the rights and protection of city employees from discrimination based on sexual orientation and gender identity." The resolution is merely an assertion to clarify the city's personnel policies, and has no legal enforcement mechanism. One member of the council, Robin Kuntz, voted no on the ground that the council lack's authority to make decision that the U.S. Congress or the state of Wyoming has not yet made. *AP State News*, Sept. 24.

LAW & SOCIETY NOTES

JUDICIARY STUDY – Lambda Legal has published a study, titled *Justice Out of Balance*, examining whether the method of judicial selection – appointment vs. election – makes a difference in LGBT related cases. The study, focused on state supreme court decisions, concluded that there is a statistically significant difference, with appointed judges more likely to rule in favor of LBT rights claims than elected judges. The study suggests that appointed judges are more likely to be insulated from popular opinion in making their decisions, while elected judges who plan to stand for re-election are much more sensitive to politically controversial issues. The study also found that all of the currently-serving openly LGBT state high court judges – ten at the current count – were appointed. The study also noted that white males are drastically over-represented on state high court benches relative to their proportion of the population and of the legal profession, and that although a majority of law students are now female, women

account for fewer than one-third of the judges in some states and as few as 16% in some. Judicial diversity tends to be higher in jurisdiction where judges are appointed, especially if there is a process for merit-based appointment rather than relatively unconstrained politically-based appointments. A PDF version of the full report can be downloaded from Lambda Legal's website.

DISENFRANCHISED TRANSGENDER CITIZENS – A study by the Williams Institute at UCLA Law School concluded that as many as 34,000 transgender people who have transitioned but have not obtained government-issued identification in their preferred gender sufficient to qualify for voting rights in eight states that have adopted strict voter identification requirements. The states in question are Alabama, Georgia, Indiana, Kansas, Mississippi, Tennessee, Virginia and Wisconsin. Study author Jody L. Herman stated, "Lawmakers and election officials should not overlook the impact on transgender voters when enacting voting restrictions based on identity documents. Voter ID laws impact many citizens who would otherwise be eligible to vote. Transgender people have unique, and sometimes insurmountable, burdens to obtain accurate IDS for voting in states that require it.

WHITE HOUSE CONFERENCE ON INCARCERATION – On September 20, the White House hosted a meeting with 150 formerly incarcerated LGBTQ people, policymakers and advocates to discuss "unique challenges faced by lesbian, gay, bisexual, transgender, and queer people and people living with HIV in the prison system," according to a press release by Lambda Legal. This was said to be the first such meeting at the level of the White House. The press release stated that although LGBT people make up about 4% of the U.S. population, about 8% of incarcerated persons identify as LGBTQ.

UNITED NATIONS – The United Nations Human Rights Council has appointed Vitit Muntarbhorn, a law professor from Thailand, as its independent expert on sexual orientation and gender identity issues. His task during the three year appointment is to raise awareness about the violence and discrimination LGBT face in the world. This position had been created with a vote of the Council on June 30, 2016, by a plurality of the Council. (Of the 47 member nations, 23 voted yes, 18 voted no, and 6 abstained.)

AIRBNB – In response to reports about discrimination by persons renting out their apartments through Airbnb, the organization announced a formal non-discrimination policy. Beginning November 1, Airbnb users must agree to treat fellow members without bias regardless of race, religion, national origin, sex, gender identity, sexual orientation or age," according to a September 8 report by *Reuters*.

PANICKY WEST VIRGINIA SCHOOL SUPERINTENDENTS – Marion County Schools Superintendent Gary Price announced that transgender students in his county may not use school bathrooms consistent with their gender identity, joining with superintendents in three other counties – Calhoun, Clay and Doddridge – who have made similar announcements. Only the Hardy County Schools have stated they will comply with the Obama Administration's interpretation of Title IX and allow transgender students to use such facilities. Most of the state's superintendents refused to give a straightforward answer when surveyed by the newspaper reporting this story, the *Charleston Gazette-Mail*, Sept. 13.

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ARUBA – The Parliament voted 11-5 on September 8 (with four abstentions) to grant same-sex couples the right to form civil unions covering many rights associated with marriage. Prior to the new enactment, gay couples from Aruba would have to plan their weddings to include a trip out of the country if they wants both parties to the marriage to have an active role in the ceremony.

AUSTRALIA – The media storm over Prime Minister Malcolm Turnbull's insistence that the question of same-sex marriage be put to an expensive and non-binding national plebiscite, with advocates for the pro and con sides to receive government funding to wage their campaigns, continued through September, as LGBT rights campaigners and leaders of opposition parties denounced the idea of putting this question to a national popular vote, arguing that it was an appropriate subject for legislation. There was widespread belief that a "free vote" in Parliament's lower house would result in passage, although more doubts were expressed about success in the Senate. * * * Queensland has joined the rest of the country in lowering the age of consent for anal sex to 16, which now becomes the age of consent for all sexual activity in Queensland. Prior to this move, anal was only legal for people age 18 or over, even though 16 was the age of consent for vaginal intercourse. *ABC Premium News*, September 15.

BELIZE – September 16 was the deadline for filing of appeals from the recent court decision holding Section 53 of the

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penal code (sodomy) unconstitutional. Appeals were filed by the government of Belize, the Catholic Church, and the National Evangelical Association of Belize. The churches' appeal is not focused on the issue of homosexuality per se, but rather more generally on the decriminalization of anal sex, which they consider to be immoral for all who engage in it, not just same-sex couples. According to a report by *7newsbelize.com* on September 16, Christian conservatives see the legalizing of sodomy as a "slippery slope" to an abandonment of moral standards dictated by Christian theology.

BOLIVIA – A new gender law has come into effect under which transgender citizens may register for identity cards that accurately reflect their gender identity, without any need to have undergone gender reassignment surgery. The first to register was transgender rights activist Pamela Geraldine Valenzuela, in a ceremony presided over by Luis Revilla, the Mayor of La Paz. She said, "I wouldn't let myself stop in my fight until I arrived at this moment, until the state recognized all transgender people in accordance with the identity that we have completely assumed." According to our press report source, *Antara – The Indonesian National News Agency* (Sept. 7), Bolivia's law follows the example of similar legislation in Britain, Colombia and Australia. According to a report by *Bolivian Express Magazine* (Sept. 30), as of August 1 at least 40 people had initiated the process of changing their name, gender and photograph on legal identification documents.

CHILE – *Reuters* reported on September 21 that Chile's President, Michelle Bachelet, announced at a U.N. General Assembly panel on LGBT rights that day that she would propose a bill to allow same-sex marriages in Chile in 2017, following up on the Congress's action in 2016 to allow same-sex civil unions. Other South American countries in which same-sex marriages are legal include Argentina, Brazil, Uruguay, and parts of Mexico.

CHINA – A local court in Beijing held its first hearing on September 12 in a case challenging certain approved school texts as "homophobic" because of their tendency to pathologize homosexuality and failure to recognize it as a normal variation of human sexuality. The plaintiff is using "Qiu Bai" as a pseudonym for fear of reprisals. Filing of the case attracted worldwide media exposure. Bringing such a case "in-country" is extremely brave, pseudonym or not. *Global Times*, Sept. 13.

ECUADOR – A transgender couple has produced a child in Ecuador, the husband (identified female at birth) having been impregnated with sperm from his wife (identified male at birth). A news report claimed this was the first such conception anywhere in the world, a claim that cannot be independently verified. According to the report, Fernando Machado and Diane Rodriguez "have not undergone full gender reassignment so were able to conceive naturally." Said Mr. Machado, "We live as man and woman. I'm a transfeminine woman and Fernando is a transmasculine man. The process to get here was complex for each of us." *News Chronicle*, 2016 WLNR 29200146 (Sept. 26).

GHANA – Minister of Health Alex Segbefia announced that Ghana has accepted the recommendation of the World Health Organization that the government undertake to finance and promote the testing and treating for HIV of at least 90 percent of the population by 2020. Everybody who tests positive will be put on treatment provided at no charge by the government, beginning October 1, 2016, and by January 2017, implementation would be "scaled up" to cover the entire country, reported *Daily Guide Ghana* on September 15. "This is government's commitment to ensure that no Ghanaian dies from AIDS or AIDS-related causes," said Minister Segbefia.

GUERNSEY – Legislators voted on September 21 to allow same-sex marriage in Guernsey, an autonomously governed island state in the English Channel that is part of the United Kingdom. This makes Northern Ireland the only part of the British Isles that does not yet allow same-sex marriage. The legislative vote was 33-5, following up on an overwhelming preliminary vote that had been taken in December 2015. The legislature had undertaken a "public consultation" before acting, and reported that 90% of respondents favored a "non-discriminatory equitable system for the legal recognition of committed couples."

HAITI – An LGBT cultural festival that was scheduled to be held in Port-Au-Prince, the capital, was cancelled at the orders of Capital Commissioner Jean Danton Leger, who said he had done so because of threats of violence by opponents of LGBT rights, as well as the Commissioner's desire to protect Haiti's "moral and social" values. *Boston Globe*, Sept. 28.

INDIA – The Thane District Court has ruled that a husband must provide financial support for his HIV+ wife and their child, according to a September 28 report in *Afternoon Voice*, 2016 WLNR 29659638. The wife was discovered to be HIV+ when a blood test was done after she became pregnant. Following this diagnosis, the husband sent his wife to live with her parents, and they bore the expenses of her pregnancy

and delivery. She went to court seeking a monthly maintenance payment. A judicial magistrate awarded her such a payment, and the husband appealed to the District Court, which upheld the ruling. Judge Jadhav observed that "the woman is residing with her parents because of refusal by opponents (husband his family) to allow her to cohabit with them." How she acquired HIV infection has not been determined, but the court observed, "The fact that she was diagnosed HIV+ after the marriage is itself sufficient to conclude that she got infected while continuation of her marital relationship with the opponent." This, of course, is not to say that she was necessarily infected through sexual contact with her husband. There are mysteries here. But obviously the court would not countenance the argument that a husband is relieved of financial responsibility to support his wife and children just because his wife is found to be HIV+." The news report did not mention the HIV status of the child.

INDONESIA – Claiming that it had discovered a link between Grindr and a "pedophile ring," the Indonesian government is reportedly blocking three gay networking apps, Grindr, Blued, and BoyAhoy. A communications ministry spokesperson told *Agence France Presse* (Sept. 15) that these apps are "most clearly promoting gay lifestyles" because they promote "sexual deviancy." The ministry sent letters on September 15 to internet service providers requesting them to block the designated apps. Ironically, Indonesia if, according to the AFP report, one of the few countries in Asia where gay sex is not illegal.

ITALY – Here's an odd-sounding case. The Supreme Court – La Corte di Cassaione – has ruled that it is not a crime for a person to masturbate in public, as long as no minors are around to be inspired by observing the defendant's performance. The defendant, identified in the court's opinion by his initials PL, as careless enough to let himself be apprehended while doing the nasty in Catania in front of students on the University campus there, and was sentenced to three months and ordered to pay a fine of the rough equivalent of $3,600. The court does not mention whether he was to be confined with his hands tied behind his back, although such a measure would seem a logical way to prevent recidivism, at least while he was incarcerated. The court found that a change to the existing criminal code made last year had effectively decriminalized the act, so long as a minor did not witness it. The court vacated PL's sentence, and remanded for a determination whether his conduct was still subject to punishment under different statutes. The CNN news report of September 8 about this case did not report on whether any minors actually observed the defendant's performance, or whether the police had the forbearance to allow PL to finish what he had begun before arresting him, assuming no minors were present.

MEXICO – The continued spread of marriage equality has finally aroused an organized backlash, fueled in part by Catholic Church authorities backed up by Pope Francis, resulting in large anti-marriage-equality demonstrations. The particular trigger seems to have been a proposal by the president to achieve nationwide marriage equality through legislation. Even though legislative leaders have not shown enthusiasm for advancing the proposal, it has set off alarm bells in the Church and other conservative quarters as it generated increased discussion of the issue in news media. A substantial minority of the country now lives in states where marriage equality is legal and licenses can be obtained from clerks without court orders. Elsewhere in the country, the trial courts are obligated under a Supreme Court ruling to issue such orders at the request of same-sex couples, and marriages validly performed anywhere in the country are entitled to country-wide recognition by government institutions, regardless where the couple resides. (The obligation of lower courts to issue such orders was reinforced on September 28, when a chamber of the Supreme Court dealt with state appeals of such orders from Chiapas, Hidalgo and Nuevo León, reiterating its prior ruling that refusal to issue such orders, called amparos, violates the constitutional rights of same-sex couples.) Thus, although Mexico can't be fully counted among the nations with marriage equality, as a practical matter same-sex couples who want to marry can do so, even if it means some travel or litigation expense, and their marriages will generally be recognized by the public sector, if not invariably by all private actors. The Church's activist intervention in the marriage debate has led Mexico's marriage equality organization, Matrimonio Igualitario, to file a formal complaint with the federal Secretary of Governance against the Catholic Archdiocese in Mexico City, asserting that the Church has broken the law by actively opposing legislative advances on non-discrimination matters and by promoting the anti-marriage-equality demonstrations. This was said to violate Article 8 of the federal Law of Religious Associations and Public Worship, under which religious bodies are not supposed to meddle in secular governance matters, in order to safeguard the freedom from religious oppression of all Mexicans, including those who do not adhere to church doctrine in their private lives. One group of activists, criticized by some others as violating personal privacy rights, even took the step of publicly "outing" several closeted gay Catholic priests as hypocrites for their public opposition to marriage equality. * * * Just a day before a major Catholic anti-marriage-

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equality demonstration, the full bench of the Supreme Court of Justice issued several rulings stemming from an earlier decision in which it had rejected constitutional challenges to Mexico City's marriage equality law. The new ruling reiterated in stronger language many points from the earlier ruling, most particularly about adoption. An English version of the relevant paragraph states: "ADOPTION. The best interest of the minor is based on the suitability of the adopters, within which are irrelevant the type of family into which [the minor] will be integrated, as well as the sexual orientation or civil status of [the adopters]." This opinion from September 23 is identified as Jurisprudence Thesis 8/2016 (10a.), expanding upon Action of Unconstitutionality 8/2014.

NORWAY – Norway is the fifth country to allow adults to legally change their official gender without producing medical evidence of gender transition, according to a September 27 report by the *Associated Press*. Under recently-enacted law, there is no requirement for surgery or counseling, and "the process is as easy as filing a tax return." So far, no application from an adult has been turned down. Minors must have written parental consent to have their official records changed. Children as young as age 6 can seek a change of gender identification.

PAKISTAN – Representatives of the transgender community have filed a petition in the Peshawar High Court seeking redress against the government's refusal to include a place on the census form for transgender people to identify themselves. Under the current form, every person must declare their sex as either male or female with no room for declaring membership in the transgender community, identity as male/female transgender, or intersex. The petitioners, who named numerous government agencies as defendants, alleged that this situation violates their constitutional rights under a 2009 ruling by the Chief Justice of Pakistan, which directed the National Database Registration Authority to recognize transgender status and record people accordingly. *BBC International Reports*, Sept. 6.

SERBIA – What if they held a Gay Pride Parade and there was so much security that almost nobody saw it take place? This was the experience in Belgrade on September 18, when more than 5,000 police and army security officers were put into position along the downtown route of the parade, such that few could view it but the parade participants were safe. The government had shut down the annual Pride Parades for several years after anti-gay forces in 2010 caused a riot in which there were many injuries and over 100 arrests. Parades resumed a few years ago, but with a heavy police presence discouraging those who might want to stand on the sidelines and lend their support. *Xinhua News Service*, Sept. 18.

TANZANIA – The Deputy Minister for Health, Hamisi Kogwangala, announced that the government, out of its high regard for "traditional values," is considering banning NGOs (non-governmental organizations) that are found to be "promoting" the rights of LGBTI people. Gay sex is illegal in the country, with a maximum penalty of 30 years in jail. The minister commented, in a report published by the Thomson Reuters Foundation on Westlaw (Sept. 8), "I cannot deny the presence of LGBTI people in our country and the risk they pose in fueling the spread of HIV/AIDS, but we don't subscribe to the assertion that there's a 'gender continuum.' We still recognize two traditional sexes and there's nothing in between or beyond. Any effort to claim otherwise is not allowed. Tanzania does not allow activist groups carrying out campaigns that promote homosexuality. Any attempt to commit unnatural offences is illegal and severely punished by law." A month earlier Dar es Salaam Regional Commissioner Paul Makonda announced a crackdown on gay people, stating that the police would use social media platforms to identify and arrest people suspected of being gay in that city. Earlier, the government had aroused international ridicule by announcing a ban on the importation of lubricants as an anti-HIV measure, contending that without the availability of lubricants the amount of anal sex was bound to decrease. We suspect their public health officials have been watching too many C-Span broadcasts of U.S. Congressional committee hearings; it's the only explanation for some of their cockeyed views about science and public health, which sound suspiciously like those promoted by certain Republican congressmembers.

UGANDA – Simon Lokodo, the Minister of Ethics and Integrity, stated that the police would arrest organizers who are planning to hold a gay pride parade in Kampala, the nation's capital. Homosexual sex is illegal in Uganda pursuant to a colonial-era law, and in 2014 that legislature passed and the president signed a draconian anti-gay law, that was subsequently declared invalid by the courts due to the lack of a proper procedure when it was enacted. *AP Worldstream*, Sept. 21.

UNITED KINGDOM – Lord Ivar Mountbatten, a cousin of Queen Elizabeth and great-great-great-grandson, has become the first British royal to "come out" as gay and speak publicly about his life. He has three children from a marriage with Penelope Thompson that ended in divorce in 2011. He recently told family and friends that he identifies as gay and introduced them to his partner, James Coyle, an airlines

management employee, whom he met in March while on a ski vacation in Switzerland. Mountbatten stated that he told Penelope Thompson that he was bisexual when they were dating and that she was understanding about his attraction to men. Mountbatten said that his decision to come out was supported by Thompson, his children, and members of the wider royal family. *Independent Online*, Sept. 18.

PROFESSIONAL NOTES

STUART DELERY, who resigned as former acting associate attorney general from the U.S. Department of Justice last April, is joining the Washington, D.C., office of Gibson, Dunn & Crutcher, according to a September 12 announcement by the firm. Delery was the highest-ranking openly gay official to serve in the Justice Department. He had been a partner at Wilmer Cutler Pickering Hale and Dore before joining DOJ in 2009. At Justice, Delery headed the Civil Division, overseeing the department's work on antitrust, civil litigation, civil rights, environmental and natural resources and tax enforcement.

"Vermont" cont. from pg. 421

The Vermont Supreme Court agreed with Solomon and Guidry that this affidavit is sufficient to satisfy the criteria of the statute, and there was no need for them to go through the motions of seeking a dissolution in a North Carolina court before applying for one in Vermont.

"It would reach beyond both the written letter and the Legislature's intent to hold that the 'acknowledgment' must also include actual showing of an attempt to file in the other state," wrote Justice Skoglund. The court reversed the trial judge's ruling and remanded the case for that court to "follow the dictates of Section 1206(b)."

Solomon is represented by Amy K. Butler of Montpelier, Vermont. Guidry, who urged the court to grant Solomon's appeal, is *pro se* in this matter. ■

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EDITOR'S NOTES

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