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FEDERAL COURT HALTS PLANS FOR TRANSGENDER TROOP BAN

Judge Says "Absolutely No Support" for President Trump's Claim of Harm to Military

EXECUTIVE SUMMARY

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Federal Judge Blocks Implementation of Trump's Transgender Military Ban

In a blunt rebuke to President Donald Trump, U.S. District Judge Colleen Kollar-Kotelly, discerning no factual basis for Trump's July 26 tweet decreeing a ban on military service by transgender people or the August 25 Memorandum fleshing out the decreed policy, issued a preliminary injunction on October 30, the effect of which is "to revert to the status quo with regard to accession and retention that existed before the issuance of the Presidential Memorandum – that is, the retention and accession policies established in the June 30, 2016 Directive-type Memorandum as modified by Secretary of Defense James Mattis on June 30, 2017." *Doe v. Trump*, 2017 U.S. Dist. LEXIS 178892, 2017 WL 4873042 (D.D.C. Oct. 30, 2017).

The practical effect of the preliminary injunction, which will stay in effect until the court issues a final ruling on the merits of the case (unless an appellate court reverses it in the meanwhile) is that the policy on transgender service announced on June 30, 2016, by former Secretary of Defense Ashton Carter during the Obama Administration, will remain in effect and the President's tweet and subsequent Memorandum purporting to revoke these policies, which the Administration planned to put into effect in February and March, are blocked for now. By incorporating reference to Secretary Mattis's June 30, 2017 Directive, the judge's order requires that the Defense Department allow transgender people to enlist beginning January 1, 2018.

Trump's August 25 Memorandum had specified that the policy it announced would go into effect by no later than March 23, 2018, regarding the requirement to discharge all transgender personnel, and that the ban on enlistments would be permanent, at least until the President was persuaded that it should be lifted.

Key to the October 30 ruling was Kollar-Kotelly's conclusion that at this stage the plaintiffs, represented by the National Center for Lesbian Rights and GLBTQ Advocates and Defenders, have adequately established that they are likely to prevail on the merits of their claim that a ban on military service by transgender people violates their equal protection rights under the 5th Amendment, and that allowing the ban to go into effect while the case is pending would cause irreparable harm to them that could not be remedied later by monetary damages.

"As a class," she wrote, "transgender individuals have suffered, and continue to suffer, severe persecution and discrimination."

The judge concluded that a policy that explicitly discriminates against people because of their gender identity is subject to "heightened scrutiny" under the 5th Amendment, which means that it is presumed to be unconstitutional and the burden is placed on the government to show an "exceedingly persuasive" reason to justify it. "As a class," she wrote, "transgender individuals have suffered, and continue to suffer, severe persecution and discrimination. Despite this discrimination, the court is aware of no argument or evidence suggesting that being transgender in any way limits one's ability to contribute to society."

This was staking out new ground in the absence of a clear precedent by the U.S. Court of Appeals for the District of Columbia Circuit or the Supreme Court. Alternatively, she noted, other courts of appeals in the 6th and 11th Circuits have ruled that gender identity discrimination is really sex discrimination and should be evaluated by the same "heightened scrutiny" standard that courts use to evaluate sex discrimination claims against the government. (A petition by the Kenosha, Wisconsin school district is pending at the Supreme Court presenting the question of whether gender identity discrimination is sex discrimination, in the context of Title IX of the Education Amendments of 1972 and bathroom access in public schools.)

As for the justifications advanced by the government for Trump's ban, the judge wrote, "There is absolutely no support for the claim that the ongoing service of transgender people would have any negative effect on the military at all. In fact, there is considerable evidence that it is the discharge and banning of such individuals that would have such effects."

The judge also concluded that the public interest is served by blocking the ban, since harm to the military from allowing transgender service was non-existent while letting the ban go into effect would actually impose significant costs and readiness issues on the military, including the loss of a large investment in training of transgender people now serving and the cost of recruiting and training people to take their places.

A major part of Judge Kollar-Kotelly's decision was devoted to refuting the Administration's contention that she did not have

jurisdiction to decide the case. She characterized their arguments as raising a "red herring," at least in terms of the retention and accession portions of Trump's Memorandum. The government argued that because the August 25 Memorandum delayed implementation of the policy until next year, nobody had standing to challenge it yet, as none of the individual plaintiffs in the case has suffered tangible harm. The judge accepted the plaintiffs' argument that both intangible and tangible harm was imposed as soon as Trump declared his policy, specifically stigmatizing transgender people as unworthy to serve, tarnishing their reputations, and creating uncertainty and emotional distress as to their future employment. Furthermore, federal courts have long held that depriving a person of equal protection of the laws imposes an injury for purposes of constitutional standing to mount a legal challenge against a policy.

The issue that seems to have provoked Trump's July 26 tweet was military payment for sex reassignment surgery. Several Republican House members, outraged by that chamber's rejection of their proposed amendment to the Defense appropriations bill to bar any payment by the Department for such procedures, complained to the president and reportedly threatened to withhold their support for the must-pass appropriations bill if their demand was not met. The simple-minded president apparently jumped to the obvious conclusion: barring all transgender people from the service would solve the problem while satisfying the anti-transgender biases of his political base. In common with his other major policy proclamations announced via Twitter, this seemed to be impulsive, not vetted for legality or defensibility, and oblivious to the harm it would do to thousands of people.

The way in which Trump announced his decision contributed to the judge's conclusions. The policy was announced without any factual basis, by contrast with the 2016 policy decision, which followed several years of study, a report by the RAND Corporation (a widely-respected non-partisan military policy think tank), wide-ranging surveys, and the participation of numerous military officials. The outcome of all this study was a well-documented conclusion that there was no good reason why transgender people should not be allowed to serve, explicitly rejecting the grounds raised by Trump in support of his decision. The judge noted the irony of Trump's methodology: first announce a ban, then a month later task Defense Department leaders with setting in motion a process to study the issue, and mandate that the policy go into effect several months later, with the study limited to recommending how to implement the ban.

Attorneys for the government argued, in effect, that the policy is still in development and that at present it is not clear what the final, implemented policy will be, including whether it would provide discretion to military leaders to decide whether to discharge individual transgender personnel or to allow particular individuals to enlist (such as, for example, highly qualified people who had already transitioned and thus would not be seeking such procedures while serving). Their arguments lacked all credibility, however, in light of the absolute ban proclaimed by Trump on July 26, and the directive to implement that ban contained in the August 25 Memorandum.

Judge Kollar-Kotelly granted the government's motion to dismiss the part of the complaint relying on the theory of "estoppel" as opposed to their constitutional claim. She found that none of the plaintiffs had alleged facts that would support a claim that they had individually relied on the June 2016 policy announcement and its implementation in a way that would support the rarely-invoked doctrine that the government is precluded from changing a policy upon which people have relied.

Despite its length (76 pages), Judge Kollar-Kotelly's opinion left some ambiguity about the very issue that sparked Trump's tweet–availability of sex reassignment surgery for transgender personnel while this case is pending. Trump cited the cost of providing such treatment as one of the reasons for his ban, but the judge noted that the actual costs were a trivial fraction of the Defense Department's health care budget.

However, the judge granted the government's motion to dismiss the part of the complaint that specifically challenged Trump's August 25 Memorandum dealing with sex reassignment surgery, because she found that none of the individual plaintiffs in the case had standing to challenge it or to seek preliminary injunctive relief against it while the case is pending. Among other things, the August 25 Memorandum provided that such procedures could continue to be covered until the implementation date of the policy next year, and that transitions that were under way could progress to completion. And the government represented to the court that those procedures would continue to be covered at least until final implementation of the policy. The dismissal was "without prejudice," which means that if additional plaintiffs with standing are added to the complaint, this part of the case could be revived.

On the other hand, attorneys for the plaintiffs, announcing that the ruling was a total victory for their clients, argued that the order to revert to the June 2016 policy while the case is pending necessarily included the part of that policy that allowed for coverage of sex reassignment by the Defense Department for serving personnel. This conclusion is plausible but not certain, because the conclusion of the judge's opinion specifies that the preliminary injunction applies to "the retention and accession policies" established in June 2016 and doesn't explicitly say anything about coverage of reassignment procedures. Of course, if DoD balks at covering the

procedures, the plaintiffs can go back to the judge for clarification.

Response to the opinion by the White House and the Justice Department was dismissive, suggesting that an appeal is likely. Judge Kollar-Kotelly's opinion is not the last word, since similar motions for preliminary injunctions are on file in several other district courts around the country where other groups of plaintiffs have filed challenges to the ban.

Judge Kollar-Kotelly's judicial career began when President Ronald Reagan appointed her to be a District of Columbia trial judge in 1984. President Bill Clinton appointed her to the U.S. District Court in 1997. Although she became eligible to take senior status many years ago, she continues to serve as a full-time active member of the federal trial bench at age 74. Her rulings in major cases exhibit an independent, non-partisan approach to deciding politically-charged cases, with no clear predispositions reflecting the presidents who appointed her.

On the political front, Trump's policy declaration and memorandum brought bipartisan criticism, including from the Republican Chair of the Senate Armed Services Committee, Senator John McCain of Arizona. In the House, Rep. Jackie Speier of California introduced H.R. 4041, to provide for the retention and service of transgender members in the Armed Forces, with a bipartisan list of initial co-sponsors: Charlie Dent (R-Pennsylvania), Susan Davis (D-California), Ileana Ros-Lehtinen (R-Florida), Adam Smith (D-Washington), and Kyrsten Sinema (D-Arizona). Of course, as in so many subject areas, the Republican members willing to buck the president by co-sponsoring this bill have all announced that they are not seeking re-election to the House in 2018. It is difficult to find incumbent Republican legislators who are standing for re-election next year who are willing to oppose Trump openly on any policy question, despite their personal disagreement with his positions. ■

Sessions Dismantles Justice Department Pro-LGBT Policies Adopted During Obama Administration

During the 2016 presidential campaign, Donald J. Trump posed as a friend of the LGBT community, waved a rainbow flag from the stage of a campaign rally, and proclaimed that as president he would be better for "the gays" than Hillary Clinton. But as soon as he started announcing his cabinet appointments after the election, it became clear that the campaign posture would not be the position of a Trump Administration, and the selection of U.S. Senator Jeff Sessions to be Attorney General was the first evidence that this would be the case.

The Attorney General issued two memorandums in October that threaten LGBT rights.

Signaling the change, Sessions collaborated with Education Secretary Betsy DeVos to prevent the Supreme Court from hearing the Gavin Grimm case from the 4th Circuit, which could have led to a precedent that public schools getting federal funds not discriminate against students because of their gender identity under federal law. Shortly before the scheduled oral argument, a joint DOE/DOJ memorandum was issued "withdrawing" the Obama Administration's interpretation of Title IX, and the departments suggested to the court that the argument be cancelled and the case be sent back to the 4th Circuit, which had premised its ruling on deference to the Obama Administration's interpretation of DOE regulations. Following up, Sessions issued a memorandum to all U.S. Attorneys and Heads of Department Components on October 4, titled "Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964," disavowing positions previously taken by DOJ as well as the independent agency charged with interpreting and enforcing Title VII, the Equal Employment Opportunity Commission (EEOC).

The two-page memorandum, that went out under Sessions' signature, stated: "Although federal law, including Title VII, provides various protections to transgender individuals, Title VII does not prohibit discrimination based on gender identity *per se*. This is a conclusion of law, not policy. The sole issue addressed in this memorandum is what conduct Title VII prohibits by its terms, not what conduct should be prohibited by statute, regulation, or employer action. As a law enforcement agency, the Department of Justice must interpret Title VII as written by Congress." The memorandum formally "withdraws" a memorandum issued by DOJ during the Obama Administration on December 15, 2014, under which the Department had supported transgender people in their gender identity discrimination claims. Sessions' position is that transgender people are protected under Title VII from discrimination because of their race, religion, national origin, and sex–but this last category refers only to biological sex, rather than taking account of the sex stereotype theory of *Price Waterhouse*. He specifically invoked the 9th Circuit's 2006 decision in *Jespersen v. Harrah's Operating Co., Inc*., 444 F.3d 1104, which he summarized as holding that "Title VII is not properly construed to proscribe employment practices (such as sex-

specific bathrooms) that take account of the sex of employees but do not impose different burdens on similarly situated members of each sex."

In short, unlike the EEOC majority that remains intact until next summer, the DOJ will no longer take the position that Title VII bans gender identity discrimination, as such. Reflecting this view as extended to Title IX, the Department supports the Kenosha, Wisconsin School District's Supreme Court appeal of a 7th Circuit ruling holding otherwise. (As of the end of October, the Supreme Court had not taken action on the District's certiorari petition.)

Sessions also reversed DOJ's position on the question of whether Title VII bans sexual orientation discrimination. Indeed, the reversal resulted in the odd spectacle of an *en banc* oral argument before the 2nd Circuit in the *Zarda* case in which counsel for the EEOC argued in support of the plaintiff's claim that sexual orientation discrimination is actionable under Title VII, while DOJ briefed the opposite position and sent an assistant attorney general to argue for the defendants before the court. DOJ also filed a brief in the Supreme Court opposing the grant of certiorari in *Evans v. Georgia Regional Hospital*, Lambda Legal's 11th Circuit case on the same question. Lambda Legal seeks reversal of an adverse ruling by that circuit and noted a split with a recent 7th Circuit ruling.

Two days later, Sessions followed up on a mandate from President Trump by issuing another memorandum for all Executive Department and Agencies, instructing them on "Federal Law Protections for Religious Liberty." Trump had issued Executive Order 13798 on May 4, instructing Sessions to issue guidance interpreting religious liberty protection under federal law. Trump made clear that he wanted religious liberty protected to the maximum extent possible. Sessions' memorandum presented what he called "twenty principles of religious liberty," asserting that respect for religious liberty, as a "fundamental right" should be "of paramount importance" and ultimately should prevail in any clash with other rights. The "twenty principles" took existing cases, Trump talking points, and conservative slogans, and sought to construct a framework under which, among other things, it was clear that people with religious objections to LGBT rights and marriage equality would have the executive branch of the federal government on their side. The memorandum appeared as a virtual enactment of Mississippi H.B. 1523 on a federal scale. It also adopted a very broad reading of the federal Religious Freedom Restoration Act as requiring extreme deference to religious practices by the federal government.

As direct evidence of this position, DOJ filed a petition with the Supreme Court seeking time to argue on December 5 when the Court hears arguments in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Ordinarily there would be no basis for DOJ to participate in this case, a dispute between a private business and a state civil rights agency over the application of a neutral state law forbidding sexual orientation discrimination in places of public accommodation. But baker Jack Phillips is protesting the state courts' conclusion that requiring him to comply with the law, despite his religious objections to same-sex marriage, does not violate his 1st Amendment rights, and his position finds echoes in several of Sessions' "20 principals." Among them is an insistence that "freedom of religion extends to persons *and* organizations," that "Americans do not give up their freedom of religion by participating in the marketplace, partaking of the public square, or interacting with government," that "the free exercise of religion includes the right to *act* or *abstain from action* in accordance with one's religious beliefs," and that "government may not target religious individuals or entities through discriminatory enforcement of neutral, generally applicable laws." Ironically, the brief DOJ has filed in the case does not harp on religion at all, instead embracing the argument crafted for Phillips by the so-called Alliance Defending Freedom, his legal counsel, that he is a "cake artist" whose cake designs are forms of protected speech under the First Amendment, and that requiring him to bake a wedding cake for a same-sex couple is a form of "compelled speech." This argument, endorsed in the brief by DOJ, threatens to open up a huge exemption in public accommodation laws and perhaps also employment discrimination laws, by empowering businesses to evade non-discrimination responsibilities by arguing the "expressive" nature of their businesses.

Thus, on some of the most important LGBT rights issues pending before the highest courts in the U.S., the Trump Administration is forcefully advocating against the LGBT rights position in every case. As one of the first examples of how the loss of federal backing for LGBT rights has immediate consequences, it was reported on October 17 that days after the DOJ Title VII memo, the EEOC ended a three-year investigation into a Title VII discrimination claim by a transgender faculty member at JFK University in California. An assigned investigator was pursuing a Title VII complaint, until DOJ changed the Administration position, and new commissioners nominated by Trump made it likely that the EEOC would follow suit, at least in terms of its enforcement priorities. (It was not immediately clear whether the new Commission majority would take action to repudiate rulings in prior cases upholding sexual orientation and gender identity discrimination claims under Title VII, or would wait to reverse the precedents in future cases.)

Sessions did make clear, however, in his Title VII memorandum that when a statute specifically deals with gender identity, DOJ would enforce it, and he won some approving (and surprised) headlines in mid-October by announced that a DOJ prosecutor experienced in hate crimes cases would be detailed to assist the U.S. Attorney's Office in Iowa in the prosecution of a man charged with murdering a transgender high school student. Sessions made clear that he is committed to combating hate crimes in all the categories covered by the federal hate crimes law, which includes protection for transgender people. *New York Times*, Oct. 15. ■

Eleventh Circuit Orders New Trial after District Court Fails to Ask Jurors About Anti-Gay Biases

In a *per curiam* opinion, the Atlanta-based 11th Circuit Court of Appeals ordered a new trial in a gay Key West man's excessive force lawsuit against that city's police department and certain police officers. *Berthiaume v. Smith*, 2017 U.S. App. LEXIS 19403, 2017 WL 4422465 (11th Cir. Oct. 5, 2017). The plaintiff in the suit, Raymond Berthiaume, contended on appeal that he was denied a fair trial by an impartial jury because the district court failed to ask jurors his proposed voir dire question, which was "'[d]o you harbor any biases or prejudices against persons who are gay or homosexual?" The appellate court agreed with Berthiaume and ruled that, on the particular facts of the case, the district court abused its discretion by refusing to put this question to potential jurors.

Berthiaume brought suit against Lieutenant Smith of the Key West police department, as well as the department itself, after Lieutenant Smith arrested Berthiaume on October 26/27 at the 2013 Fantasy Fest parade and charged him with domestic battery. At trial, the evidence and testimony were as follows:

Berthiaume attended the Fantasy Fest parade that evening with three others: a friend; his then-partner and now husband; and his former partner, Nelson Jimenez. At some point everyone except the former partner, Jimenez, were ready to leave. Jimenez stayed at an area gay bar, while the other three returned to their car but continued to wait for Jimenez. After waiting for Jimenez for some time, Berthiaume went in search of Jimenez and, when he found him, led Jimenez out of the bar with a hand gripping Jimenez's upper arm. Jimenez pulled free of Berthiaume's grip, took the car keys, and ran down an alleyway. Berthiaume, who was wearing only flip flops and boxer shorts (or a loin cloth), followed Jimenez to retrieve the keys.

Lieutenant Smith and other officers observed Berthiaume and Jimnez as they left the bar and assumed that they were witnessing a fight between the two men. There was differing testimony at trial as to the extent of physical contact between the two men and whether Berthiaume ran or walked after Jimenez. In all events, at some juncture Lieutenant Smith and the other officers ran toward the alley after Berthiaume. When Lieutenant Smith caught up to Berthiaume, he pushed him on the shoulder to stop his pursuit of Jimenez. At that point, Berthiaume fell to the ground and fractured his wrist and jaw such that both required surgery. Following Berthiaume's fall, Jimenez first thanked Lieutenant Smith, but later told Smith he did not want to press charges. Lieutenant Smith explained at trial that he nevertheless arrested Berthiaume because "'there is a preferred arrest by the State of Florida'" in "'domestic situations' in order to ensure the aggressor and victim are separated for at least the rest of the evening." The state chose not to prosecute Berthiaume.

The jury returned a verdict in favor of the defendants. Before the verdict was returned, however, Berthiaume moved for a new trial on the basis of deprivation of an impartial jury. His argument was that only recently had society begun to accept gay people. Thus, according to Berthiaume, a case such as his involving a gay plaintiff and gay witnesses required the court to inquire into prospective a juror's anti-gay bias. The judge's denial of this motion led to Berthiaume's appeal.

In vacating the judgment and remanding the case, the 11th Circuit relied on a 1981 Supreme Court decision, *Rosales-Lopez v. U.S.*, 451 U.S. 182. *Rosales*, a criminal case, held that under "special circumstances" the Constitution might necessitate inquiry into racial bias during jury selection in cases where racial issues are "inextricably bound up with the conduct of the trial" and where "substantial indications" exist that racial bias might affect jurors.

The 11th Circuit also looked to one of its own unpublished decisions that built upon the precedent of *Rosales*, *United States v. Bates*, 590 F. App'x 882 (11th Cir. 2014). *Bates* held that failure to inquire into anti-gay bias may be grounds for a conviction's reversal. In *Bates*, a gay man was charged with possession of child pornography. In examining the accused's computer, investigators also found evidence that the defendant used the internet to find other gay men for sex. The trial judge in *Bates* refused to question jurors as to anti-gay bias and the man was convicted following the prosecution's "parade" of evidence of his homosexual activities. On appeal, the conviction was reversed.

In Berthiaume's case, the 11th Circuit wrote that "[his] sexual orientation and that of his witnesses became 'inextricably bound up with the issues to be resolved at trial.' In describing the events leading up to Berthiaume's arrest, the witnesses repeatedly testified about Berthiaume's romantic relationships with Jimenez and Villa. Indeed, in explaining why he felt it necessary to arrest Berthiaume despite Jimenez's refusal to press charges," continued the court, "Lieutenant Smith explained that victims are often reluctant to press charges in 'domestic situations' such as these because they have mixed emotions about the perpetrator." Although the trial judge did pose general questions about bias to the jury, none of them were specific enough to determine whether any of the jurors might harbor prejudices against a gay man based on his sexual relationships. While the judge asked if the jurors could be impartial, the appeals court thought this was "not calculated to reveal latent prejudice." Failing to inquire about prejudice on the basis of sexual orientation during *voir dire* was abuse of discretion, according to the 11th Circuit. This, ruled the court, entitled Berthiaume to reversal.

The panel which decided Berthiaume's appeal included two appointees of President Clinton and one appointee of President Obama. – *Matthew Goodwin*

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New York Judge Waives Residency Requirement for Divorcing Polish Gay Couple

New York's Domestic Relations Law, Section 230, sets residency requirements for married couples seeking to divorce in the state, which vary in length–one or two years–depending upon whether they were married in New York and have lived in the state continuously. This creates a problem for out-of-state same-sex couples who come to New York to marry and then return to a home jurisdiction that does not recognize same-sex marriages. The problem is compounded, of course, if they want to divorce without at least one of them establishing residency in New York. This is the problem faced by Andrej Gruszczynski and Wiktor Jerzy Twarkowski, Polish citizens who were married in the New York City Clerk's Manhattan Marriage Bureau on December 6, 2013, having traveled to New York specifically to get married, and then returned to their home in Warsaw. After a few years of marriage, they "mutually decided that they did not want to remain married to one another," writes Justice Matthew F. Cooper in *Gruszczynski v. Twarkowski*, 2017 N.Y. Slip Op. 27348, 2017 WL 4848485 (N.Y. Supreme Ct., N.Y. Co., Oct. 26, 2017), "but because Poland does not recognize same-sex marriage in any form, the parties could not turn to their local courts to obtain a divorce."

They sought legal advice, and were counseled to file for divorce in New York. Gruszczynski's attempt to do so by filing the papers in New York County's "uncontested matrimonial calendar" in September 2016 was rejected by the Matrimonial Clerk. The complaint for divorce alleges that there are no children, no assets to divide, no requests by either spouse for spousal maintenance, and no contest by the parties, who are mutually agreed that they should divorce. All they desired was that a judge sign an order dissolving the marriage, with the only ground cited for divorce being "irretrievable breakdown of the relationship" by their mutual agreement to end it. But the Clerk found that as both spouses reside in Poland, the statutory residential requirement applicable to their situation, one year of residency, acts as a bar, and the Clerk refused to accept the filing.

Their lawyer, Livius Ilasz, then filed a motion with Justice Cooper, seeking an order permitting an uncontested divorce despite the lack of residence. In affidavits accompanying the motion, both parties described how they traveled to New York City "specifically to avail themselves of this state's right to marry, a right not afforded to them by their own country," Cooper explained. The men described "their need to avail themselves of New York's no-fault divorce law so that they can dissolve a marriage that neither party wishes to continue," wrote Cooper, and they "stress that if New York refuses to entertain the proceeding, they will face the prospect of being unable to find any forum in which they can be divorced." They called on the equitable powers of the court to waive the residency requirement and allow them to dissolve their marriage.

The case harkens back to the "wedlock" phenomenon experienced by U.S. same-sex couples prior to June 26, 2015, when same-sex marriage (and, correlatively, divorce) became available in every state by judicial fiat from the Supreme Court. Reports surfaced in the media of occasional judges in non-equality states who were willing to bend the rules to help out local residents who had married out of state and needed to get a dissolution of a civil union, domestic partnership, or even a marriage. But published decisions on the issue are scarce, so Justice Cooper's effort may fill an important legal gap now for foreign nationals who come to the U.S. to marry and then return home.

"There are good reasons to allow this uncontested divorce action to proceed irrespective of the parties' inability to meet the one-year residency requirement," he wrote. He found that the couple had made a "compelling argument that, under the circumstances presented here, a strict application of DRL Sec. 230 is inequitable and discriminatory." In an introductory portion of the opinion, the judge set out some background history, including how New York City had embarked on a promotional campaign after marriage equality became available in the state to lure out-of-staters to New York to get married, generating substantial additional business for the city's hotel, restaurant, tourism, and retail businesses. Justice Cooper quotes a figure of a quarter of a billion dollars in extra business revenues during the first 12 months of the marriage equality era in New York, attributed to a statement issued in July 2012 by Mayor Michael Bloomberg. Thus, New York was explicitly inviting people, such as the parties in this case, to come to New York to get married.

"Having accepted New York's invitation to come and exercise their right to marry as a same-sex couple, the parties now find that they are being deprived of the equally fundamental right to end the marriage. Thus, they face the unhappy prospect of forever being stuck in their made-in-New York marriage, unable to dissolve it here or in their home country. Clearly, equity demands that the parties be spared such an excruciating fate," Cooper wrote, noting a parallel decision by the Albany-based Appellate Division, 3rd Department (*Dickerson v. Thompson*, 88 App. Div. 3d 121 (2011)), authorizing a New York trial court to dissolve a Vermont civil union so that one of the civilly united parties would not have to move to Vermont to establish residency in order to terminate the relationship there.

Cooper explained the policy concerns that led New York to establish residency requirements for divorce. At a time when New York had liberalized its divorce law, there was fear that out-of-staters seeking to escape more demanding requirements in their home states (such as proving adultery by one

partner, for example, for a fault-based divorce) would flock to New York to divorce, inundating the courts with the matrimonial contests of citizens of other states. However, since those days divorce laws throughout the country have been dramatically altered to allow no-fault divorce everywhere–recently including, among the last to join the trend, New York–so that the incentives to come to New York specifically to divorce–at least from elsewhere in the United States–have disappeared. Given the current situation, wrote Cooper, "It is difficult to see how permitting plaintiff and defendant to pursue their uncontested divorce here would somehow open the floodgates to our courts." He pointed out that in the absence of any interest by Poland in adjudicating matrimonial issues for same-sex couples, New York is actually the jurisdiction having the most substantial interest in this marital relationship, which, after all, New York created.

"Basic fairness and social justice, along with the lack of any adverse impact on this state and its court system, all appear to be sufficient reasons to allow plaintiff to maintain this action for an uncontested divorce," Cooper wrote. He also noted that some prior New York rulings had held that the residency provisions of Sec. 230 were not "a jurisdictional requisite" and, as the defendant was not objecting to the jurisdiction of the court based on the lack of residency of either party, the "defense" of lack of jurisdiction was effectively waived.

Granting the plaintiff's motion, the court directed him to resubmit the uncontested divorce papers to the Matrimonial Clerk within 30 days, and the Clerk was directed to accept and forward the papers, "including the proposed judgment of divorce," back to the judge's chambers "for review and signature." Nobody is going to appeal this ruling, so there will not be an appellate ruling that could create a binding precedent on trial courts, but Justice Cooper obviously took pains to write an opinion that would be a very persuasive precedent for future reference. ■

Ohio Supreme Court Unanimously Rejects Constitutional Challenge to HIV Disclosure Law

The seven-member Ohio Supreme Court unanimously rejected a free speech and equal protection challenge to the state's law making it a felony assault for a person who knows he is HIV-positive to engage in "sexual conduct" with another person without disclosing his HIV-positive status to this sexual partner. *State of Ohio v. Batista*, 2017-Ohio-8304, 2017 WL 4838768, 2017 Ohio LEXIS 2172 (Oct. 26, 2017). The court divided 4-3, however, on the appropriate legal analysis leading to its conclusion on the 1st Amendment part of the challenge.

Justice O'Donnell wrote, "The First Amendment does not prevent statutes regulating conduct from imposing incidental burdens on speech," and he argued that in this case, the statute was aimed directly at conduct.

Upholding an 8-year prison sentence for Orlando Batista, four members of the court ruled that the law regulated conduct rather than speech and that the state had a rational basis for imposing the criminal disclosure requirement for people living with HIV and not for those living with other, comparable, sexually-transmitted diseases, such as Hepatitis C, or engaging in other types of conduct that could transmit HIV.

Batista learned that he was HIV-positive while serving a prison sentence. It appears that he was already infected before being incarcerated, but was unaware of that fact. After his release, he had sex with his girlfriend without disclosing his diagnosis. The opinion for the majority by Justice Terrence O'Donnell does not indicate whether Batista's girlfriend became or was already infected, or whether Batista's medical treatment had suppressed the virus to undetectable levels, which would make sexual transmission unlikely.

The statute under which the state convicted Batista states: "No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall knowingly engage in sexual conduct with another person without disclosing that knowledge to the other person prior to engaging in the sexual conduct." Batista argued that the statute unconstitutionally compelled people living with HIV to disclose their status, a form of government-compelled speech. He also argued that singling out people living with HIV for this disclosure obligation in connection with sexual activity raised Equal Protection concerns, because people with other, similar infectious conditions were not burdened with this obligation or penalized for not disclosing to their sexual partners, and no disclosure obligation was placed on people engaging in non-sexual activities that could transmit HIV.

On behalf of the majority of the court, Justice O'Donnell wrote, "The First Amendment does not prevent statutes regulating conduct from imposing incidental burdens on speech," and he argued that in this case, the statute was aimed directly at conduct: actually engaging in sexual conduct without having disclosed one's HIV-positive status to the sexual partner.

He summoned in support decisions by appellate courts in Missouri (*State v. S.F.*, 483 S.W.2d 385 (Mo. 2016)) and Illinois (*People v. Russell*, 158 Ill.2d 23, 630 N.E.2d 794 (1994)), both of which had rejected the argument that similar HIV-disclosure statutes targeted conduct. The Missouri court had stated in 2016, "While individuals may have to disclose their HIV status if they choose to engage in activities covered by the statute, any speech compelled by it is incidental to its regulation of the targeted conduct and does not constitute a freedom of speech violation." The Illinois Supreme Court was even more direct, stating that the Illinois statute did not have "the slightest connection with free speech."

Three members of the court disagreed with this mode of analysis, in a concurring opinion by Justice R. Patrick DeWine. "The statute plainly regulates both conduct and speech," wrote DeWine, as "one who tests positive for the human immunodeficiency virus ("HIV") must tell his partner that he is HIV positive before engaging in sex. When the government tells someone what he must say, it is regulating speech." But this conclusion did not get Batista any closer to victory on his appeal, as DeWine reasoned to the same conclusion as O'Donnell, finding that there was ultimately not a valid free speech claim because the state had met the necessary strict scrutiny test to justify a content-based regulation of speech.

"Under strict scrutiny," wrote DeWine, "a content-based regulation of speech will be upheld only if it is narrowly tailored to achieve a compelling governmental interest and it is the least restrictive means of doing so." In this case, he found, there were two government interests. One was preventing the spread of HIV, the other "ensuring informed consent to sexual relations," noting that society has "long criminalized nonconsensual sexual relations." He found that the disclosure requirement was justified by both concerns.

While acknowledging testimony by Batista's expert witnesses that advances in treatment for HIV infection had led to normal lifespans for those infected, rendering HIV infection no longer an "invariably fatal" disease, as it appeared to be when, for example, the Illinois Supreme Court's decision was announced in 1994, DeWine wrote that the issue today isn't whether the consequences of being infected are less serious now than they were years ago when the statute was passed. Rather, he wrote, "the question is who gets to evaluate that risk: should the HIV-positive individual get to assess that risk for his sexual partner or should the partner get to make her own decision. Fair to say that most – if not all – people would insist on the right to make that decision for themselves."

DeWine saw the statute as intended to protect the uninfected as well as to restrain the infected. "Though Batista invokes his right not to be forced to speak," wrote the judge, "the victim's rights in this case are at least equally worthy of protection. I would have concluded that the interrelated interests of the government that are manifest in the statute – protecting public health and ensuring informed consent – rise to the level of a compelling government interest."

He also concluded that the obligation imposed by the statute was "narrowly tailored" to advance the government interest, by restricting the disclosure requirement to those who wish to have sex and requiring disclosure only to the partner with whom they wish to have sex. "The only speech that is compelled is speech that is directly necessary for informed consent," he wrote. "I cannot fathom – and Batista has not advanced – any less restrictive or more narrowly tailored means that could have been employed by the government to achieve its interests here."

As to the Equal Protection challenge, Justice O'Donnell wrote for a majority of the court that the comparison to Hepatitis C "is misplaced," that the decision of which public health issues to address in such a statute is a legislative, not a judicial function. "Here," he wrote, "the classification is individuals with knowledge of their HIV-positive status who fail to disclose that status to someone prior to engaging in sexual conduct with that person. The valid state interest is curbing HIV transmission to sexual partners who may not be aware of the risk. The statute's treatment of individuals with knowledge of their HIV-positive status who fail to disclose that status to a sexual partner furthers the state interest here."

Justice O'Donnell rejected the idea of having the court "weigh the wisdom of the legislature's policy choices," claiming that this was "beyond our authority." In an Equal Protection case, unless there is a suspect classification or fundamental right involved, all the state needs is a rational basis for its actions. Since the majority of the court found no 1st Amendment free speech issue, and knowingly being HIV-positive is not a "suspect classification," the court's analysis is no more demanding than to ask whether the legislature had a conceivable basis for singling out HIV-positive people for this disclosure requirement. He found that the lack of similar treatment for those knowingly infected with Hepatitis C "does not eliminate the rational relationship between the classification here – individuals with knowledge of their HIV-positive status who fail to disclose that status to sexual partners – and the goal of curbing HIV transmission."

Judge O'Donnell also rejected Batista's argument that the state was irrational in imposing the disclosure obligation in connection with sexual conduct and not in connection with other modes of HIV transmission. "Simply because there are other methods of HIV transmission does not render the classification here without a rational basis," he wrote, without further explanation.

Responding to the expert testimony on advances in treatment and reductions in the risk of transmission, O'Donnell wrote, "We recognize that there have been advancements in the treatment of individuals with HIV that may have reduced the transmission and mortality rates associated with the disease. However, we cannot say that there is no plausible policy reason for the classification or that the relationship between the classification and the policy goal renders it arbitrary or irrational."

Judge DeWine, writing for the concurring judges, also rejected Batista's equal protection argument. Having already concluded that the statute survived strict scrutiny on the First Amendment claim, it followed that it would survive any level of scrutiny on an equal protection analysis as well.

Reading these opinions is frustrating if one has kept up with the latest pronouncements by public health authorities on the efficacy of state-of-the-art HIV treatments to reduce the risk of sexual transmission to a negligible level, but evidently the court was unwilling to entertain seriously the proposition that the state does not have a legitimate interest in imposing the disclosure requirement across the board on HIV positive people, including those who do not pose a real risk of sexual transmission. The likelihood that the court does not fully understand the scientific issues in this case seems high.

Batista was represented by attorneys from the Hamilton County Public Defenders office, but he did not lack exceptional support for his appeal, having drawn amicus brief support from the ACLU of Ohio, the Center for Constitutional Rights, the State Public Defenders office, and half a dozen HIV, LGBTQ and other civil rights and criminal defense advocates, including GLAD, HRC, NCLR, and the Treatment Action Group.

Justice O'Donnell's opinion for the majority explicitly rejected both state and federal constitutional challenges. It is open to Batista to seek U.S. Supreme Court review on the federal constitutional claims, but the Supreme Court rarely agrees to review decisions that could be premised on independent state constitutional grounds. On the other hand, beyond passing mention of the state constitution, both the majority and concurring opinions focused on federal constitutional doctrines and precedents, and it is open to argue that federal constitutional protection for speech and equality is more protective of individual rights than the relevant state laws, which would provide a basis for the Supreme Court to take up the issue. ■

North Carolina Appeals Court Finds That Non-Biological Parent Has Standing to Sue for Custody of Her Former Partner's Biological Child

Judge Donna S. Stroud of the North Carolina Court of Appeals recently addressed an interesting custody dispute between unwed lesbians whose relationship soured after nearly a decade together. In *Moriggia v. Castelo*, 2017 WL 4629430, 2017 N.C. App. LEXIS 873 (Oct. 17, 2017), Leonora Moriggia (represented by Justin R. Apple and Kathy H. Lucas of Hatch, Little & Bunn, LLP) appealed the trial court's dismissal of her custody suit against her former partner, Linda Castelo (represented by S. Thomas Currin II of Rik Lovett & Associates).

In March 2015, Moriggia filed suit against Castelo seeking joint custody of a minor child named Raven (a pseudonym to protect the child) who was conceived with donor sperm and a donor egg, carried by Castelo, and birthed during a long-term relationship between Moriggia and Castelo before their separation in October 2014. Castelo argued that Moriggia was neither the legal nor biological parent of Raven and, accordingly, lacked statutory standing to bring a child custody action against Castelo. In a January 2016 order by Judge Anna Worley, the trial court agreed with Castelo and dismissed Moriggia's complaint for lack of statutory standing. In response, Moriggia filed the instant appeal.

Under North Carolina law, any "parent, relative, or *other person*, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child" (emphasis added). Courts have held that the legal parent's intent for the "other person" to form a parent-child relationship satisfies this standing requirement even in the absence of a biological relationship. The trial court nonetheless found that Moriggia lacked standing here because Castelo (i.e., the legal parent) changed her intent for Moriggia to be a co-parent to Raven shortly after the child's birth despite Castelo's former intention that Moriggia be a co-parent to the child. To reach that conclusion, the trial court refused to consider the parties' actions prior to Raven's birth, because they were allegedly "irrelevant."

The Court of Appeals reversed, holding that actions prior to Raven's birth were relevant in determining Castelo's intent. Applying that standard, the appellate court found that Castelo had intended Moriggia to be a parent to Raven, citing as evidence the fact that Moriggia and Castelo had co-signed paperwork from the surrogacy agency stating "that any child resulting from the procedure will be *their* legitimate child in all aspects" (emphasis added) and identifying the parties as the "Recipient Couple." The appellate court went on to confirm that the women lived together with Raven for over a year, thereby demonstrating Castelo's continuing intention for Moriggia to be Raven's parent even though Castelo's intentions later changed. In light of these findings, the court of appeals vacated the trial court's holding and remanded the case for further consideration in light of Moriggia satisfying the requirements of statutory standing.

This case evidences a common-sense approach to custody disputes by recognizing that there is no logical reason to discount the pre-birth intent of one legal parent when statutory standing requires only that the legal parent intended for a third party to be a parent in order to confer standing. – *Ryan Nelson*

Ryan Nelson is corporate counsel for employment law at MetLife.

Missouri Lesbian Co-Parent Wins New Chance to Achieve Custody or Visitation with Former Partner's Child

An October 3, 2017, decision by Missouri Court of Appeals produced mixed results on appeal from a judgment in a case involving lesbian co-parent parental rights. The opinion by Judge Sherri B. Sullivan in *K.M.M. v. K.E.W.*, 2017 WL 4365570, 2017 Mo. App. LEXIS 975 (Mo. App., E.D.), articulated the intricacies of rebutting parental presumption and was a major victory for the National Center for Lesbian Rights.

Plaintiff K.M.M. (Kathleen) and Respondent K.E.W. (Kate) began a romantic relationship in 2007. In 2009, Kate and Kathleen jointly purchased a home, where they lived with Kathleen's two children until their separation in 2015. For the duration of the couple's relationship the parties maintained a joint bank account, which they used to pay shared expenses.

The opinion by Judge Sherri B. Sullivan articulated the intricacies of rebutting parental presumption and was a major victory for the National Center for Lesbian Rights.

The parties discussed having a child together and decided that Kate would carry the child. On April 11, 2011, the parties executed documents concerning their parental rights and consenting to artificial insemination. Both parties signed the consent document. Kate signed as the "Patient" and Kathleen signed as the "Spouse", which she crossed out and replaced with "Partner." The record indicates that the parties thoroughly discussed the artificial insemination process, including prospective sperm donors and fertility treatments. Kathleen listed Kate as her "domestic partner" on her medical insurance, which partially covered the cost of fertility treatments, artificial insemination, and medical care during pregnancy. Kate paid for the remaining costs of artificial insemination, and other prenatal expenses were shared between the parties.

On July 5, 2012, Kate gave birth to the new baby. (The opinion by Judge Sullivan refers to the infant as "Child"). After Child's birth, the parties enrolled Child in a daycare at Kathleen's employer's campus. On the daycare registration forms, Kate identified herself and Kathleen as Child's "mother, parent, or guardian", and Kathleen's previous children as Child's siblings.

The trial court found that Kathleen participated in the care, custody, and nurturing of Child. At trial, Kathleen testified that she, Kate, and the children acted like a family, and the record indicated that Kate had routinely referred to herself, Kathleen, and the children as a "family."

At trial, however, Kate denied being a family. She instead testified that Kathleen and the children were "a group of people who lived and hung around together." On direct examination, when asked if she would have had artificial insemination outside of a committed relationship, Kate admitted that she "probably wouldn't have done it completely on her own." Despite Kate's testimony otherwise, the trial court found that prior to the parties' separation, they had acted and operated as a "family," without the adherence of legal status.

Kathleen's name did not appear on Child's birth certificate, nor had she adopted Child. The trial court found that throughout the parties' relationship Kathleen had raised the issue of adoption to Kate. But each time Kate had deflected the discussion. The court found Kathleen's request to adopt the Child contributed to Kate leaving the relationship.

The couple's relationship deteriorated. On January 17, 2015, Kate moved her and Child's belongings out of the house. Kate sent Kathleen a text message stating: "I don't want you to think it means I'm going to cut you off from seeing him. I'm not." Later, Kate switched Child's daycare. Kathleen then asked Kate to set up a consistent visitation schedule—to which Kate initially agreed. But on February 12, 2015, Kate informed Kathleen that she would not allow Kathleen or her children to see Child. Further, Kate said that she would call the police and get a restraining order if Kathleen attempted to contact them. Kathleen did not see Child after April 2015.

At trial, Kate contended that the shared home environment had been dangerous for Child. She asserted that Kathleen's son and Kathleen's alcohol use made the environment unsafe. L.M., Kathleen's son, was diagnosed with Attention Deficit Hyperactivity Disorder and Kate testified that his behaviors toward Child were unsafe and dangerous. Furthermore, Kate claimed that by December 2014 she feared Kathleen and felt unsafe leaving her alone with Child. The court rejected this argument, noting that Kate had continued to allow Kathleen to transport Child to daycare, and that Kate had met with Kathleen on multiple occasions after that point. The court further found Kate's claim to fear for her safety unsupported, thus ruling that Kathleen posed no threat to Kate or Child.

The trial court concluded that a familial relationship existed between the parties, but Kathleen had not rebutted Kate's presumptive parental

authority nor demonstrated that it was in Child's best interest that she share custody or be awarded visitation. Both parties filed requests for the court to reconsider, which were denied.

On appeal, Kathleen first argued that the trial court erred in dismissing her claim to establish legal parentage under Section 210.824 of Revised Statutes of Missouri (RSMo Supp. 2012), because applying the Section only to marital children would violate the Equal Protection clauses of the United States and Missouri Constitutions.

Considering this point, Judge Sullivan quoted in full Section 210.824, titled "Artificial insemination, consent required, duties of physician, effect of physician's failure to comply with law—inspection of records permitted, when." This enumerated the rights of husbands when their wives undergo artificial insemination from a third-party donor. In her petition, Kathleen contended that she and Kate executed an agreement in accordance with Section 210.824 and asked the court to apply the statute equally to "women who consent to another woman's insemination." Kathleen further alleged that under the United States and Missouri Constitutions' Equal Protection clauses, Section 210.824 was unconstitutional if not equally applied to unmarried same-sex couples. Finally, Kathleen asserted that under Section 210.824 she was a parent of Child, since the artificial insemination was done under the supervision of a licensed physician and with her written consent.

Judge Sullivan quickly dismissed Kathleen's first point, observing that the claim had been raised for the first time on appeal and was therefore not preserved. Invoking *Beery v. Beery*, 840 S.W.2d 244, 246 (Mo. App. E.D. 1992), Judge Sullivan noted the "stringent procedural requirements regarding the raising and preservation of constitutional issues." If a constitutional issue is not raised at the first opportunity in the trial court, the issue is presumed to be waived on appeal. Thus, Judge Sullivan denied Point I.

Kathleen's second point on appeal was that the trial court erred in in dismissing her claim to enforce a voluntary custody agreement between herself and Kate. In her petition, Kathleen alleged that the parties had a voluntary custody agreement, which Kate had breached by denying Kathleen contact with Child and refusing to establish regular visitation. Explaining the elements of a breach of contract claim, Judge Sullivan noted that Kathleen must allege facts demonstrating "(1) the existence of a contract or agreement and the terms of that agreement; (2) plaintiff performed or tendered performance; (3) defendant's failure to perform; and (4) plaintiff's damages resulting from defendant's failure to perform." *McGaw v. McGaw*, 468 S.W.3d 435, 439 (Mo. App. W.D. 2015); *White v. White*, 293 S.W.3d 1, 23 (Mo. App. W.D. 2009).

Looking to Kathleen's pleadings, Judge Sullivan reasoned that her allegations were too generalized to support a breach of contract theory. Kathleen had failed to allege any specific terms of the alleged custody agreement, parental responsibilities, or co-parent obligations. Judge Sullivan's conclusion was further supported by Kathleen's failure to request a specific remedy; she asked that the court "award her joint legal and physical custody and reasonable periods of visitation." Ultimately, finding that the trial court had not erred in dismissing the claim for failure to state a claim upon which relief could be granted, Judge Sullivan denied point II.

Because Kathleen's third and fourth points were based on Section 452.375 of RSMo Supp. 2012 titled "Rebutting the Parental Presumption," Judge Sullivan addressed both points together. In her final two points, Kathleen challenged the trial court's denial of her request for third-party custody or visitation pursuant to Section 452.375(5)(a), based upon the court's finding that she failed to demonstrate such an award would protect the welfare and best interests of Child. For her third point, Kathleen challenged the trial court's finding that she had not rebutted Kate's parental presumption. She argued that the court improperly weighed the bonded parent-child relationship between Kathleen and Child in making its determination. Kathleen's fourth point was that the trial court's determination that it was not in Child's best interest to award her custody or visitation contradicted the great weight of the evidence.

Here, wrote Judge Sullivan, "for several decades, it was generally recognized that a third party's standing to litigate custody or visitation pursuant to Section 452.375.5 was limited to situations where the third party was a named party to an action brought by someone else such as a dissolution, or already had custody other than *de facto* custody." *White v. White*, 293 S.W.3d 1, 23 (Mo. App. W.D. 2009). She then noted that the Missouri Supreme Court had "opened the courthouse doors" when they held that third parties could maintain independent action seeking custody or visitation pursuant to Section 452.375.5(5)(a). *In re T.Q.L.*, 386 S.W.3d 135, 140 (Mo. Banc 2012).

Judge Sullivan then established the backdrop for rebutting parental presumption. She described numerous precedent decisions recognizing the importance of a parent's interest in the care and custody of her child, including *In the Interest of K.K.M.*, 647 S.W.2d 886, 889 (Mo. App. E.D. 1983) (recognizing the presumption that children's best interests "are best served by the vesting of custody in the parent") and *Flathers v. Flathers*, 948 S.W.2d 463, 466 (Mo. App. W.D. 1997) (holding that "natural parents are not to be denied custody of their minor children, unless the third party seeking custody first carries its burden of showing that each parent is unfit, unsuitable, or unable to have custody or that the welfare of the children requires it").

Section 452.375.5(5)(a) encompasses a rebuttable presumption that parents are fit, suitable, and able custodians of their children and a child's welfare is best served by awarding custody to their parents. To rebut the parental presumption, a third party must demonstrate "either that each parent is unfit, unsuitable or unable to be a custodian *or* the welfare of the child

requires, *and* it is in the best interests of the child to award custody to the third party." Additionally, the third party seeking visitation or custody must prove that they are "suitable and able to provide an adequate and stable environment for the child."

Next, Judge Sullivan briefly noted the two bases for rebutting the parental presumption—the "fitness" and "welfare" bases. But she dismissed the former because Kathleen had acknowledged that Kate was a fit parent.

To rebut the parental presumption on the "welfare" basis, the court must find proof of "a special or extraordinary circumstance rendering it in the child's best interest to award custody to a third party." *Flathers*, 948 S.W.2d at 470. One such circumstance is "a significant bonding familial custody relationship." *McGaw*, 468 S.W.3d at 443.

She reasoned that the trial court had failed to consider Child's need for a frequent, continuing, and meaningful relationship with Kathleen.

Reviewing the trial court's holding, Sullivan emphasized the court's finding that prior to their separation, Kathleen and Kate acted as "a family as defined as those who love and protect each other." She observed that while the court found a familial relationship, it had ruled that it was not "significant enough to constitute a special or extraordinary reason or circumstance under the welfare basis."

Judge Sullivan found that the trial court had incorrectly conflated the two steps of their analysis. She rejected the trial court's approach, finding that it had "improperly considered factors beyond those going to the familial relationship and looked to factors relevant to the best interest determination, the second step in the statutory analysis." Specifically, the judge wrote that the trial court should not have looked to the parties' conflict, differing parenting styles, and Kathleen's alcohol use in evaluating Kate and Kathleen's familial relationship. While these types of factors could conceivably be relevant under a welfare analysis, there must be some indication they affected the bonded familial relationship. Judge Sullivan found no evidence that any of the issues affected the ability for Kathleen and Child to form a bonded relationship.

Instead, Judge Sullivan found overwhelming evidence of a significant bonded familial custodial relationship between Kathleen and Child. "The evidence," wrote Judge Sullivan, "leads to only one sensible conclusion: this is a family under every reasonable definition aside from the legal." Here, she echoed the trial court's conclusion that Kathleen had "acted with the obvious maternalistic care that can be expected of the child's birth mother."

Pointing to Kate's admission that she would not have had Child absent a committed relationship, Judge Sullivan found that the record demonstrated Kate had desired and invited Kathleen to undertake an active parental role. Moreover, prior to the parties' separation, Kathleen had sought to formalize and legally protect the role she had been fulfilling by formally adopting Child. After the separation, Kathleen had requested to continue her parental role, seeking formal visitation and offering to pay child support. Though Kate had refused to accept financial support, Kathleen had contributed $800 a month to an account established in Child's name, accumulating $12,810 by the time of trial. Judge Sullivan saw this as evidence of parental intentions.

Judge Sullivan reasoned that given the essential role that parents or surrogate parents play in the care and nurturement of growing children, the significance of a bonded parent-child relationship is even more pronounced for minor children. Judge Sullivan then phrased the question before the court: "Whether the dedicated, nurturing, and loving parent-child relationship between Kathleen and Child constitutes a significant bonded familial custody relationship." Judge Sullivan held that the record demonstrated that Kathleen and Child had a significantly bonded relationship and thus Kathleen had demonstrated the existence of special or ordinary circumstance that rebutted Kate's parental presumption.

Next, Judge Sullivan analyzed the best interest determination. She looked to Section 452.375.2, which provided the court with relevant factors to consider in its determination. Judge Sullivan recalled that the trial court had found that Kathleen had not met the "best interest" standard, and took issue with the trial court's indication that it treated the case as a traditional "parental rights" case. She reasoned that the trial court had failed to consider Child's need for a frequent, continuing, and meaningful relationship with Kathleen.

Ultimately, Judge Sullivan found that the trial court erred in its findings under the "welfare" prong, because it had ruled that Kathleen had not rebutted Kate's parental presumption. Because the trial court's subsequent misapplication of its findings under the "welfare" prong had tainted the court's best interest determination, Judge Sullivan remanded for reconsideration of Child's best interest in light of the appellate court's findings.

The court closed with the finding that "the trial court misapplied the law by improperly combining the bonded parent-child relationship analysis, failing to properly weigh the significant bonded relation." Thus, the trial court's judgement was affirmed in part, reversed in part, and the cause remanded for further proceedings consistent with the appellate court's guidance. – *Chan Tov McNamarah (Cornell Law School class of 2019)*

Lesbian NYU Administrator Loses Out on Sexual Orientation Discrimination, But Can Pursue Retaliation Claim

Looking at the timeline of events, a federal district court disagreed that the harassment suffered by a former departmental director of research administration at New York University (NYU)'s medical school and hospital was due to her sexual orientation. Michele Malanga had a good working relationship with her department chair, Dr. Silvia Formenti, until she accused her of fraudulent billing practices. Malanga presented enough evidence to go to trial on a False Claims Act claim that her eventual termination was in retaliation for those accusations, but not because she is a lesbian, U.S. District Court Judge William H. Pauley III said in a decision on NYU's summary judgment motion. *Malanga v. NYU Langone Med. Ctr.*, 2017 WL 4466612, 2017 U.S. Dist. LEXIS 165458 (S.D.N.Y. Oct. 15, 2017).

Malanga was hired in June 2011 by Formenti to be Director of Research Administration for the Department of Radiation Oncology. In 2013, she claimed to have discovered a variety of misconduct in Dr. Formenti's billing practices, including mislabeling research tubes, submitting false bills to the government, and quid pro quo arrangements with laboratories. She initiated an investigation and informed Formenti and others about her efforts. Although Formenti told her to stay out of it, she went into whistleblower mode. Malanga claimed that after this happened, Formenti started to make comments to her about her sexuality, calling her "butch," describing her clothing as "dykey," and making grunting noises at her. After a suspiciously-timed separate investigation into co-worker's complaints made against Malanga, NYU later terminated her, assertedly for "disruptive and potentially actionable behaviors affecting the work environment of the Department," in October 2013.

She sued under the federal False Claims Act, New York State Labor and Human Rights Laws, and the New York City Human Rights Law alleging sexual orientation discrimination. The court refused to grant NYU's motion to dismiss the False Claims Act retaliation claim or the New York City Human Rights Law hostile work environment claim, but dismissed the state law claims and her claim that her supervisor was aiding and abetting NYU in discrimination against her. *Malanga v. NYU Langone Med. Ctr.*, 2015 WL 7019819, 2015 U.S. Dist. LEXIS 153304 (S.D.N.Y. Nov. 12, 2015). After extensive discovery, NYU moved for summary judgment to dismiss the remaining claims.

On the sexual orientation discrimination claim, Judge Pauley quoted Malanga's own deposition testimony to show she failed "to demonstrate that she was treated less well at least in part because of her sexual orientation," according to the relevant legal test under the New York City Human Rights Law. For example, she said at a deposition that "[t]he relationship changed because I was dealing with her billing issues and her not following the protocols and things like that." Looking broadly at the whole body of evidence, he wrote "[t]he facts suggest that Dr. Formenti directed her comments at Malanga in retaliation for Malanga's billing-related complaints, not because Dr. Formenti knew or perceived her to be lesbian." In particular, Judge Pauley highlighted that "there is not a shred of evidence that Malanga was mistreated prior to 2013 by Dr. Formenti or anyone else on the basis of her sexual orientation." Viewed altogether by Judge Pauley, Formenti's actions were "evidence of retaliatory motive rather than discriminatory animus."

Moving to the False Claims Act retaliation claim, Judge Pauley found that Malanga's evidence did, meanwhile, create a fact dispute as to all three elements of that claim and raised a triable issue as to whether NYU's reason for firing her was pretextual. In his eyes, "[t]he timing of the investigation into Malanga's actions—and the complaints giving rise to such an investigation—plausibly create a genuine dispute underlying NYU's reason for terminating Malanga."

On the sexual orientation discrimination claim, Judge Pauley quoted Malanga's own deposition testimony to show she failed "to demonstrate that she was treated less well at least in part because of her sexual orientation."

Judge Pauley also allowed Malanga to file an amended complaint reflecting New York University as the proper defendant, rather than Langone Medical Center and NYU Hospitals, and scheduled a final pretrial conference on the now sole remaining claim.

Malanga is represented by Todd Jamie Krakower, Erika Minerowicz, and Michael Raymond Dichiara at Krakower Dichiara LLC in Park Ridge, New Jersey. – *Matthew Skinner*

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

North Carolina Governor Cooper Seeks Negotiated End of "Bathroom Bill" Litigation

One of the headaches Roy Cooper inherited when he was narrowly elected Governor of North Carolina last November over incumbent Governor Pat McCrory was the position of lead named defendant in litigation attacking H.B. 2, the so-called "Bathroom Bill" passed by the legislature in an "emergency session" in order to preempt a local ordinance that would require places of public accommodation in Charlotte to allow transgender people to use restroom facilities consistent with their gender identity. H.B. 2 went far beyond the bathroom access issues, however, preempting localities from passing legislation protecting LGBT people from discrimination and mandating discrimination against transgender people in public facilities, and also imposing other restrictions on municipal legislative powers (as part of the general war between the Republican legislature and the heavily Democratic larger cities in the state). The measure arguably violated the 14th Amendment and various federal anti-discrimination laws, and the litigation outcome did not look good for the state, based on preliminary court rulings. Cooper's first step in addressing the matter was working out a legislative compromise to repeal H.B. 2 and replace it with H.B. 142, a milder bill which rescinded the mandate to exclude transgender people from certain facilities while prohibiting localities from legislating on the issue. This provoked an amendment to the complaint in the pending lawsuit, changing it to target H.B. 142, as that measure still disempowers the local legislatures from protecting transgender people and leaves their facilities access rights an open question. So Cooper's next step was to seek a negotiated settlement.

On October 18, Cooper, the ACLU and Lambda Legal announced a Consent Judgment and Decree that the parties would submit to U.S. District Judge Thomas D. Schroeder (M.D.N.C.) to attempt a settlement of *Carcano v. Cooper*, No. 1:16-cv-00236-TDS-JEP. At the same time, Cooper released a new executive order, E.O. No. 24, which would take the place of a more limited executive order, E.O. 93, which had been issued by Pat McCrory in April 2016 in an attempt to partially defuse the controversy generated by H.B. 2. One complication with the litigation settlement is that the court had granted permissive intervention petitions on June 6, 2016, to N.C. Senate President Pro Tempore Phil Berger and N.C. Speaker of the House Tim Moore, and this negotiated settlement was concluded solely between plaintiffs and the executive branch defendants, and is thus theoretically not binding on the legislative leaders (who enjoy a veto-proof Republican majority, so they could take action without the approval of Governor Cooper).

The Executive Order includes sexual orientation and gender identity in a list of Prohibited Grounds for discrimination by the state, including its employment policies, operations, and contracting. It specifically provides that operations and agencies under the governor's executive jurisdiction will not adopt policies that exclude individuals from public facilities because of their gender identity, thus effectively reversing H.B. 2 and filling the policy vacuum left by H.B. 142 with respect at least to state facilities. It also provides that local governments shall have the right to establish such policies as well. The proof of effectiveness will remain in the execution, and it will take a while before one can form conclusions about how effectively this remedies the outrageous situation created by H.B. 2 and partially continued under H.B. 142.

As to the settlement agreement, it specifies that H.B. 142 "must be interpreted to mean that no executive agency, officer, employee, or agent thereof, may promulgate any regulation which prevents transgender people from using public facilities in accordance with their gender identity, nor subject transgender people to prosecution pursuant to N.C.G.S. Sec. 114-11.6." Also, without the state conceding liability for its past actions, the settlement acknowledges that excluding transgender people from facilities or subjecting them to arrest or prosecution for facilities use "raises serious federal law concerns, including concerns over constitutional guarantees of equal protection and due process, as well as other applicable federal statutes." The plaintiffs agree to waive any monetary claims they have against executive branch defendants and to dismissal of all claims stemming from the relevant sections of H.B. 2 and H.B. 142. It provides that the parties "intend the following Consent Decrees to benefit all transgender people who visit public facilities under Executive Branch control or supervision, and to be binding for purposes of issue preclusion and claim preclusion in all future actions, including through non-mutual offensive collateral estoppel."

The Decree itself would protect transgender people from being prevented from using public facilities consistent with their gender identity, and preserves the right of the parties to challenge future legislation while settling the dispute as to the existing legislation. The parties agreed that they "shall each bear their own fees, expenses, and costs with respect to all claims raised by Plaintiffs against the Executive Branch Defendants." The lack of participation of the Legislative Branch Defendants in this settlement leaves questions, of course, about how final the settlement is and how effective it will be, even if approved by the court and complied with by the Executive Branch of the state government. The radical anti-LGBT propensities of the legislature pose a continuing threat in this respect, given the veto-proof majorities enjoyed by the Republicans, whose reaction to Cooper's election was to enact several laws reducing the governor's powers in important respects as well as reducing the size of the state Supreme Court to prevent him from replacing justices whose terms were expiring. ■

Pennsylvania Appellate Court Orders New Hearing in Transgender Name-Change Case

A three-judge panel of the Pennsylvania Superior Court (an intermediate appellate court) found that the Philadelphia Court of Common Pleas erred by denying a transgender applicant's name change petition without holding a hearing as required by statute, and, in a concurring opinion signed by all the judges on the panel, indicated that in the absence of any hearing evidence of fraudulent intent, such petitions should be routinely granted. *In re A.S.D.*, 2017 Pa. Super. Unpub. LEXIS 3951, 2017 WL 4801515 (Oct. 24, 2017).

The petitioner, identified as male at birth, was convicted on August 25, 2009 of a third-degree felony, "Access Device Issued to Another Who Did Not Authorize Use." She subsequently transitioned and by the time she filed a name change petition on August 19, 2016, she had been living as a woman for about six years and had not been subject to any probation requirements for more than two years. In her petition, in which she disclosed her past conviction and subsequent events, she swore that there were no outstanding judgments against her, that she had submitted her fingerprints to the State Police as required by statute, and that her reasons for seeking a name change were the obvious ones: she had been using the requested name informally since transitioning, she sought a name consistent with her female appearance in order to avoid the confusion that ensued when her legal name, as reflected in official documents, was not in accord with her appearance or the name by which she was commonly known. "Petitioner believes this name change will lessen social stigma against Petitioner and that it will protect Petitioner from potential harassment and even violence." The petition also requested a waiver of the usual requirement of publication, and that the record of this proceeding be sealed.

The petition was submitted to Philadelphia Common Pleas Judge Linda Carpenter, who scheduled a hearing, but there is no record a hearing was actually held, and Judge Carpenter rejected the petition, citing A.S.D.'s criminal record, and said that A.S.D. should wait 12 months before filing another petition. A.S.D. filed a motion to reconsider, and this time Carpenter responded with a written opinion, asserting that even though A.S.D. had complied with all the statutory requirements, the question whether to approve the name change was up to the discretion of the court, and that she considered the criminal record sufficient cause to put off allowing a legal name change. This opinion is published as *In re: A.S.D.*, 2017 Phila. Ct. Com. Pl. LEXIS 47 (Jan. 27, 2017).

A.S.D. appealed to the Superior Court, which vacated and remanded the Common Pleas Court decision and directed that a hearing be held, the subject matter of which is to be whether there is any evidence that the name change is being sought for fraudulent reasons. If fraudulent intent is not shown, the petition should be granted.

In a concurring opinion signed by all the judges on the panel, Judge Mary Jane Bowes indicated that in the absence of any hearing evidence of fraudulent intent, such petitions should be routinely granted.

Writing for the Superior Court panel, President Judge Emeritus John T. Bender wrote, "Our review of the record in this case reveals that A.S.D.'s petition asserts that she has complied with the requirements listed in section 702(c), and the trial court acknowledges this fact. However, since no hearing was held we are compelled to vacate the order appealed from pursuant to the dictates of *In re Harris*, 707 A.2d 225 (Pa. Super. 1997). The *Harris* Court, as in the instant case, was considering the trial court's denial of a name change petition filed by a transgender person. Specifically, this Court's opinion directed that: "Preliminarily, we note that our Supreme Court long ago articulated the general standard to be applied to petitions requesting name changes. *After determining that the petitioner has complied with the necessary statutory prerequisites, the court must hold a hearing after which the court may, at its discretion, grant or deny the petition*. In making its determination, the court must act in such a way as to 'comport with good sense, common decency and fairness to all concerned and to the public.' *Petition of Falcuci*, 355 Pa. [at] 592, 50 A.2d [at] 202. (emphasis supplied by Superior Court). Because no hearing was held, we must vacate the order denying A.S.D.'s petition and remand the matter for proceedings as directed by the *Harris* case."

Judge Mary Jane Bowes, evidently dissatisfied with the narrow grounds articulated for the remand, wrote a concurring opinion, joined by Judge Bender and the other judge on the panel, going a bit further. "I write further to emphasize that A.S.D.'s compliance with the technical requirements of the Judicial Change of Name statute, and the evidence proffered by objectors to the petition, should be the sole considerations utilized by the trial court when ruling on a name change petition," she began. Because the purpose of the hearing is to consider whether there is a potential fraud problem with the

name change, this clearly means that the trial judge is not to consider the past criminal record, as the offense for which A.S.D. was convicted is not on a statutory list of particularly serious felonies for which the statute prohibits granting name changes. Judge Bowes made clear that Judge Carpenter erred in premising a denial of the petition on A.S.D.'s criminal record, opining that the statute did not afford the trial court discretion to make a decision on that basis if the petitioner had complied with all the statutory requirements imposed on convicted felons in connection with subsequent applications for name changes. She wrote that "interpreting the statute as requiring a court to grant a change of name petition, where its technical requirements are met and there is no evidence of fraudulent intent, comports with a liberal application of the act."

"In summary," wrote Judge Bowes, "the statute provides a mechanism by which an individual formerly convicted of a non-serious offense may apply for a name change. It requires such an individual to wait two years following the completion of her sentence before applying for a change of name. Appellant, herein, fulfilled the dictates of the statute in this regard. The statute does not delineate a further waiting period, such as the one-year interval ordered by the court, before considering the name change application. Since this timeframe is not found in the statute, I believe it reflects an abuse of discretion and was fundamentally unfair to impose on Appellant. Thus, as in the case herein, where a transgender petitioner files an unopposed name change petition, which comports with the requirements of Sec. 702, I believe the petition should be granted if, upon holding the hearing, the court finds no indication that the name change is being sought for fraudulent purposes."

In a footnote to his opinion for the court, Judge Bender noted that "by the time this decision is handed down, almost one year has elapsed since the original denial was issued."

None of the opinions indicate whether A.S.D. was represented by counsel, so presumably she represented herself. ■

Tennessee District Court Dismisses Sexual Orientation Claim by Former Police Chief

Women must work twice as hard to get half the recognition that their male counterparts receive. This is the harsh reality professionals across all industry must come to grips with. What is even more shameful is the treatment of lesbians in the workplace, who must work at least three times as hard for a granule of respect. In most federal circuits, an employer can discriminate against a lesbian employee without any repercussions under Title VII of the Civil Rights Act of 1964. One need not look further than the case of Gay Shepherd, who was forced to resign from her position as police chief at Tennessee Tech University (TTU) in 2014.

In *Shepherd v. Tennessee*, 2017 U.S. Dist. LEXIS 166120, 2017 WL 4467478 (M.D. Tenn. Oct. 5, 2017), Shepherd filed an employment law action against the State of Tennessee. TTU and the Tennessee Board of Regents are divisions of the State. Shepherd alleged that her low pay and constructive discharge were due to: (1) age discrimination in violation of the Age Discrimination in Employment Act (ADEA); (2) gender discrimination under Title VII; and (3) sexual orientation discrimination also under Title VII. Chief U.S. District Judge Waverly D. Crenshaw, Jr. ultimately dismissed Shepherd's age and sexual orientation claims; however, he allowed her to proceed with her gender discrimination claim, and to include hostile work environment and religious discrimination claims in her amended complaint.

Shepherd began working as a TTU police officer in 1979. In 1996, the University President promoted her to police chief. Because Marc Burnett, the Vice President of Student Affairs, believed that Shepherd's sexual orientation offended his religious convictions, the police department was moved from his department to the Business and Fiscal Affairs Department. Thus, Shepherd did not have to report to Burnett until the police department was moved back to the Student Affairs Department in 2013. Up until TTU forced Shepherd to resign in the following year, Burnett refused to work with her due to her age, gender, and sexual orientation. He even ordered new uniforms for all the male police offers, but did not order one for Shepherd. Although Shepherd complained of Burnett's harassment to TTU's Internal Audit officer, the officer advised her that it was not enough to warrant a formal complaint but it was "really close."

Over the course of her employment at TTU, Shepherd received many local and state awards, including the Outstanding Staff Award, Outstanding Professional Award, Love and Community Service Award, and Awesome Eagle Award. As police chief, Shepherd was the only female or openly-gay police chief at any of the Tennessee Board of Regents' universities, and the only female in TTU's police department. Despite her accomplishments and having served a longer term as police chief than others, she was the lowest paid police chief of the universities.

Turning to Shepherd's claims against Tennessee, Judge Crenshaw quickly dismissed her claim for age discrimination because the State is immune from suits under the ADEA. He then dismissed her claim for sexual orientation discrimination because 6th Circuit precedent explicitly does not recognize sexual orientation discrimination under Title VII. *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006).

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Transgender Veteran Strikes Out Twice on Challenges to Trump Administration Policies

Cassandra Leigh Williamson, a transgender military veteran in Tuscaloosa, Alabama, filed a lawsuit in federal district court challenging the constitutionality of President Trump's August 25 Memorandum banning military service by transgender individuals. U.S. District Judge L. Scott Coogler dismissed the claims without prejudice on October 11. *Williamson v. Trump*, 2017 U.S. Dist. LEXIS 167865, 2017 WL 4572319 (N.D. Alabama, Oct. 11, 2017). Two days later, Coogler issued another opinion dismissing without prejudice Williamson's separate action challenging a decision by the Department of Veterans' Affairs not to go ahead with a proposal to provide gender reassignment procedures for veterans. *Williamson v. Sulkin*, 2017 WL 4572319, 2017 U.S. Dist. LEXIS 169601 (N.D. Alabama, Oct. 13, 2017).

In support of her claim to standing to bring the challenge to the August 25 Memorandum, Williamson argued that the President's action "had an immediate chilling impact on the plaintiff's ability to get work" because it was "seen by the community and prospective potential employers of the Plaintiff as a justification to not consider her for employment and to mistreat her when she goes out to get food, go to church, and deal with other issues in the community, or even to walk her dog." According to Judge Coogler, she "argues the symbolic weight attached to the President's actions encourages private 'bias and bigotry toward "Plaintiff," and that "potential employers feel emboldened to not consider her." Williamson sought a nationwide injunction preventing implementation of the parts of the Memorandum authorizing the discharge of transgender military personnel and the ban on the Defense Department paying for their transition-related medical expenses.

The problem, wrote Judge Coogler, was that even if one assumed the truth of Williamson's allegations, "Plaintiff has not stated 'general factual allegations of injury' that fulfill her burden at the pleading stage to show she has suffered a 'concrete and particularized' injury in fact." Although the 11th Circuit did hold in *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender," the problem here is that Williamson "does not say with any specificity who these employers are nor does she produce enough facts for the Court to analyze her generalized claims of employment discrimination. There is not enough information for the Court to determine whether any of Plaintiff's employers or potential employers caused her an injury-in-fact." Thus, concluded Coogler, "Plaintiff wholly fails to show how the Defendants' actions have caused her injury or how an injunction by this Court would remedy future injuries. Plaintiff's pleadings lack any evidence that the discrimination suffered was caused by the memorandum or by President Trump's tweets. Plaintiff's allegations are that employers, not the President, have caused an injury to Plaintiff through employment discrimination. Although the memorandum does order that the accession of transgender persons in the military eventually be ceased, it in no way directs the hiring practices of private individuals or companies."

Furthermore, added Judge Coogler, "To the extent that Plaintiff claims that President Trump's actions impacted the rights of *current* transgender military personnel, a class to which Plaintiff as a veteran does not belong, it fails because it raises the rights of third parties not before the Court. Nor do Plaintiff's allegations fall into any of the recognized exceptions for third party standing." Thus, the complaint was dismissed because the Plaintiff "does not have standing to sue any of the named Defendants."

Williamson's second suit alleges that she was harmed by the Department of Veteran Affairs decision in 2016 to "forgo a proposed regulation change which would have reversed its official policy of not providing gender alterations as a medical service." The VA had proposed such a rule in the spring of 2016. An existing regulation had barred providing such service since 1999. Although the proposed new rule was published for comment, it was removed from the official fall 2016 Unified Agenda in November 2016 "due to budget constraints." (Or was it entirely coincidental that Trump's election early in November provoked a "pause" by the VA?) Wrote Judge Coogler, "In an official statement, the VA indicated that it 'has been and will continue to explore a regulatory change that would allow VA to perform gender alteration surgery . . . ' and the proposed rule change would be delayed until such a time as 'when appropriate funding [becomes] available." Although Williamson's *pro se* complaint was not totally clear, Coogler wrote, "Plaintiff

"To the extent that Plaintiff claims that President Trump's actions impacted the rights of *current* transgender military personnel, . . . it fails because it raises the rights of third parties not before the Court."

appears to seek injunctive relief and requests that the Court 'direct the VA to immediately reverse [the] harmful policy."

Williamson argued that there is "no rational justification to withhold or limit necessary or appropriate care for transgender veterans and service personnel," noting that VA already provides "most transition-related medical care for transgender veterans who have been diagnosed with gender dysphoria. She alleged that by refusing this "medically necessary care, as deemed by necessary by her doctors, the VA is causing great and last harm to [her] health and well-being."

Judge Coogler concluded that the claim was not ripe for adjudication. He pointed out that VA had not withdrawn the proposal; rather, it had just delayed its implementation on budgetary grounds, and might well effectuate it in the future. He cited *Thomas v. Union Carbide*, 473 U.S. 568 (1985), for the proposition that a "claim for relief is not yet ripe for adjudication when it rests upon 'contingent future events that may not occur as anticipated.'" Coogler noted that a 2011 Executive Order by President Obama requires agencies to take costs into account when considering rule changes. This has not been withdrawn or superseded by Trump. "The VA's reasoning for not moving forward with their proposed rule change in 2016 appears to have been based upon the financial infeasibility of the change at present, and was in no way aimed to discriminate against or harm transgender individuals or veterans like Williamson by depriving them of necessary medical care," wrote Coogler. "On the contrary, as shown by Williamson's complaint and attachments, she has received numerous consultations from the VA, her requests for a referral to a psychologist have been honored and the VA has provided her with care and treatment it is authorized to provide." He referred to 38 C.F.R. sec. 17.38, which states that the medical benefits packages available to veterans "express 'does not include gender alterations.'"

"The possibility that the VA will include a similar rule change in its next Unified Agenda, whether funding will become available to make such a change, and whether such a change will be approved and ultimately put into effect, are each contingent upon one another and are altogether tenuous. Thus, Williamson's claim for relief is based upon 'contingent future events that may not occur as anticipated . . . ' and is not ripe for review. The tenuous nature of these claims 'counsel' in favor of an exercise of 'judicial restraint' in this matter," Coogler concluded.

This writer has rarely read quite so disingenuous a judicial opinion. It may be true that in November 2016, when VA made the decision not to go forward with the proposed rule change on budgetary grounds, there was no ulterior motive to discriminate against transgender veterans, per se. That was during the Obama Administration, in which the Executive Branch came to embrace transgender rights and to regulate against unequal benefits for transgender people. This is the Trump Administration, in which the Justice Department advocates against transgender rights and the White House seeks to cut funding sharply for all domestic benefits programs in order to finance HUGE tax cuts for wealthy people and corporations. Judge Coogler is being totally disingenuous to "counsel" restraint as the VA goes back on the 2016 proposal to reflect the trend in other areas of the law to provide inclusive benefits for transgender people, and thus to honor our nation's obligation to its veterans to be sure that the medical benefits package covers all their legitimate health care needs. Federal courts, health care administrators, and the Internal Revenue Service have all come around considering gender transition procedures as medically necessary where qualified health care providers diagnose severe gender dysphoria. There is no excuse for excluding such procedures for coverage in the benefits provided to our military veterans. But the idea that the VA is suddenly going to find itself with sufficient financial resources to list this rule change on next year's Agenda appears in the present political context as wishful thinking. ■

CIVIL LITIGATION

U.S. SUPREME COURT – Add one more to the pile-up of certiorari petitions on LGBT-related issues pending at the Supreme Court. On October 30, Campaign for Southern Equality, the victorious plaintiff in the Mississippi marriage equality case, filed a petition seeking review of the Texas Supreme Court's ruling finding that plaintiffs lacked standing to mount a federal court challenge to the constitutionality of Mississippi H.B. 1523, a measure that enshrined a particular set of religious and moral views about marriage, gender identity, and extra-marital sex into state law, privileging people with such beliefs to engage in discriminatory conduct, among other things. *Campaign for Southern Equality v. Bryant*. If this sounds familiar, it's because CSE's lawsuit was consolidated with another lawsuit brought by a different set of plaintiffs challenging H.B. 1523, and the other group has already filed a petition for certiorari after the 5th Circuit denied a petition for rehearing or *en banc* reconsideration during October. *Barber v. Bryant*, petition filed October 10, 2017. Both petitions seek review of *Barber v. Bryant*, 860 F.3d 345 (5th Cir. 2017). Both petitions point out that the 5th Circuit's ruling on standing opens up a big circuit split on the question of whether and when individuals have standing to challenge a state law or policy that facially violates the Establishment Clause. Counsel of record on the CSE petition is Roberta Kaplan of the new firm, Kaplan & Company, LLP, with participation of several other lawyers from her firm, lawyers from Paul, Weiss, Rifkind, Wharton & Garrison LLP (whose partnership Kaplan left to found her firm), and several New Orleans lawyers. Possibly the Supreme Court will treat these petitions summarily and reverse the 5th Circuit, since their ruling is totally out-of-step with past standing precedent on Establishment Clause cases, as the dissent from the *en banc* denial decision amply documents. Other certiorari petitions pending as of the end of October include: *Arlene's Flowers v. State of Washington* (filed Aug. 21, 2017), challenging application of a state public accommodations law to a florist who declined to design floral arrangements for a same-sex wedding; *Kenosha Unified School District No. 1 v. Whitaker* (filed August 25, 2017), challenging transgender student restroom access under Title IX; *Evans v. Georgia Regional Hospital* (filed Sept. 7, 2017), contending that Title VII prohibits sexual orientation discrimination, and *Turner v. Pidgeon* (filed Sept. 15), challenging the Texas Supreme Court's contention that *Obergefell v. Hodges* and *Pavan v. Smith* do not necessarily require a municipal employer to provide equal benefits to same-sex spouses of its employees. * * * *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, scheduled for oral argument on December 5, continues to receive coverage in both the legal and mainstream media, especially as various amicus briefs were filed during October. A brief filed by the Justice Department on behalf of "wedding cake artist Jack Phillips" (as he is styled by his attorneys from Alliance Defending Freedom as well as DOJ) aroused considerable comment, amidst reports that career lawyers in the Department were opposed to filing the brief but ordered to fall into line with the Trump Administration agenda by Attorney General Jeff Sessions, who started off the month by formally reversing the Department's various LGBT rights positions in a series of memoranda and amicus briefs. Dozens of amicus briefs were filed on both sides of the case, including a brief for the American Bar Association filed by former U.S. Solicitor General Donald Verrilli, Jr., who argues to uphold the state court ruling against the baker, contending that a reversal would tear a "gaping hole" in anti-discrimination law by licensing businesses to discriminate against customers based on the religious beliefs of their owners and employees. By the end of October, the *National Law Journal* reported that the Court had received more than forty amicus briefs on behalf of baker Phillips, and many briefs in support of the state, including those representing the views of three dozen major corporations, more than 1,500 clergy who oppose discrimination in public accommodations, 200 members of Congress, 150 mayors, and even a group of celebrity chefs. All of the major national LGBT legal groups have weighed in, of course. The *NLJ* reported that newly-confirmed Solicitor General Noel Francisco will be making his "debut" as SG before the Court making the Administration's argument in favor of discrimination. The Colorado Civil Rights Commission will be represented by the state's Solicitor General, Frederick Yarger. Counsel of record for Charlie Craig and David Mullins, the couple whose shopping trip to order a wedding cake led to the litigation, is the ACLU. * * * In other news in the *Campaign for Southern Equality* litigation, U.S. District Judge Carlton W. Reeves agreed to reopen the underlying marriage equality case to consider whether H.B. 1523 violates the court's prior order declaring unconstitutional Mississippi's laws banning the formation and recognition of same-sex marriages, which order had ultimately been affirmed by the 5th Circuit Court of Appeals. On October 27, Judge Reeves signed an "Agreed Order" lifting a prior stay in the case, and authorizing the plaintiffs to conduct discovery to "identify how many and which of the 82 county Circuit Clerk's Offices in Mississippi, if any, have employees who have sought to recuse themselves from issuing marriage licenses to gay or lesbian couples, and the process by which they plan to handle such recusals" pursuant to H.B. 1523. The court also ordered the parties to meet and confer concerning further discovery, and noted that the state had

not, by agreeing to this Order, waived any defenses, objections or appeal rights it might have. This discovery relates to the basis on which the 5th Circuit ruled this summer that plaintiffs lacked standing in the case. Now that H.B. 1523 has gone into effect, it may be possible for plaintiffs to establish standing on a showing that the measure is not merely symbolic.

U.S. COURT OF APPEALS, 3RD CIRCUIT – Foiled by procedural requirements, a gay man from Ghana proceeding pro se suffered dismissal of his petition to review a final order of removal in *Tajudeen v. Attorney General*, 2017 U.S. App. LEXIS 20619, 2017 WL 4712496 (3rd Cir., Oct. 20, 2017). Mohammed Tajudeen applied for asylum, withholding of removal, and protection under the Convention Against Torture (CAT), citing fear of returning to Ghana "because his Muslim religion prohibited homosexuality." His application recited assaults he had suffered and local police having advised him to move to a different community for his safety. He also included reports concerning human rights violations against gay people in Ghana. This did not impress the Immigration Judge, who denied his applications and ordered him removed. Tajudeen claims he did not understand the IJ's question of whether he wished to appeal the ruling to the Board of Immigration Appeals, and in the event he did not file a timely appeal. However, he subsequently "attempted to make some kind of filing before the immigration court in Elizabeth, New Jersey," says the per curiam 3rd Circuit opinion. The filing was rejected, because he had not appeal the I.J.'s ruling to the BIA. He initiated review in the 3rd Circuit on March 31, 2017, seeking a stay of removal, claiming that he had appealed to the Board and the Board had denied his appeal. He urged the 3rd Circuit to remand the case for more fact-finding, since he claimed to have new evidence he had not previously presented. "Tajudeen provides little detail about what comprises the evidence that he now says is newly available," wrote the court, and proceeded to grant the government's motion to dismiss for lack of jurisdiction for failure to exhaust administrative remedies. This is one of those opinions that is emotionally difficult to read, since it seems likely that with competent counsel Tajudeen could have navigated the system and won the right to remain in the U.S. Studies show that lack of counsel in immigration proceedings is frequently out-come determinative . . . .

ARKANSAS – Pulaski County Circuit Judge Tim Fox, who has received on remand the case of *Pavan v. Smith*, in which the U.S. Supreme Court on June 26 reversed an Arkansas Supreme Court decision which had rejected a constitutional challenge to the state's policy against listing same-sex co-parents on birth certificates, issued an order to Arkansas Attorney General Leslie Rutledge and Nathaniel Smith, the head of the state's Health Department, on October 23, directing that they figure out how to modify the state's birth certificate law so as to meet constitutional requirements. In his order, Fox noted "at least one major procedural error" in the state supreme court ruling sending the case back to him, according to a report in the *Arkansas Democrat Gazette* (Oct. 24). Fox set a Nov. 6 deadline for the officials to respond. Fox had ruled in favor of the plaintiffs, but was reversed by the state Supreme Court.

CALIFORNIA – The trial judge's failure to screen the jury for anti-gay bias could not be raised on appeal by a lesbian defendant because she had not objected to the court's questions on *voir dire*, so the issue was not preserved, ruled the 4th District Court of Appeal in *People v. Bosco*, 2017 WL 4927710 (Cal. 4th Dist. Ct. App., Oct. 31, 2017). Furthermore, defendant's attorney's failure to seek voir dire questioning of potential jurors about any anti-gay bias they might have was also not grounds for vacating 23 guilty verdicts entered against Giuliana Bosco on a variety of white-collar crimes arising from a complex story too long to recount here. One gets the flavor by reciting the grounds: grand theft, forgery of seal or handwriting, unlawful use of personal identifying information, false personation, and practicing law without a license. The trial judge, San Diego Superior Court Judge Laura W. Halgren, sentenced Bosco, a same-sex married lesbian, to a total term of 13 years and 8 months. One of Bosco's arguments on appeal was that her conviction might be due to anti-gay juror bias, and she specifically pled ineffective assistance of counsel "when her counsel did not submit proposed jury voir dire questions to the court regarding any possible bias of the potential jurors or their inability to be fair and impartial based on her same sex marriage status or sexual orientation." Wrote Justice Nares for the appellate panel, "Assuming arguendo Bosco's counsel performed deficiently as she asserts, we nevertheless conclude she has not carried her burden on appeal to show that such deficient performance prejudiced her case. Based on our review of the evidence, we conclude it is not reasonably probable Bosco would have obtained a more favorable verdict had her counsel not performed deficiently as she asserts by not proposing jury voir dire questions to the court regarding her same sex marriage status or sexual orientation," noting that the trial judge did instruct the jurors to "not let bias, sympathy, prejudice, or public opinion influence your opinion." The court held that jurors should be presumed to follow such instructions. Since the court also rejected multiple claims by Bosco that the evidence was

insufficient to sustain the conviction, one imagines the guilt was clear-cut enough that the verdicts could not logically be attributed to homophobic prejudice. Bosco's appointed counsel on appeal is Ava R. Stralla.

CALIFORNIA – The 2nd District Court of Appeals affirmed a summary judgment in favor of the employer in *Terris v. County of Santa Barbara*, 2017 WL 4683778 (Oct. 19, 2017) (not officially published), in which a former county employee, Shawn Terris, claimed that one of the reasons her position was eliminated and she was laid off in 2009 was her employer's perception of her sexual orientation. California law forbids sexual orientation discrimination in employment, but of course requires that a discrimination plaintiff prove that actual or perceived sexual orientation was a motivating factor in the challenged personnel action. The court's opinion explains in detail how Terris fell far short of providing probative evidence on this key point. Her most direct evidence concerned certain remarks made by the County Executive between 1998 and 2001. The remarks, in context, did not necessarily support a conclusion that the County Executive was anti-gay, and, as the court pointed out, were much too remote in time to be probative about employment decisions made a decade later, especially when Terris conceded that she did not know the County Executive's attitude about gay people and provided no other "evidence" to link those comments to the layoff. As a result of her seniority, Terris was in a position to bid to bump into another position when hers was eliminated, but the position she sought was classified, after she submitted her bid, to require qualifications she did not have, and she ultimately was laid off. She was unable to show that the budgetary and management reasons advanced by the defendant to justify its actions were pretextual. At heart, however, the main problem with her case was that the allegation in her complaint that the County Executive was "hostile to homosexuals" was contradicted by her deposition testimony, in which she said, "I don't know if he dislikes homosexuals." As the court observed: "Proof of 'discriminatory animus' is necessary" in a disparate treatment discrimination case. Terris is represented by James H. Cordes.

CALIFORNIA – A gay man alleging a conspiracy against him by San Francisco police officers – including stalking, trying to get him institutionally committed, and forcing conversion therapy on him, suffered dismissal with prejudice of his constitutional claims against the City and County of San Francisco in *Major v. City and County of San Francisco*, 2017 WL 4419175, 2017 U.S. Dist. LEXIS 165645 (N.D. Cal., Oct. 5, 2017). U.S. Magistrate Judge Kandis A. Westmore, upon reviewing the complaint filed *pro se* by Mark E. Major, deemed the matter suitable for disposition without a hearing and cancelled a hearing on the City's motion to dismiss that had been scheduled for September 21. Judge Westmore dealt with Major's allegations and claims seriously, setting out the history of multiple amended complaints and missed deadlines, and the failure of the complaint to allege specific facts that would support the various constitutional theories asserted in the complaint, and in light of the number of amended complaints Major filed without ever becoming specific enough to satisfy civil pleading standards for stating a claim, the judge decided to dismiss the case with prejudice. Actually, the allegation that the City of San Francisco might have a policy of anti-gay discrimination sufficient to ground 14th Amendment municipal liability claims seems inconsistent with the politics of the city over the past several decades.

CALIFORNIA – U.S. District Judge Dean D. Pregerson denied a motion by Pepperdine University to reconsider his determination at the conclusion of the trial in *Videckis v. Pepperdine University*, 2017 WL 4785942, 2017 U.S. Dist. LEXIS 176184 (C.D. Cal., Oct. 23, 2017), that each party bear its own costs. The plaintiffs, two former student-athletes on the university's women's basketball team, asserted that Pepperdine and its employees discriminated against them because they were dating each other while teammates. They filed a 7-count complaint, at the heart of which was an allegation that Pepperdine's actions violated Title IX's ban on sex discrimination. Pepperdine had moved to dismiss the Title IX claims and, consequently, the entire case for lack of a federal question, but Judge Pregerson had concluded that using a sex stereotyping theory Title IX claims by persons alleging sexual orientation discrimination would be covered under the sex discrimination statute. Although they survived the motion to dismiss, the plaintiffs lost their case in a jury trial. Pepperdine asked the court to order plaintiffs to reimburse the university for its cost of defending the action, but the judge refused, and in this new opinion explained further his reasons for doing so. He rejected Pepperdine's argument that the case did not "raise issues of substantial public importance." To the contrary, wrote Pregerson, "their case raised the important and unsettled legal question of whether Title IX applies to sexual orientation discrimination," and said, "The court declines to assess the public importance of the case solely through the lens of the jury verdict." Pregerson also rejected the contention that because after a lengthy trial the jury took only four hours to reach a verdict, it was not a close or difficult case. "The claims in this case were not frivolous," he wrote, "and they were vigorously litigated. As articulated in this Court's prior Order, 'the legal claims that Plaintiffs brought under Title IX were

relatively novel and unsettled in this circuit, and the factual issues raised in the seventeen-day trial in this matter were numerous and complex." Further, and perhaps most importantly, the court opined that requiring students who unsuccessfully sue under Title IX to cover their university's defense costs would "discourage a potential civil rights plaintiff, especially a student, from vindicating their rights under Title IX." He noted, quoting from a prior district court opinion in *Mansourian v. Board of Regents*, 566 F. Supp. 2d 1168 (E.D. Cal. 2008), that students "must often finance education with a significant amount of student loans. Risking the imposition of thousands of dollars in costs in addition to these loans in order to vindicate rights they are guaranteed as students would likely deter potential litigants." Plaintiffs are represented by Jayesh Patel, Jeremy J. Gray, Agnes Markarian Sullivan, Jeffrey J. Zuber, Meredith A. Smith, and Robert W. Dickerson, or Zuber Lawler & Del Duca LLP (Los Angeles).

COLORADO – A year ago the federal district court in Denver ordered the State Department to reconsider its refusal to adopt a gender marker that is neither male nor female for Dana Zzyym, who identifies with neither gender and was denied a passport for refusing to select either a male or female marker. The change of administration in the interim just made things worse, so *Zzyym v. Kerry*, No. 15-cv-02362-RBJ, 2016 U.S. Dist. LEXIS 162659, 2016 WL 7324157 (D. Colo. Nov. 22, 2016), is now *Zzyym v. Tillerson* and Lambda Legal went back to the federal district court on October 20, seeking a ruling that the State Department's continued refusal to issue an appropriate passport to Zzyym violates Zzyym's 5th Amendment rights of Due Process and Equal Protection, depriving Zzyym of the right to travel and to have appropriate citizenship identification.

KENTUCKY – U.S. District Judge David Bunning has rejected a request from Governor Matt Bevin to reconsider his decision awarding nearly $225,000 in legal fees and costs to couples who sued Rowan County Clerk Kim Davis for refusing to issue marriage licenses to same-sex couples. It seems that under state law the award of fees against an elected official like Davis would be paid by the state, and Bevin tried to convince Bunning that awarding the fees is unfair. Shortly after taking office, having been elected while the case was in progress, Governor Bevin took steps, first through executive action and then through procuring legislative action, to change the marriage licensing process so that county clerks would not be required to sign the licenses and thereby appear to be endorsing same-sex marriages, which was the ground on which Davis had refused to issue licenses. The *Lexington Herald Leader* reported that on October 25 Judge Bunning wrote that Bevin's attempt fell "woefully short" of convincing the judge.

KENTUCKY – U.S. District Judge Gregory F. Van Tatenhove has granted a permanent injunction against Kentucky officials on behalf of a John Doe plaintiff who is a registered sex offender, blocking their enforcement of a provision of the state's sex offender registration act that prohibits registered offenders from using any social networking websites that may be accessed or used by minors. *Doe v. Kentucky ex rel. Tilley*, 2017 U.S. Dist. LEXIS 173750 (E.D. Ky., Oct. 20, 2017). Applying the Supreme Court's recent ruling in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), the court found that the Kentucky restrictions violate the First Amendment rights of Doe and other similarly situated registered sex offenders in Kentucky. The main problem identified by the court is the vague, overly-broad statutory language, which would leave individual registrants to guess at whether particular social media were out of bounds for them. Similarly, the statute imposes reporting requirements on registrants with respect to their internet usage and online identities which are impermissibly vague. Wrote the judge, "To its detriment, KRS Sec. 17.510(10) does not define the "Internet communication name identities" it requires sex offenders to register. In an effort to downplay this, the Defendants argue the Court should read 'Internet communication name identities' to include only those internet identifiers 'that are primarily used for online communication with members of the public (as are e-mails and instant messaging).' But just like in *Packingham*, the statute is not susceptible to such a narrowing construction. It may be true that the General Assembly meant the law to apply only to a sex offender's new Facebook profile, but the law as written might as well apply to usernames created to engage an online dialogue over Amazon.com products or Washingtonpost.com news stories. Additionally, the statute fails to explain how, exactly, a sex offender must register a change in his or her identities. At oral argument, the Commonwealth conceded the reporting requirement was an immediate one but was otherwise unable to explain to the Court whether registration of a new identity must be accomplished online, through a phone call, via some sort of written communication, or in person. This vagueness is troubling because 'the ambiguities in the statute may lead registered sex offenders either to overreport their activity or underuse the Internet to avoid the difficult questions in understanding what, precisely, they must report.'" The court found that a permanent injunction was necessary because the irreparable harm of abridging First Amendment free speech rights was well-established, and the balance of hardships tipped in Doe's favor. Since the court had declared several of the provisions unconstitutional in a final judgment

after hearing, the state had no legitimate interest in enforcing them in the face of a successful facial challenge by Doe.

LOUISIANA – A panel of the Louisiana First Circuit Court of Appeal ruled on November 1 that Governor John Bel Edwards had violated separation of powers and exceeded his authority under the state's constitution when he issued an Executive Order banning discrimination because of sexual orientation and gender identity in the executive branch of the state government and required that the state's contracts with private companies including a non-discrimination provision covering those two categories. *Louisiana Department of Justice v. Edwards*, 2017 La. App. LEXIS 1982. The ruling affirmed a decision by 19th Judicial District Court Judge Todd W. Hernandez. Wrote Judge Beau Higginbotham for the court, "The Governor has constitutional authority, as chief executive officer of the state, to see that all laws of the state and the United States are faithfully executed, and nothing prohibits the Governor from establishing policy through Executive Orders. However, the limited power of the Governor to issue Executive Orders does not inherently constitute authority to exercise the legislative lawmaking function. The Governor's Executive Order in this case goes beyond a mere policy statement or a directive to fulfill law, because there is no current state or federal law specifically outlining anti-discrimination laws concerning and/or defining sexual orientation or gender identity. The current laws simply prohibit discrimination based on a person's biological sex." The state constitution's equal protection clause, unlike the parallel federal clause in the 14th amendment, actually spells out prohibited grounds, including sex, but does not mention sexual orientation or gender identity. "Clearly," wrote the judge, "the Louisiana Legislature and the people of the State of Louisiana have not yet revised the laws and/or the State Constitution to specifically add 'sexual orientation' or 'gender identity' to the list of protected persons relating to discrimination. Further, there is no binding federal law or jurisprudence banning discrimination on the basis of sexual orientation or gender identity. Thus, we agree with the district court that the Governor's Executive Order constituted an unconstitutional interference with the authority vested solely in the legislative branch of our state government by expanding the protections that currently exist in anti-discrimination laws rather than directing the faithful executive of the existing anti-discrimination laws of this state." In a footnote, the court acknowledged ongoing litigation in the federal courts about whether sexual orientation or gender identity discrimination is prohibited by federal sex discrimination laws, but pointed out that the U.S. Supreme Court has yet to rule on the issue. Thus, the court concluded, it was appropriate for the trial court to permanently enjoin the adoption and implementation of the executive order. The court held that this ruling rendered moot the ongoing dispute about the role of Republican Attorney General Jeff Landry in refusing to approve various state contracts because they lacked the anti-discrimination language required by the executive order. Governor Edwards is expected to appeal.

LOUISIANA – The Equal Employment Opportunity Commission announced a final settlement in the case of *Broussard v. First Tower Loan LLC*, pending in U.S. District Court for the Eastern District of Louisiana. The individual plaintiff, a transgender man named Tristan Broussard, alleged discrimination in violation of Title VII by the bank, claiming that it fired Broussard because of his gender identity and failure to conform to the bank's gender-based expectations. The EEOC had intervened in the case on Broussard's side in 2015. The lawsuit had been stayed pending arbitration, and the arbitrators ruled in favor of Broussard, awarding him $53,000 in damages but no injunctive relief. EEOC kept the case alive and has achieved a consent decree under which the company will prohibit gender identity discrimination and establish appropriate procedures to deal with discrimination complaints and training of managers. *Mena Report*, Oct. 12.

MISSOURI – The Missouri Court of Appeals (Western District) has rejected the view of the state's Commission on Human Rights that because the legislature has not included "sexual orientation" in the Human Rights Law, gay people are not entitled to protection against discrimination because of their failure to accord to gender stereotypes. *Lampley v. Missouri Commission on Human Rights*, 2017 Mo. App. LEXIS 1069, 2017 WL 4779447 (Oct. 24, 2017). The court does not go so far as to embrace the view that sexual orientation discrimination is always an instance of sex stereotyping, however, but rejects the Commission's position that gay people can't bring sex stereotyping claims, where the Commission perceives that their sexual orientation had something to do with the discrimination. Wrote Judge Anthony Rex Gabbert for the court, "The MCHR contends a sex stereotyping analysis transforms sexual orientation into a suspect class. We disagree. This analysis simply allows the fact finder to determine whether sex stereotypes motivated the disparate treatment. Sexual orientation is incidental and irrelevant to sex stereotyping, a conclusion underscored in *Price Waterhouse*, where the claimant made no reference to sexual orientation. If an employer mistreats a male employee because the employer deems the employee insufficiently masculine, it is immaterial whether the male employee is gay or straight. The

prohibition against sex discrimination extends to all employees, regardless of gender identity or sexual orientation." The court reviewed a variety of decision from other jurisdictions where sex discrimination laws had been used by courts to uphold discrimination complaints by gay or trans plaintiffs who could plausibly allege sex stereotyping claims, including the recent 2nd Circuit decision in *Christiansen v. Omnicom Group, Inc*., 852 F.3d 195 (2nd Cir. 2017). The court held that MHCR erred by dismissing a discrimination complaint by Harold Lampley (a gay man) that alleged sex stereotyping discrimination, and a complaint by a co-worker who alleged she was discriminated against for associating with Lampley.

MONTANA – The ACLU of Montana filed a lawsuit on October 17 challenging the constitutionality of a proposed ballot initiative that would require transgender people to use public bathrooms and locker rooms corresponding to their sex as identified at birth. The suit was filed in Cascade County District Court on behalf of seven transgender residents, the parents of a transgender child, and the city of Missoula, and the Bozeman City Commission voted to join the lawsuit on behalf of the plaintiffs. The argument is that the proposal would unconstitutionally legalize discrimination by depriving transgender Montanans of equal protection of the law and violate due process rights of privacy and dignity. The plaintiffs seek an order to prevent the measure from being placed on the November 2018 general election ballot. *San Diego Union-Tribune*, Oct. 18.

NEVADA – Screening an application by Patrick Witt to proceed *in forma pauperis* in his Title VII discrimination claims against his former employer, U.S. Magistrate Judge Cam Ferenbach (D. Nev.) ruled that based on his income and expenses, Witt could proceed on that basis, and furthermore that the Complaint he had submitted *pro se* alleging discrimination because of race and sexual orientation stated claims under Title VII. *Witt v. Tix4Tonight, LLC*, 2017 U.S. Dist. LEXIS 165123 (Oct. 4, 2017). Witt, a gay African-American man, alleged that the employer "promoted heterosexual and non-African-American employees over Witt, harassed and stereotyped Witt, and terminated Witt when he reported the hostile work environment, all while Witt had positive interactions with customers and received pay raises" (summarizing allegations of the complaint). Witt sued on three claims: race discrimination, sex discrimination (sexual orientation), and retaliation. Judge Ferenbach found that Witt had asserted claims upon which relief can be granted under Title VII, and did not premise that ruling solely on the race discrimination claim. Addressing sex discrimination, which the judge characterized as presenting a "close question," the judge noted 9th Circuit precedent stating that "an employee's sexual orientation is irrelevant for purposes of Title VII" (*Rene v. MGM Grand Hotel, Inc*., 305 F. 3d 1061, 1063 (9th Cir. 2002)). "However," wrote the judge, "Witt asserts he 'was harassed and discriminated on based on his demeanor that his supervisors did not feel fit within traditional male traits." Thus, using the sex stereotype theory embraced by the 9th Circuit in *Nichols v. Azteca Rest. Enterprises, Inc*., 256 F.3d 864, 874 (9th Cir. 2001), the judge wrote: "Construing Witt's allegations in a light most favorable to him, the Court finds he has asserted a sexual discrimination claim. Witt also alleges he was harassed, discriminated against, and terminated after reporting a hostile work environment, which fulfills the elements of a retaliation claim."

NEW YORK – A Sullivan County Supreme Court jury found that a school district that had failed to respond appropriately to complaints of severe homophobic bullying of a student should pay $1 million in damages to the student's family, broken down as follows: $300,000 for past damages, $640,000 for future damages, and $30,000 for each of the parents of the student, Anthony Motta, Jr., who suffered severe physical and verbal bullying from 2011 to 2013 as a student in the Eldred School District. Motta does not identify as gay, but was subjected to anti-gay epithets and harassment based on the perceptions of his classmates. The verdict, reported on October 30 in the *New York Law Journal*, was immediately challenged as excessive by defendants, who moved in court to seek a reduction. According to the *Law Journal* report, Acting Sullivan County Justice Michael McGuire had dismissed the suit in 2015, finding that the state's Dignity for All Students Act (DASA) did not provide a private right of action, but a 3rd Department panel reinstated the case, finding that Motta had adequately pleased a negligent supervision case against the school district. The appellate court found that "the conflicting evidence establishes triable issues of fact with regard to whether defendant adequately supervised the students and, if not, whether such negligent supervision was the proximate cause of Motta's injuries. *See Motta v. Eldred Central School District*, 141 App. Div. 3d 819, 2016 N.Y. Slip Op 05424 (July 7, 2016). Evidently, the jury found Motta's evidence more convincing than that submitted by the school district. The school district issued a statement expressing "disappointment" with the jury's verdict, claiming that its staff is "attentive, watchful and supportive," and that the district provides training to staff related to bullying and promoting civility and acceptance. So they claim, but a presumably conservative rural jury thought otherwise! The Motta family is represented by JenniElena Rubino and Jean-Paul Le Du of the Rubino Law Firms.

CIVIL LITIGATION

NEW YORK – In *McMahon v. Tompkins County*, 2017 U.S. Dist. LEXIS 164719, 2017 WL 4443884 (N.D.N.Y., Oct. 4, 2017), U.S. District Judge David N. Hurd granted the County's motion to dismiss a Title VII case brought by Karen McMahon, a lesbian corrections officer, whose counsel, Edward E. Kopko, perhaps out of undue optimism about the development of Title VII law within the 2nd Circuit, framed her complaint as a sexual orientation discrimination claim under Title VII, supplemented with a similar claim under the New York Human Rights Law. In order for the federal court to have jurisdiction, the claim would have to be viable under Title VII. (The complaint did not allege a 14th Amendment violation as an alternative basis for federal jurisdiction.) The complaint recites a litany of incidents beginning shortly after McMahon's hiring in 2000; most of the incidents would be time-barred under Title VII's short statute of limitations, and the court found that the various allegations did not come within the "continuing violation" exception as they struck the court as distinct incidents when viewed in light of the disparate treatment claim, and there was no specific allegation of an official anti-gay policy at the county jail. Judge Hurd decided, in an "excess of caution," to analyze the case alternatively as presenting a hostile environment claim, for which the continuing violation doctrine might sweep in the earlier incidents, but he found that the incidents as described did not cumulate to rise above the high bar of severity that the Supreme Court has set for hostile environment claims. But, most importantly – and not even mentioning in passing that the 2nd Circuit is now considering whether to reverse circuit precedent on this point in an *en banc* review – the court agreed with the County's argument that sexual orientation claims are not actionable under Title VII. "Accordingly," he wrote, "to the extent that McMahon's decision to specifically plead her sexual orientation suggests that she believes it is relevant to this analysis, it cannot be considered a protected class for purposes of determining whether or not she has stated a Title VII claim. Even if Title VII did in fact provide such protection," Hurd continued, "McMahon's pleading appears to offer up her sexual orientation gratuitously, since none of her allegations attempt to draw any causal connection between the alleged misconduct undertaken by the various actors in her complaint and her sexual orientation. Nor does she allege that other individuals outside her protected class were treated more favorably." The judge also found that even if one were to analyze this as a more traditional sex discrimination claim, the factual allegations did not support an inference that McMahon's sex was the reason for the long record of frequent slights, discourtesies and misunderstandings she documents. (Indeed, a review of the allegations as summarized by the court suggests that the real "problem" may be that she was a frequent grievance filer and a union official who was aggressive about asserting her rights, pushing her claims to arbitration, and winning her grievances. Perhaps she just brought this case in the wrong forum.) The court found no more basis for McMahon's suit if analyzed as a retaliation case. In any event, the case was dismissed, the court declining to assert jurisdiction over the supplemental state law claims.

OKLAHOMA – Yet again U.S. District Judge Robin J. Cauthron has refused to dismiss a transgender academic's Title VII case against her former employer, find plausible allegations of hostile environment, discrimination, and retaliation claims sufficient to merit trial. *Tudor v. Southeastern Oklahoma State University*, 2017 WL 4849118, 2017 U.S. Dist. LEXIS 177654 (W.D. Okla., Oct. 26, 2017). Dr. Rachel Tudor, then a male-identified tenure track faculty member at the university, informed the administration that she was transitioning. She alleges that after this announcement "she began suffering significant discrimination and harassment," wrote the judge, summarizing Tudor's allegations. "The alleged discrimination culminated in denial of her application for tenure and dismissal from the University." In this opinion, the court was ruling on the university's motion for summary judgment on all claims, and found that the motion should be denied because there are material fact issues to be determined and Dr. Tudor's pleadings are sufficient to ground actionable charges under Title VII. Judge Cauthron rejected the attempt by the university to minimize the frequency and severity of incidents on which Tudor relied to allege a hostile environment, and also indicated that in prior rulings the court had rejected the university's argument that 10th Circuit precedent made Title VII protection unavailable to a transgender woman alleging discrimination because of her gender identity. (There is a frequently-cited 10th Circuit case, *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (2007), but employers routinely overstate its precedential holding and, in any event, it predates significant developments in Title VII case flaw. There is now widespread agreement in the federal judiciary that employees who transition are protected under the sex discrimination ban in Title VII, although some employers haven't yet caught up to this.) The court also found that the complaint alleged multiple plausible grounds for a retaliation claim. If the court's denial of s.j. on all counts signals the likely outcome (and the opinion is strongly-worded), the university would be well-advised to seek a settlement. Dr. Tudor is represented by Brittany M Novotny, Oklahoma City, OK; Ezra I Young, PRO HAC VICE, Law Office of Jillian T Weiss PC, Tuxedo Park, NY; Marie E Galindo, Law Office of Marie E Galindo, Lubbock, TX. This suit was

filed jointly with the Justice Department and the EEOC, with numerous counsel listed on the opinion.

PENNSYLVANIA – U.S. District Judge Mitchell S. Goldberg denied a motion to dismiss claims that a Pennsylvania woman accused of participating in an anti-gay hate crime and the woman's father, the Chief of Police in Bucks County, and the Bucks County District Attorney and two county detectives, conspired to violate the constitutional rights of the plaintiff, a woman who lives and works in other counties who started a satirical blog in response to news reports of the hate crime that included various critical statements about the hate crime defendant and her father. Whew, that was difficult to encapsulate in one lead sentence! *O'Donnell v. Knott*, 2017 U.S. Dist. LEXIS 165732, 2017 WL 4467508 (E.D. Pa., Oct. 6, 2017). Essentially, O'Donnell alleges that Chief Knott got the County D.A. to send his detectives to O'Donnell's workplace to stifle her protected First Amendment speech and, incidentally, get her fired for her blogging. The bulk of the opinion is taken up with disposing of the defendants' absolute and qualified immunity arguments. For example, Bucks County D.A. David Heckler alleged that he enjoyed absolute immunity for his conduct in connection with the alleged actions against the plaintiff – which included setting in motion a process that led to the two detectives coming to the plaintiff's workplace and making accusations of identity theft and defamation against her in the presence of her boss that led her employer to discharge her – because, the D.A. contended, this activity was "intimately associated" with the "judicial phases of the criminal process." Judge Goldberg found that it would be premature to dismiss the claims against Heckler on absolute immunity grounds, because "it is not clear from the face of Plaintiff's Amended Complaint that Heckler is entitled to absolute immunity because Plaintiff's factual allegations plausibly depict a situation in which Heckler's conduct could, if proven, amount to a function that was not prosecutorial or otherwise 'intimately associated with the judicial phases of litigation.'" Along the way, Judge Goldberg reviewed case law supporting First Amendment protection for people who operate satirical blogs, where any reasonable person reading them would realize their satirical nature and not construe them to be intended as factual statements about the person being satirized. Katherine Knott had been arrested for participating in a hate crime involving the vicious assault of two gay men in Philadelphia. Reacting to news reports about it, plaintiff Kathleen O'Donnell established an account on a social media website called Disqus.com, under the user name "Knotty is a Tramp," which included such comments as: "I'm an entitled princess who can beat up gay people if I want to; My chief of police father is disappointed in me; I brutally beat up two guys with my mob of 12; Don't know what drove me to my crimes except a good life and plenty of alcohol; Didn't you see my mug shot in Philadelphia. I look good in my pink hoodie. So not looking forward to wearing orange". . . and many more statements of that ilk. Finding that at this stage of the case O'Donnell's creation should be deemed to be protected First Amendment speech, and that a reasonable law enforcement official, such as the two defendant detectives would be aware of that constitutional protection, Judge Goldberg found that the complaint was sufficient to withstand the dismissal motion, which was only granted with respect to Bucks County as a governmental defendant (noting that O'Donnell had stipulated that the County be dismissed from the case). The court also refused to dismiss a state law civil conspiracy charge against the Knotts and other defendants. The opinion certainly makes interesting reading, especially for those concerned with the application of First Amendment rights on the internet.

UTAH – Equality Utah and the National Center for Lesbian Rights have withdrawn a lawsuit against the Utah State Board of Education as a result of the legislature's repeal of a law that banned speech in schools by students and teachers that "promotes" homosexuality. The bill repealing the "No Promo Homo" law was signed into law by Governor Gary Herbert in March. The State Board of Education informed school districts on September 19 that they are to revise any outdated policies to align with current standards set by the bill, S.B. 196 (The Health Education Amendments). *stgeorgeutah.com*, Oct. 6.

WASHINGTON – This one is a no-brainer for the court. In *Karnoski v. Trump*, 2017 U.S. Dist. LEXIS 167232 (W.D. Wash., Oct. 10, 2017), a lawsuit challenging Donald Trump's ban on transgender people serving in the military, one of the co-plaintiffs is a currently serving military member who enlisted as a man, identifies to herself as transgender, but has not transitioned to living openly as a woman, and has not made known to her fellow service members or the community at large that she is transgender. "Given Defendants' reversal of the Department of Defense's prior policy on transgender military service," wrote Judge Marsha J. Pechman, "Jane Does fears she will be separated from the military if her identifying information is disclosed," so she has moved to participate anonymously under the Jane Doe pseudonym. Defendants did not oppose her motion. "Jane Doe's need for anonymity outweighs any prejudice to Defendants or the public's interest in knowing her identity," wrote the judge. "Here, the severity of harm threatened by Jane Doe disclosing her

identity is severe. Given Defendants' decision to ban transgender people from military service, requiring Jane Doe to disclose her identity could lead to her separation from the military; the loss of her military career would also mean the loss of her career benefits. Considering Defendants' ban, Jane Doe's fears are reasonable, and she is uniquely vulnerable to harm because she has not disclosed her transgender status to her chain of command." The court also found that letting movant proceed anonymously would have "little bearing on Defendants' ability to address the legal issues raised" and so they would not be prejudiced. Requiring her to proceed under her actual name might "function to limit access to the courts for any citizen with a legitimate fear of retaliation by the government." Thus, the motion was granted.

CRIMINAL LITIGATION NOTES

CALIFORNIA – For years now, some California trial judges have reflexively ordered HIV testing of defendants who plead guilty to sex crimes that are on the list of those that may subject a convicted defendant to such testing, without bothering to comply with the statutory requirement that they find probable cause to believe that the actual conduct of the defendant may have resulted in HIV transmission if the defendant was, in fact, infected with HIV. Here's another such order, entered by Kern County Superior Court Judge Robert S. Tafoya in *People v. Rocha*, 2017 Cal. App. Unpub. LEXIS 6970, 2017 WL 4534180 (Cal. App., 5th Dist., Oct. 11, 2017). The defendant pled no contest to one count of lewd and lascivious conduct with a child under the age of 14 (Penal Code Sec. 288(a)). On appeal, he contended, and the prosecution conceded, that there was insufficient evidence to impose HIV testing. The charge was that the victim told her mother than the defendant would "look inside her pants in the vaginal area when they were along." His conduct later progressed to "touching the victim's breasts, vagina and buttocks." There were no allegations that the defendant ever went beyond fondling the victim with his hands. On appeal, he argued, that there was not probable cause to believe that any bodily fluids capable of transmitting HIV were transferred from defendant to the victim, and the people conceded that the trial court did not expressly make a finding of probable cause that this could happen under the circumstances alleged. What if the trial court fails to make the required statutory finding on the record? Obviously, the testing order should be vacated, but what then? Relying on the California Supreme Court ruling in *People v. Butler*, 31 Cal.4th 1119 (2003), the court of appeal found that the correct remedy is to remand "for further proceedings to determine whether the prosecution has additional evidence that may establish the requisite probable cause" because of "the significant public policy considerations at issue." It is up to the prosecution now to decide whether to request a hearing for this purpose. If it does not, "the HIV testing order shall be stricken and any existing blood or saliva specimen taken pursuant to the order shall be destroyed."

CALIFORNIA – In an unpublished opinion the California Court of Appeals (opinion by Presiding Justice Sandy R. Kreigler, with concurrence by Associate Justice Lamar W. Baker, and Superior Judge Dennis J. Landin, sitting by designation) affirmed application of three strikes rules to uphold a sentence of 25-life for an inmate convicted of sodomizing his cellmate in *People v. Letele*, 2017 Cal. App. Unpub. LEXIS 6921 (Calif. Ct. App. 2d Dist., October 5, 2017). Pesamino Prince Letele and his cellmate, identified as "L.D.," had been consensual sexual partners and had sex several times a day for years. In February of 2017, Letele, a gang member, learned that L.D. was serving time for sexual abuse of a minor. Letele determined that the "code" of his gang dictated that he kill L. D., but Letele, facing imminent release, did not want to "catch" a new crime, so he assaulted L.D. sexually, hoping that the acts would satisfy his gang cohorts without extending his prison sentence. The assaults on two consecutive days involved beatings, nude bondage, overpowering L. D., and forcing him to have oral and anal sex. Medical evidence supported the use of force for the sex, as well as oral and anal injuries. The jury nevertheless deadlocked on counts involving forcible sex, but it convicted Letele of two counts of having consensual sodomy with a partner in a correctional institution – a misdemeanor under California Penal Law § 286(e). In 2012, California had passed Proposition 36, which lessened the severity of the state's three strikes rule and required that the third strike involve a crime of violence. Prisoners whose third strike did not involve violence could apply for resentencing. Here, the trial judge found that the sodomies involved violence from the facts presented to the jury, and denied Letele resentencing. The opinion is a technical application of California criminal procedure on resentencing that is beyond the scope of this blurb. It seems clear from the recitation of the facts that L. D. was violently assaulted sexually. It also seems clear that the jury did not convict on those counts. While this writer is not an expert on California criminal procedure, two problems seem to arise. The first is whether the state can criminalize consensual sodomy for prisoners under *Lawrence v. Texas*, 539 U.S. 558 (2003). A challenge to same was rejected by the California Court of Appeals, Fifth District, in *People v. Groux*, No. F059366 (June 28, 2011), on the ground that the action was not being private or necessarily consensual under the circumstances; but there appears to be no definitive California

Supreme Court decision. Second, the trial judge used violent record evidence not necessary to the conviction of consensual sodomy under Penal Law § 286(e) to reject sentence reduction under Proposition 36, when the jury had been unable to agree on these points. This raises Sixth Amendment issues under *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (judge cannot under Sixth Amendment enhance sentence as hate crime based on record without submitting pertinent facts to jury). This case seems to be an example of horrible facts making bad law. *William J. Rold*

KANSAS – Chief U.S. District Judge Julie A. Robinson denied a motion for a writ of habeas corpus filed by Michael Gaines, an HIV-positive inmate, who claimed, *inter alia*, that he was denied effective assistance of counsel in his trial on charges of criminal threat and committing battery against some correction officers who had intervened in what they perceived as a fight between the defendant and another inmate, when his defense counsel failed to make a motion *in limine* to exclude any testimony about the defendant being HIV-positive. *Gaines v. Heimgartner*, 2017 WL 4758929 (D. Kansas, Oct. 20, 2017). The incident in question occurred while Gaines was detained in the Sedgewick County jail, and was lined up with other inmates inside the medical clinic for some blood tests. Conflicting evidence obscures the reasons why Gaines and another inmate appeared to be involved in a struggle, which ultimately turned into a struggle with corrections officers seeking to control Gaines. "During the struggle," wrote Judge Robinson, summarizing the facts as determined by the Kansas Court of Appeals in its opinion affirming the conviction and sentence, "Gaines said, 'mother fucker, I'm going to kill you and your family when I get out of here.' Deputy Leonel Verduzco came to assist [Corrections Officers] Eaglin and Diericks, and the three deputies finally gained control of Gaines, put handcuffs on him, and stood him on his feet. Gaines then spit blood and saliva at Eaglin and Verduzco, hitting them in their faces." The jury acquitted Gaines on the charge of criminal threat, but convicted on the count of battery against Eaglin and Verduzco. Gaines pursued various avenues of appeal and post-conviction review unsuccessfully, before filing his motion for a habeas writ in the U.S. District Court, asserting various claims, of which the one of relevance in the context of *Law Notes* relates to his HIV-status. "Petitioner's first point of error is that trial counsel was ineffective for failing to challenge admission of the State's evidence of his HIV-positive status, and of certain racially charged comments he had made in the past" (which could be relevant given the race of the Corrections Officers). "He argues that the statement about his medical condition violated his right to privacy and violated his right to a fair trial." The Kansas Court of Appeals had dealt with this issue by assuming that the trial counsel was deficient by failing to secure an *in limine* ruling and by failing to object to admission of the evidence at trial. Nonetheless, that court determined that Gaines failed to show a reasonable probability that the result of the trial would have been different if the evidence of his HIV-status had been kept out, largely relying, according to Judge Robinson, on "the fact that Petitioner was acquitted of the criminal threat count, which demonstrated that the jury could not have placed undue emphasis on the allegedly prejudicial evidence Petitioner believes should have been excluded." She continued, "Petitioner conclusorily asserts that the repeated references to his HIV status caused him an unfair trial," but the court was unconvinced, characterizing his arguments as "mere conjecture," explaining: "The jury found beyond a reasonable doubt that Petitioner committed battery against the deputies, but did not find sufficient evidence to establish the State met the elements of the criminal threat charge. It was not unreasonable for the KCOA to rely on this acquittal in determining that the unchallenged evidence did not prejudice the jury. Likewise, it was not unreasonable for the KCOA to rely on the well-established principle that the jury is presumed to follow the instructions given, which included an instruction that it is not to consider the case with sympathy or prejudice for either party." Consequently, the court refused to grant the motion as to this claim. Gaines represented himself on the motion.

MAINE – Finding a 1995 statute ambiguous on the point and lacking support in legislative history to suggest that the state's indecent conduct law would apply to the act of sending a nude photograph over the internet to a Facebook "friend," the Maine Supreme Judicial Court partially overturned the conviction of a young man who had sent nude photographs of himself to five teenage girls through Facebook messaging. *State v. Legassie*, 2017 WL 4414207, 2017 ME LEXIS 223, 2017 ME 202 (Oct. 5, 2017). Also, ruling on an evidentiary objection to the admission of testimony about textual messages the defendant was charged with sending to the five girls through their Facebook accounts, the court held that the "best evidence" rule applies, so a screen shot of a message can be introduced but not testimony about the content of the message in the absence of evidence that the actual message is not available to submitted as evidence. The analysis of the "best evidence" issue centered in part on the meaning of an "original" as opposed to a "copy" of a digital message. The court held that both the version of the message residing on the sender's server and the version that appears in a person's email in-box or as posted on a Facebook timeline may be deemed "originals" for purposes of the best evidence rule, and that a

screen shot of a digital message can be deemed an "original" for purposes of admitting evidence as to the content of the message. As a result of this ruling, rejecting the view of the trial judge, who had opined that the "best evidence" rule did not apply, and the necessity of the state proving the actual content of the messages if it wanted to prosecute the defendant for sending them, the court had to set aside convictions on the counts related to those victims for whom screen-shots of the messages were not proffered as evidence, in the absence of testimony that the messages had been deleted and thus could no longer provide a basis for introducing an "original," and to strike the girls' testimony, given years after the fact, as to the content of the messages that had been the basis of convictions. The net result was to affirm some of the convictions, vacate others, and remand for further review of the trial record as to others. Perhaps the most significant substantive part of the decision was the holding that the "indecent conduct" law applies only to in-person conduct, so sending a nude photograph through the internet could not be prosecuted under that statute. The point may, however, be seen as relatively trivial, since Maine has since enacted a law criminalizing the dissemination of obscene photographs to minors as a Class C offence which, wrote the court, "appears more directly applicable to Legassie's conduct and weighs against the State's proposed interpretation" of the indecent conduct statute. There is no indication, however, that the photos Legassie sent to the five teenage girls would be considered "obscene" under contemporary standards. Although we suspect they would be labeled as NSFW!!

PRISONER LITIGATION NOTES

CALIFORNIA – *Law Notes* has provided continuous coverage of the saga of transgender inmate Shiloh Heavenly Quine in the California prison system. *Quine* was "settled' some time ago, with the state required to revise its policies regarding transgender inmates. Last month, U.S. District Judge Jon S. Tigar denied a motion of several transgender inmates to intervene in the litigation. *Law Notes* (October 2017 at page 421). Meanwhile, Judge Tigar has supervised the implementation of the new policies, ruling that some policies were insufficient. *See* "Federal Judge Applies 'Intermediate Scrutiny' to Denial of Gender Appropriate Items to Transgender Prisoners," *Law Notes* (June 2017 at pages 238-9). Now, in *Quine v. Beard*, 2017 U.S. Dist. LEXIS 169100, 2017 WL 4551480 (N.D. Calif., October 12, 2017), California officials seek a stay of that Order, which Judge Tigar denies. As background, California has divided its system into 11 "hub" institutions, at which it seeks to congregate transgender prisoners; and 24 "non-hub" institutions. Judge Tigar's Order applied to all institutions ("hub" and "non-hub"), and it required such items as access to pajamas, nightgowns, rovers, scarves, bracelets, earrings, hair brushes, and hair clips – and he directed the state to pay for compression tops and binders for inmates who cannot afford them. The motion for a stay is based on standard stay theory, plus a few new wrinkles. First, California argues that the Order interferes with its efforts to congregate transgender inmates in "hubs"; secondly, it argues that application of intermediate scrutiny to analysis of such claims has not been addressed by the 9th Circuit as yet. Judge Tigar found "little" support for the argument that the state would be irreparably injured if it could not use its "hub" system to congregate transgender inmates. On the legal standard, the state's arguments were a rehash of points rejected when the April Order directed access to gender-appropriate items. The state failed again to persuade Judge Tigar that the balancing test of *Turner v. Safley*, 482 U.S. 78, 89 (1987), applied to transgender discrimination claims in light of the Supreme Court's refusal to apply it to sex discrimination claims in *Johnson v. California*, 543 U.S. 499, 509 (2005). Interestingly, Judge Tigar found that, even though other transgender inmates were third party beneficiaries of the new policies – even though they could not intervene – Quine had an interest as a party to the settlement to enforce the new policies for other transgender inmates, so that she had an injury if they were not enforced and she had standing to oppose a stay. Citing to an equity treatise on enforcement of contracts, Judge Tigar wrote that "a promisee may sue to enforce such a contract made for the benefit of a third party in equity under the principle that the promisor is under an equitable obligation to the promisee to perform." He likened such enforcement to interests of the public, which factor also mitigated against a stay. That Quine can enforce the interests of non-parties as a "promissee" strikes this writer as legal "gobbledygook" [pardon if this case note just quoted Justice Scalia], and a tangled way of reaching a quasi-class action result without certification. Mixing metaphors, someone, sometime, is going to have to "grab the bull by the horns" in transgender prison litigation and certify a class. Apparently, that time is not yet. Quine is represented by Morgan Lewis & Bockius, LLP; and the Ad Astra Law Group, LLP, San Francisco; and the Transgender Law Center, Oakland. *William J. Rold*

CALIFORNIA – James Leroye Jefferson is an HIV+ transgender inmate who sued because of verbal taunts and her prison's refusal to let her work in food services, in *Jefferson v. Grey*, 2017 U.S. Dist. LEXIS 169151, 2017 WL 4557227 (S.D. Calif., October 12, 2017). U.S. District Judge Dana M. Sabraw dismissed the verbal taunts as not actionable under the Eighth Amendment. She also

dismissed the food services job claim as barred by *Gates v. Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994). In *Gates*, the Ninth Circuit held that the deference given to correctional administrators under *Turner v. Safley*, 482 U.S. 78, 89 (1987), applied to claims involving prisoners under the Rehabilitation Act. Even though the risk of transmission through food services was "low risk," the fear of other inmates justified the regulation – despite a recommendation of the Mediator in the Vacaville Consent Decree, as adopted by the District Judge. *Gates* has never been directly over-ruled. It was cited recently for the same point in *Doe v. Beard*, 63 F.3d 1159, 1164 (C.D. Calif. 2014), by Judge Pregerson. This is junk science, and it probably could have been fought more successfully were Jefferson not *pro se*. Following the challenge to complete segregation of HIV+ inmates in Alabama, the Eleventh Circuit eventually ruled that the Rehabilitation Act required individualized determinations of job fitness, not broad rules, in *Harris v. Thigpen*, 941 F.2d 1495, 1526-7 (11th Cir. 1991) (under the Rehabilitation Act, "even if the risk is significant, the court is then obligated to examine *as to each program* whether 'reasonable accommodations' by the DOC could minimize such risk to an acceptable level. Moreover, it is not enough for the district court simply to rely on general findings and prison policy reasons . . . .") (emphasis by the court). On remand, the District Court put to rest the bad science and "blame the patient" underpinnings of the Ninth Circuit's *Gates* decision. The court found that the exclusion policies for jobs in food services for HIV+ inmates, which the state no longer defended, were "obviously irrational": "the science is unanimous: there is no risk of HIV spreading through food." Moreover, "the ADOC wisely no longer contends that accommodating assumed prejudice is a legitimate justification for discriminating against the plaintiffs in this way." *Henderson v. Thomas*, 913 F.Supp.2d 1267, 1309 (M.D. Ala. 2012). Come on, Ninth Circuit. Judge Sabraw permitted Jefferson leave to amend. *William J. Rold*

FLORIDA – *Pro se* plaintiff Christopher Shorter is a male-to-female transgender inmate who has filed numerous grievances about her incarceration [note: the court uses male pronouns because the caption uses a "male" first name]. U.S. Magistrate Judge Patrick A. White's Recommendation in *Shorter v. Romero*, 2017 U.S. Dist. LEXIS 168920 (S.D. Fla., October 11, 2017), is an odd treatment of the case: it focuses on some legal issues without resolving them, and it ignores others plainly raised by the facts. Shorter alleges that she has been prohibited from attending religious (Christian) services because the chaplain does not like her and is afraid of her. She also says her grievances are ignored and that she has been forbidden from seeking mental health care. She is in federal custody and purports to sue under *Bivens v. Six Unknown Fed'l Narcotics Agents*, 403 U.S. 388 (1971). Judge White finds that Shorter has stated a claim under the Free Exercise Clause of the First Amendment for the prohibition on attending services. He also finds that she has a potential Establishment Clause claim because other inmates are permitted to attend services. [Note: This second recommendation seems weak; Judge White relies on an Establishment Clause case in which kosher meals were provided Jewish inmates but there was no accommodation for Muslim inmates' diet; Establishment Clause cases for prisoners usually entail something like forcing an inmate to complete a program that has religious components to qualify for points for parole]. He discusses both strict scrutiny for First Amendment claims and balancing of interference with prisoners' constitutional rights under *Turner v. Safley*, 482 U.S. 78, 85 (1987), without resolving the controlling test. After all this, Judge White recommends that both First Amendment theories proceed, despite observing that the Supreme Court has never extended *Bivens* to implied causes of action under the First Amendment. He then applies the Religious Land Use and Institutional[ized] [sic] Persons Act (RLUIPA), codified at 42 U.S.C. §§ 2000cc, et seq., (although it was not pleaded) and reaches a similar conclusion, recommending that Shorter be allowed to proceed under it as well. The framing of the religion claims strikes this writer as bookends of an Equal Protection argument about transgender discrimination, which is never discussed. The failure is particularly odd since the Eleventh Circuit has favorably addressed Equal Protection and sex stereotyping of transgender plaintiffs and government discrimination in *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011). Although Judge White recognizes that "federal courts must 'look behind the label' of an inmate's *pro se* filings and determine whether there is any framework under which his claims might be cognizable," quoting *United States v. Jordan*, 915 F.2d 622, 624-25 (11th Cir. 1990), he does not address Shorter's claim that she was forbidden from seeking mental health services. Such access to health services is the first and most fundamental right guaranteed by *Estelle v. Gamble*, 429 U.S. 97, 104-5 (1976). Judge White rejects Shorter's grievances claim because documents attached to her complaint indicate that she received responses to her grievances, albeit unsatisfactory ones. He finds that Shorter has pleaded insufficient facts to establish a cause of action for First Amendment retaliation regarding her grievances, but he gives her an opportunity to replead. *William J. Rold*

ILLINOIS – U.S. Chief District Judge Michael J. Reagan says that *pro se* plaintiff Deon Hampton "is a transsexual woman, yet resides in a male

prison." On screening of her complaint under 28 U.S.C. § 1915A, he allows her to proceed on two counts of transgender abuse under the Eighth Amendment, as well as a count of battery under Illinois state law, in *Hampton v. Meyer*, 2017 U.S. Dist. LEXIS 173201, 2017 WL 4699269 (S.D. Ill., October 19, 2017). Judge Reagan notes that much of the complaint is "completely illegible" and that he cannot ascertain what is claimed or against whom. So, many allegations that are unclear are dismissed without prejudice, with leave to replead. Count One involves a "campaign of harassment" that stated a claim of cruel and unusual punishment under the Eighth Amendment. Hampton was forced to wear a bra and thongs and perform before revealing her breasts and buttocks, while enduring slurs like "sissy," "faggot," and "cocksucker." She was forced to perform sexual favors for staff. Hampton was allowed to proceed under *Hudson v. McMillian*, 503 U.S. 1, 9 (1992), and *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). On Count Two, Hampton was cuffed, dragged from her cell, kicked, spit upon, beaten, and had her clothes cut off and her hair cut. She was left completely naked without a bedsheet, blanket, or jumpsuit. Medical evidence showed bruises and a broken tooth. Hampton was allowed to proceed on claims of excessive force without penalogical justification under *Wilkins v. Gaddy*, 559 U.S. 34, 40 (2010), and *Hudson*, 503 U.S. at 6. On these facts, Judge Reagan also found a claim under Illinois battery law, citing *Welton v. Ambrose*, 814 N.E.2d 970, 979 (Ill. App. 2004). Hampton was threatened with retaliation if she reported the incidents, but she threatened to file a complaint under the Prison Rape Elimination Act [PREA], following which she was put in segregation on a bogus ticket. Judge Reagan found no allegation that Hampton actually filed a PREA complaint, so, without protected activity to trigger the First Amendment, he dismissed the retaliation claim. [Note: this should be able to be corrected on repleading]. The relief sought for the false charges – restoration of good time – was not available under § 1983 under *Heck v. Humphrey*, 512 U.S. 477, 487 (1994). The opinion suggests to this writer that Judge Reagan thought it possible that a claim could be framed against the warden, but the specifics of personal involvement are not clear from the state of the complaint. Similarly, Judge Reagan notes that a claim may exist against Wexford Mental Health (a corporate provider) for policies of turning a "blind eye" to staff-caused injuries, but the complaint as it stands is insufficient. It seems to this writer that Judge Reagan's opinion calls out for more to be done with this case. He refers further proceedings, including a request for appointment of counsel, to a magistrate judge. *William J. Rold*

KENTUCKY – This is a case that meets the "make the judge throw up" test. No circuit court would affirm a dismissal on screening of these facts. *Pro se* inmate plaintiff Joshua Haley alleges that he was kept as a sex slave over his protests for over a year, with the knowledge of at least eight correction officer defendants. When he tried to remove himself from the situation, his "master" assaulted him with boiling water, broke his jaw, and beat him unconscious, yelling: "If I can't have you, no one will." Haley required multiple reconstructive surgeries. U.S. District Judge David J. Hale writes that Haley is self-described as a "30 year old gender nonconforming male that has an extremely feminine appearance housed within the male prison." The case is reported at *Haley v. Arnold*, 2017 U.S. Dist. LEXIS 161813 (W.D. Ky., October 2, 2017). Although classified as "at risk for assault," Haley was housed with a known "sexual predator" as a cellmate. Haley alleges that two defendant corrections officers witnessed the brutal attack when Haley tried to end the "relationship," but they failed to intervene because Haley is HIV+. Haley alleged that they have not been properly trained to intervene in an altercation involving HIV+ inmates. Haley also sued the warden for the training claim, for failing to file criminal charges against his assailant, or for not "creating a E.O.R." [Note: The opinion never defines "E.O.R.," but this writer's review of the Kentucky DOC regulations establishes that an E.O.R., is an "Extraordinary Incident Report (KDOC Policy No, 8.6, 5/9/08), that requires reporting and investigation of, *inter alia*, all assaults on inmates. It is not discretionary when the assault is aggravated, as here; and it is reported to (and triggers) further review by the DOC Commissioner, relevant Deputy Commissioners, and the maintenance of a database.] Haley also alleges that the warden has actively concealed video evidence of the attack that is evidence in Haley's case. Judge Hale allowed all of the protection from harm and deliberate-indifference-to-his-safety claims to proceed against the eight defendants, without case citation – although they plainly state claims under *Farmer v. Brennan*, 511 U.S. 825, 840-44 (1994). Judge Hale dismisses the Eighth Amendment training and supervision claim against the warden because there were no allegations that the warden told the officers not to intervene or that he participated in the attack himself or as a bystander. Judge Hale allows the warden to stay in the case under a state law negligence theory, without citing any Kentucky precedent. [This writer's brief review of Kentucky law using key words like "warden," "failure to protect," "failure to train" and the like, reveals no prisoner cases – only decisions involving dog wardens and animal control. It appears that Kentucky negligence law for government officials generally depends on whether the challenged action is ministerial or discretionary, and most prison administration is considered discretionary, to which qualified immunity applies under state

law]. This case cries out for counsel. The complaint needs to be amended to include allegations that withstand scrutiny on the liability of the warden. What training was given on breaking up inmate fights? What training and protective gear is issued for handling HIV+ inmates in use of force? How many other incidents have been reported to Central Office? Was the warden reluctant to file an E.O.R. to keep his management record clean from scrutiny from his supervisors? Ditto for public prosecution? Where are the tapes of the incident? What is the policy on preserving such evidence? [And why didn't Judge Hale order them preserved, instead of seeing them only as relevant to Hale's grievances?] What was going on for a year while Haley was a "slave"? Who knew? Why was he housed in a cell with a known predator? The warden's deposition practically writes itself. This seems to be a good contingent tort case, and this writer hopes someone picks it up. *William J. Rold*

MICHIGAN – David Anthony Flores, a/k/a/ Ambarr Star Flores, *pro se*, sued for violation of his civil rights after he was placed in involuntary protective segregation following an assault with a weapon by another inmate. By the time of the decision, Flores had been moved from the Upper Peninsula to a facility in Ionia in West Central Michigan. U.S. District Judge Paul L. Maloney dismissed the case on screening in *Flores v. Unknown Leece*, 2017 U.S. Dist. LEXIS 171364, 2017 WL 4639957 (W.D. Mich., October 17, 2107). Flores did not sue for deliberate indifference to his safety, and his injuries are described as "superficial." Rather, he claimed that the prison where the assault occurred (Michigan's Marquette facility) "is well known for locking up gay and transgender prisoners" and that he should not be punished for being a victim of an assault. The opinion is short on facts, and it does not say whether he is still in segregation or how long he was (or has been) there. It does survey Sixth Circuit law on involuntary protective custody, addressing two aspects: (1) duration of involuntary segregation as invoking a liberty interest under the Fourteenth Amendment, if the circumstances pose an "atypical and significant hardship" under *Sandin v. Conner*, 515 U.S. 472, 484 (1995); and (2) if there is a liberty interest, what process is due, including whether periodic status review is allowed and has occurred. Flores attached a report to his complaint that provided a basis for finding that there had been some review of his status and that the decision for involuntary protective custody was not purely arbitrary or facially discriminatory against transgender inmates. Judge Maloney counted a strike, but he did not certify that an appeal would be frivolous and could not be taken *in forma pauperis*. *William J. Rold*

MICHIGAN – *Pro se* inmate Franklin Clayton, sexual orientation unspecified, was convicted of exposing another person to HIV by having sexual relations without informing such other person that he was HIV+. While serving an indeterminate sentence, he was found guilty of having sex with another inmate, exposing his partner to HIV without telling him. He was placed in administrative segregation for such acts per Michigan statute. Upon release, he violated the regulations again, and he was returned to administrative segregation. Although lower level officials recommended his return to general population after the second offense, it was vetoed by the state's Chief Medical Officer, who has such discretion under state law. Clayton was informed that he would remain in administrative segregation until his maximum release date in September 2018. In *Clayton v. Washington*, 2017 WL 4478246, 2017 U. S. Dist. LEXIS 165537 (October 5, 2017), U.S. District Judge Janet T. Neff affirmed a Magistrate's Recommendation that Clayton's civil rights challenge to his continued administrative segregation be denied. Although Clayton maintained that he was no longer infectious, he presented insufficient evidence on this point. The court was unwilling to interfere with discretion committed by statute under these circumstances, particularly for an inmate convicted of the conduct and twice found guilty of it while incarcerated. Presentation of this plaintiff's claims was hindered by his filing of hundreds of pages of handwritten documents that are difficult to follow, as reviewed on PACER. For a challenge to indefinite administrative segregation of HIV+ inmates for sexual activity, who allege they are no longer contagious, this would seem to be a difficult test case. *William J. Rold*

NEBRASKA – When will they learn? This is at least the fourth federal lawsuit reported by *Law Notes* involving transgender civilly-committed *pro se* inmate Mee Mee Brown in Nebraska's 120-bed Norfolk mental institution. First, the state reneged on promises made to a federal judge to treat Brown's serious medical needs. Then, they harassed her because she is transgender, saying she will never "progress" as a mental patient if she continues to "pretend" to be a woman. It is safe to say that both Brown and the judge are well-known, but the transphobic behavior of state officials at the Norfolk facility continues. Prior cases are summarized in *Law Notes* (Summer 2017, pages 277-278), and they involve, among other things, transgender treatment and Equal Protection claims. Now, in *Brown v. Kroll*, 2017 U.S. Dist. LEXIS 167092, 2017 WL 4535923 (D. Nebr., October 10, 2017), Senior U.S. District Judge Richard G. Kopf screens a new complaint and allows Brown to proceed on Equal Protection and First Amendment claims, including against new defendants. Brown has been civilly

committed at Norfolk since 2013. Her new claims include retaliation and Equal Protection transgender discrimination claims against nursing supervision and her treatment team for issuing instructions to other inmates to maintain at least a ten-foot radius away from Brown – in short, an order to ostracize her. Judge Kopf finds this allegation – which included threats to other inmates to "extend" their stay at the mental hospital if they violated it – to state an Equal Protection claim under "class of one" theory – *see See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) – and under "heightened scrutiny" or "stereotyping" theory, citing cases from the Sixth, Seventh, and Eleventh Circuits. As to First Amendment retaliation, Judge Kopf allowed claims against various defendants, including the warden, to continue, because these defendants specifically referred to Brown's prior litigation and her grievances when punishing her, including refusing to allow her to pass beyond initial admission categorization in treatment after all this time. Judge Kopf is the first in this writer's experience also to allow a transgender inmate's First Amendment claim to proceed under a transgender expression theory, ruling that Brown's wearing of female undergarments and insistence on use of her legally-changed name are expressions of her sexual identity that may have First Amendment protection. He addresses these potential First Amendment protections in a section of the opinion entitled "Exercising 'Transgender Rights,'" citing *Zalewska v. Cty. of Sullivan*, 316 F.3d 314, 320 (2d Cir. 2003), which cited a Massachusetts state decision, *Doe v. Yunits*, No. 001060A, 2000 WL 33162199 (Mass. Super. Oct.11, 2000). The plaintiff in *Zalewska*, a female bus driver protesting a county rule that she wear pants on the job, lost her challenge to the rule as violating her First Amendment expression rights. But, in interesting *dicta*, *Zalewska* noted that *Yunits* granted a preliminary injunction to a high school transgender girl to wear dresses to school under the First Amendment. Analogizing to arm bands as protected high school speech in *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 507-08 (1969), the *Zalewska* court wrote that "there may exist contexts in which a particular style of dress may be a sufficient proxy for speech to enjoy full constitutional protection" [citing *Yunits*]; and continuing: "In *Yunits*, the plaintiff's dress was an expression of his clinically verified gender identity. This message was readily understood by others in his high school context, because it was such a break from the norm. It sent a clear and particular message about the plaintiff's gender identity." 316 F.3d at 320. Transgender advocates should look at First Amendment expression theory (which avoids levels of scrutiny fights and the quasi-*mens rea* disputes often found in Equal Protection litigation). The next time someone tries to make this argument in Corrections, it will be easier. This is how the law evolves. *William J. Rold*

NORTH DAKOTA – In a rather unusual twist, in separate cases, two cisgender female inmates, Kimberly Ann Ratliff and Kristine Larae Erickson, challenge their confinement with pre-operative transgender women. Ratliff describes her situation as follows: "male transgender inmates, who still possess their genital organs . . . are housed as women," creating a risk of assault and harassment, sufficient to invoke *habeas corpus* for federal prisoners under 28 U.S.C. § 2255. In *United States v. Ratliff*, 2017 U.S. Dist. LEXIS 166158 (D.N.D., October 4, 2017), and *United States v. Erickson*, 2017 U.S. Dist. LEXIS 166173 (D.N.D., October 4, 2017), U.S. District Judge Ralph R. Erickson denied all relief, without prejudice, because such challenges are to conditions of confinement, not to legality of conviction or incarceration itself and are therefore not cognizable under § 2255 [string citations omitted]. The cases contain a summary of the U. S. Bureau of Prisons classification system for transgender and intersex inmates. Judge Erickson notes that almost the same challenge was rejected in Minnesota in *United States v. Dao*, 2017 U.S. Dist. LEXIS 123234 (D. Minn., August 2, 2017). Judge Erickson does not address whether a civil rights claim on these facts would survive screening. *William J. Rold*

OHIO – U.S. Magistrate Judge Elizabeth P. Deavers recommends dismissal of most of *pro se* transgender inmate Desean Spraggins' civil rights complaints of verbal abuse, harassment, and retaliation; but she allows her to proceed against two defendants in *Spraggins v. Owens*, 2017 U.S. Dist. LEXIS 174569, 2017 WL 4785962 (S.D. Ohio, October 20, 2017). The Report and Recommendation [R & R] examines dozens of grievances, but only two defendants' responses are found actionable. Their positions are not specified in the decision. Defendant Sexton, in response to a grievance filed by Spraggins, allegedly "stated to Plaintiff he don't give a fuck why Plaintiff [is] on suicide watch . . . [and he] encourage[ed] Plaintiff repeatedly three times to kill yourself." Sexton also allegedly "threatened retaliation if Plaintiff continued to report staff misconduct [and] threatened 'to throw Plaintiff to the floor'" if she continued. Defendant Showalter allegedly made "anti-gay statements" and filed false misconduct reports after Spraggins filed another grievance. Applying *Thaddeus-X v. Blatter*, 175 F.3d 378, 394, 398 (6th Cir. 1999), the R & R found that Spraggins met three elements of First Amendment retaliation: (1) that she was engaged in protected conduct; (2) an adverse action was taken against her that would deter a person of ordinary

firmness from continuing to engage in that conduct; and (3) the adverse action was motivated at least in part by the plaintiff's protected conduct. The R & R found that the "chronology" permitted a claim from which retaliation "may plausibly be inferred," citing *Smith v. Craven*, 61 F. App'x 159, 162 (6th Cir. 2003) (false disciplinary reports may constitute adverse action for claim of retaliation). Judge Deavers found verbal abuse alone insufficient to state a claim under *Hudson v. McMillian*, 503 U.S. 1, 8-9 (1992). The R & R includes discussion of conspiracy claims for violation of civil rights under 42 U.S.C. §§ 1985(3) and 1986, but the allegations were insufficient for these difficult-to-satisfy causes of action. Supervisors were dismissed because there were no allegations beyond *respondeat superior*. *William J. Rold*

PENNSYLVANIA – U.S. Magistrate Judge Martin C. Carlson begins this opinion regarding transgender inmate Niara Burton, as follows: "Broadly framed, this case presents substantial questions regarding how courts should reconcile issues of personal autonomy, gender identity, and personal privacy with the essential security requirements of the state correctional system." While the decision takes itself very seriously, it does not live up to the expectations of its opening language. Burton has filed more than 100 grievances concerning alleged transgender discrimination since 2012, culminating in a lawsuit that is being handled by another magistrate in the same court. In *Burton v. Wetzel*, 2017 U.S. Dist. LEXIS 158488, 2017 WL 4284345 (M.D. Pa., September 27, 2017), Judge Carlson held a hearing on specific alleged retaliation arising from two strip searches of Burton in May of 2017, in which Burton alleged improper "fondling" and "voyeurism" of bystander officers. Burton, who claimed the searches were retaliatory, sought a mandatory preliminary injunction prohibiting correction officials (including non-parties) from retaliating against her in the future for filing grievances. In addition to taking testimony of the officers and Burton, Judge Carlson watched videotapes of the searches. He also reviewed the reports of the institution's PREA [Prison Rape Elimination Act] investigation of the incidents, and he heard the testimony of the investigating officer. He noted that the evidence was in conflict and the tapes were inconclusive, for purposes of the high burden needed for a mandatory preliminary injunction, being careful to avoid making "findings" that would interfere with the underlying case on the merits. Judge Carlson describes the conflicting evidence in detail, before writing mostly about the standards for preliminary injunctions and the difficulty of issuing mandatory preliminary relief on this record and extending it to non-parties. He found no substantial evidence that Burton was deterred from asserting her rights by the alleged retaliation, even if it occurred – so the First Amendment was not implicated. Judge Carlson found after exhaustive analysis that Burton did not show likelihood of success on the merits, or immediate irreparable harm if a preliminary injunction did not issue. There is no discussion of the Fourth Amendment or of policies and procedures balancing privacy of transgender inmates with correctional imperatives. In fact, Burton's transgender status is largely incidental to the decision. The opinion is a primer on preliminary injunctions under F.R.C.P. 65, not the "substantial questions" posed by transgender inmates in corrections. *William J. Rold*

WASHINGTON – HIV+ inmate Ray Charles Harris is before the court on his second attempt to state a claim for failure to treat his HIV in *Harris v. Balderama*, 2017 U.S. Dist. LEXIS 174485, 2017 WL 4700166 (W.D. Wash., October 19, 2017). His case was previously reported in *Law Notes* as *Harris v. Balderama*, 2017 U.S. Dist. LEXIS 92462 (W.D. Wash., June 15, 2017) (Summer 2017 at page 279). His case is dismissed again by U.S. Magistrate Judge David W. Christel, for essentially the same reasons, with leave to amend a second time. Harris complains that he missed his HIV medication on a few occasions and that he was thereafter "blacklisted" from lab work needed in order to determine his status and whether the interruption caused resistance to the medication he had been taking. He also claims that defendants are protecting people who are "impersonating witnesses" who testified against him in his criminal trial. Judge Christel finds that the medical allegations are negligence at most and not sufficient to plead deliberate indifference under the Eighth Amendment. He also finds them "conclusory," particularly the ones about protecting trial witnesses. On the third round, the state will be permitted to raise the affirmative defense that Harris has failed to exhaust administrative remedies under the Prison Litigation Reform Act. *William J. Rold*

LEGISLATIVE & ADMINISTRATIVE

U.S. CONGRESS – Both houses of Congress have unanimously passed resolutions condemning violence and persecution against LGBT people in Chechnya on October 30. Apart from U.N. Ambassador Nikki Haley, the Trump Administration has been largely silent on the anti-gay persecution in Chechnya.

HEALTH & HUMAN SERVICES – The U.S. Department of Human Services published a notice in the Federal Register on October 4, withdrawing a rule proposed by the Obama Administration in 2014 (79 Fed. Reg.

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73873 [Dec. 12, 2014] to revise the applicable conditions of participation in Medicaid and Medicare for certain health care providers in light of the Supreme Court's decision striking down Section 3 of the Defense of Marriage Act in 2013. The proposed rule would have revised certain definitions and patients' rights provisions that currently defer to state law in determining marital status, in order to ensure that same-sex spouses are recognized and afforded equal rights in certain Medicare and Medicaid-participating facilities. The notice explains that following publication of the proposed rule, the Supreme Court's decision in *Obergefell v. Hodges*, requiring every state to license and recognize same-sex marriages, had changed the legal landscape and, in the opinion of the Department, made the proposed rule unnecessary. This action was criticized by some LGBT health care advocates, who maintained that the proposed rule was still needed to ensure proper treatment of LGBT seniors residing in facilities participating in these federal health care programs. Indeed, in reporting on this action, *The Advocate* headlined its article "Trump Kills Proposed Rule That Would Have Protected LGBT Seniors."

LOCAL LAWS – *USA Today* reported on October 19 that despite a "barrage of anti-LGBT bills" being introduced in state legislatures and receiving much media attention during 2017, a "record number of cities" had taken action to advance LGBT rights this year. "A record 68 cities earned perfect scores for advancing LGBT inclusive policies and practices this year," citing a report released by the HRC Foundation and the Equality Federation Institute. Progress was particularly noted on local law protection for transgender people, with more municipalities adding coverage for transition related procedures for their employees and including gender identity in local anti-discrimination laws.

CALIFORNIA – Equality California, the state's energetic LGBT rights lobby, approaches each new session of the legislature as an opportunity to enact a multitude of LGBT-related bills. After the legislative session ended, EC was able to celebrate seven new pieces of legislation that were signed into law by Governor Jerry Brown: SB 239, modernizing the state's archaic HIV criminalization laws to reflect the impact of current knowledge and treatment of HIV infection; SB 179, modernizing the state's approach to gender recognition; SB 219, enacting a seniors long term care bill of rights that is inclusive of LGBT seniors; SB 384, revising the state's sex offender registry laws in significant ways to create a tiered system of registration correlating restrictions with the seriousness of offenses; SB 310, modernizing the state law governing name changes; AB 677, reducing LGBT disparities in education and employment; and AB 1556, clarifying provisions of the Fair Employment and Housing Act, the state's principle anti-discrimination statute. In addition to these bills, the legislature passed two resolutions sponsored by EC: AJR 16, condemning anti-gay violence in Chechnya, and AJR 22, opposing the Trump Administration's move to bar transgender people from military service. [EC puts to shame Empire State Pride Agenda, the NY state-wide LGBT rights lobbying group which dissolved itself recently with the misguided pronouncement that its limited legislative accomplishments culminating in marriage equality and some regulatory reforms concerning transgender rights sufficed, and there was no longer a need for a state LGBT rights lobby. Over the past several years, EC has successfully promoted dozens of new state laws that have no analogue in New York statutes, addressing a multitude of LGBT concerns. State-wide LGBT political groups in other states should be scouring EC's website for ideas about legislation to promote in their own jurisdictions.]

PENNSYLVANIA – The Pennsylvania Human Relations Commission is considered a proposed "guidance" under which it would adopt an interpretation of the state's ban on employment discrimination because of sex that would follow the lead of federal courts that have construed Title VII's sex discrimination ban to apply to sexual orientation and gender identity discrimination complaints. The guidance embraces an interpretation of sex stereotyping that treats as a sex stereotype the presumption that people are heterosexual and cisgender, and that those who are gay or transgender and suffer discrimination because they fail to conform to these stereotypes. The guidance was proposed in April, has been published for comment, and may be adopted by the Commission at its November meeting, according to a report published November 2 by the Fox Rothschild LLP Employment Discrimination Report. * * * Pittsburgh Mayor Bill Peduto announced on Oct. 19 that the health plan covering city employees and their dependents has been amended to cover gender affirmation surgery. This extension of coverage gives Pittsburgh a 100% rating from HRC on inclusive policies for LGBT employees.

TEXAS – During the recent special legislative session, it appeared that the determined opposition of House Speaker Joe Straus was the main reason that the Governor's request to pass an anti-transgender "bathroom bill" was unsuccessful. Unfortunately, on October 25 Speaker Straus announced his retirement after a decade of service. An *Associated Press* report noted Straus's moderating influence in the face of a far-right executive branch and strong Republican majorities in both houses of the legislature. Straus was credited with "slowing" the governor's agenda of "tax cuts, immigration crackdowns and taxpayer-funded vouchers for private and religious schools," in addition to his determination to block anti-

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LGBT measures that would harm the business climate in the state. Straus was characterized as "a friend of the Bush family who has remained a traditional business-friendly Republican while the rest of the Texas GOP has drifted increasingly rightward." The article reported that the minority House Democrats "had grown reliant on Straus to stop legislation that they viewed as the most extreme." Straus represents a San Antonio district that might well elect a Democrat to be his successor in the House.

WEST VIRGINIA – Morgantown has become the eleventh local jurisdiction in West Virginia that bans anti-LGBT discrimination, reported *BloombergBNA Daily Labor Report* on October 18. The City Council voted unanimously to approve the measure, which also adds protections for veterans, at its October 17 meeting. The measure establishes a Human Rights commission with jurisdiction over discrimination complaints concerning employment, public accommodations, housing, and real property, listing forbidden grounds of discrimination as race, religion, color, national origin, ancestry, sex, age, disability, sexual orientation, gender identity, familial status and veterans status. West Virginia is one of several states where legislative deadlock over LGBT rights at the state level has inspired many localities to enact such ordinances. Other prominent examples are Pennsylvania, Michigan, and Texas. Indeed, almost all of the largest cities in the U.S. ban such discrimination, many of them being located in "Red States" whose legislatures are openly hostile to LGBT concerns.

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AK-CHIN INDIAN COMMUNITY – A tribal court has ruled that the Ak-Chin Indian Community must allow and recognize same-sex marriages of its members as a matter of fundamental rights under the tribal constitution. An attorney for plaintiffs in the case noted its importance in holding that the tribal law against such marriages violated the tribe's constitution, not just the U.S. Constitution. *azcentral.com*, Oct. 25.

AUSTRALIA – Western Australia Mark McGowan has expressed a formal apology to West Australians who were convicted for engaging in consensual homosexual conduct in the past, and has introduced legislation to get such past convictions expunged from government records. *AAAP Newswire*, Nov. 1.

AUSTRIA – LGBT rights advocate Helmut Graupner reports that a preliminary ruling by the Constitutional Court makes it likely that Austria will finally join the Western European trend towards marriage equality in 2018. A final ruling in a case brought by Graupner is expected in December. Under the preliminary ruling, it appears that the court is abandoning its prior position that registered partnerships are adequate to provide legal equality for same-sex couples. Reported Graupner, "The court instituted proceedings to delete the words 'of different sex' from the Austrian Civil Code's marriage law and proceedings to terminate the registered partnership law," having opined that even if the array of rights for registered partners was "absolutely identical" to the rights of marriage, a separate institution for same-sex couples is no longer consistent with the legal requirement of equality. * * * The recent move by Germany to institute marriage equality left Austria as one of the few Western European holdouts.

CANADA – The Canadian Press reported (Nov. 1) that the Alberta Human Rights Commission awarded $56,000 in damages to a First Nations Man (The Canadian locution for the kinds of person who are referred to in the U.S. as "Native Americans" or, colloquially, "American Indians") who was denied employment at an autobody shop after the owner allegedly questioned him about his race, sexual orientation, religious beliefs, and his same-sex marriage during a job interview. The complainant, Rambo Landry, moved with his husband, a Royal Canadian Mounted Police Sergeant, to Vegreville from the husband's previous posting in the Northwest Territories. In his testimony, Landy estimated that the defendant proprietor, Myron Hayduk, spent 80% of the interview time discussing religion, marriage, race, sexual orientation, and matters not related to the job, including asking what Landy would do if he encountered an anti-gay customer and expressing disagreement with same-sex marriage. Tribunal Chair Karen Scott wrote in the October 17 decision, "I find that Mr. Landry's race, sexual orientation and marital status were factors in the respondent's decision not to hire him. Accordingly, I award the complainant $20,000 as general damages for loss of dignity as well as $36,000 for lost wages, plus interest." At the time Hayduk interviewed Landry, he was also serving as Vegreville's mayor.

REPUBLIC OF CHINA (TAIWAN) – Premier Lai Ching-te announced on October 28 that his government will try to finalize and sent to the legislature a marriage equality bill before the end of the current session. There had been speculation that the government might delay, as the Court gave it until next spring to take action (or else the court would do so). * * * *FocusTaiwan.tw* (Oct. 12) reported that the Taipei High Administrative Court had dismissed a lesbian couple's lawsuit against the city's Zhongzheng household registration office for rejecting their application

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for marriage registration, finally dismissing a case that was initiated in 2014. Although the Constitutional Court has ruled that same-sex couples have a constitutional entitlement to marry, it delayed implementation of its decision for two years to give the government time to revise existing statutes. In the interim, it appears, the lower courts will refrain from any action implementing same-sex couple marriage rights.

COUNCIL OF EUROPE – For the first time, a European intergovernmental body has adopted a resolution on the human rights of intersexual people, reported *ILGA Europe* on October 12. Among other important points, the measure calls for health care workers to refrain from performing "medically unnecessary, sex-normalising surgery" on intersex infants who are not old enough to understand their circumstances and give informed consent to such operations.

EGYPT – Law enforcement officials have been relying on vague, general anti-lewdness and obscenity laws in their crackdown on gay people. Some legislatures have proposed a more directly law, as 15 members of the parliament joined together to introduce a measure that would make "perverted sexual relations" between persons of the same sex a felony punishable by up to 5 years, and "inciting" or "hosting" same-sex encounters could subject violators to up to 3 years. The same 3-year penalty would apply to those attending any "gay party" or carry "any sign or code for homosexuals." This last prohibited act relates to a recent incident of flying a rainbow banner at a concert by a foreign, openly-gay performer, which led to the reported arrests of about 30 people. *BuzzFeedNews*, Oct. 26.

ESTONIA – An attempt by the Conservative People's Party (EKRE) to secure passage of a bill to repeal the Registered Partnership Act, was defeated in the parliament, according to an on-line news report.

GREECE – The Greek Parliament voted on October 10 to liberalize the law on gender recognition, removing a provision that required people to undergo sterilization procedures before they could obtain government recognition of their gender identity, and generally removing various requirements that involved proof of medical treatments. Under the measure approved in the vote, anyone age 17 or older can apply for legal recognition of a gender change. They may not be married at the time of an application. The judge will determine whether the person's gender express-presentation matches their gender marker as a prerequisite. Children age 15-17 can also access the process, but they will need a certificate from a medical counsel on Athens Children Hospital to complete their legal transition.

HONG KONG – Yeung Chu-wing, a volunteer from the local sexual minorities group Rainbow Action, instituted a legal challenge to Hong Kong laws that criminalize consensual gay male sex, claiming the laws are discriminatory and unconstitutional, reported *South China Morning Post* on October 11. The plaintiff asks the High Court to declare the relevant sections of the criminal laws to be inconsistent with Article 25 of the Basic Law and Article 22 of the Bill of Rights.

MEXICO – The state legislature in Chiapas is reportedly refusing to take action on marriage equality, despite a ruling by the Supreme Court of Mexico on July 11, 2017, striking down the state's ban on same-sex marriage. This means some local clerks are continuing to require same-sex couples to obtain court orders (called amparos) before they will issue marriage licenses. In the state of Chihuahua, there is now a "jurisprudential" decision from the appellate courts, as five identical amparos have been issued to same-sex couples from that state, holding that the denial of marriage licenses to them was unconstitutional. Bureaucratic delays at the appellate court level appear to have stalled the process, however, of making licenses routinely available from clerks, because the Supreme Court has yet to issue a final declaration of unconstitutionality binding in that state.

NEW ZEALAND – A transsexual woman who claimed to have suffered years of discrimination and abuse in the United Kingdom was granted residence in New Zealand on humanitarian grounds, according to an October 12 report in *The Guardian*. The Immigration and Protection Tribunal in Auckland concluded that she was safer residing in her adopted country, where she had not suffered any abuse or discrimination since arriving in 2009. The tribunal ruled that it would be "unduly harsh" to require her to return to the U.K. upon expiration of her current visitor status, when she had suffered "years of persecution" due to her gender identity in the U.K. The report struck this reader as a bit strange, considering that conditions for transgender people in the U.K. have been radically transformed since 2009 as a result of European Human Rights Court decisions that were subsequently implemented with domestic legislation. But, as in the U.S., the focus of administrative tribunals tends to be on conditions at the time a person left their home country due to persecution, not necessarily conditions as they are now.

PHILIPPINES – The House of Representatives has approved a "landmark" anti-discrimination

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measure that would protect LGBT people from discrimination if approved by the Senate and enacted into law. *Washington Blade*, Oct. 6.

TAJIKISTAN – The government announced on October 17 that it had drawn up a register of 367 "allegedly" gay citizens who will be required to undergo testing to avoid "the spread of sexually-transmitted diseases," according to a report by *Agence France Presse English Wire*. A newspaper published by the state prosecutor said that the list was compiled following research in the LGBT community. The newspaper report said that the people had been "put on a register due to their vulnerability in society and for their safety and to prevent the transmission of sexually transmitted diseases." The authoritarian government in this former Soviet state has not been notably supportive of the LGBT community in the past. The current report claims that they found no transgender people, just lesbian or gay people.

TANZANIA – *Agence France Presse English Wire* (Oct. 18) reported that Tanzanian police announced they had arrested twelve men, including two South Africans and a Ugandan, for "presumed homosexuality." "We arrested the criminals at (the hotel) Peacock – they were promoting homosexuality," said Dar es Salaam Police Chief Lazaro Mambosasa and a press conference. "Tanzanian law forbids this act between people of the same sex," he said, "it is a violation of our country's laws." He also said the hotel manager had been arrested for "providing a room" for the homosexuals. The same article reports that police made 20 arrests on similar ground in Zanzibar in September, at a hotel where the group was undergoing training with an officially-registered international NGO, the Bridge Initiative, which works in AIDS awareness.

PROFESSIONAL NOTES

JUDI O'KELLEY, who has served for eleven years as Director of Leadership (a development position) at Lambda Legal, has left to join the staff of The National LGBT Bar Association as its first Chief Program Officer, starting November 15. Prior to joining Lambda, O'Kelley had been lead plaintiff in *O'Kelley v. Perdue*, a lawsuit seeking to strike down Georgia's anti-gay marriage amendment.

The **ACLU OF FLORIDA** is accepting applications for a two-year fellowship in its Jacksonville office. About 50% of the time will be devoted to LGBT issues, the remainder to other civil liberties issues. For details: https://www.aclu.org/careers/legal-fellowship-aclu-florida-jacksonville

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Kentucky Judge **W. MITCHELL NANCE**, under fire for having declared in an order he filed in April that he could not ever approve any adoptions by same-sex couples because of his moral objections to homosexuality, resigned from the bench as charges against him were pending before the state's judicial disciplinary commission, according to a November 1 *Associated Press* report. We like the irony of his name.

The **NATIONAL LGBT BAR ASSOCIATION**'s Out & Proud Corporate Counsel reception in London on November 15 will honor **TUVIA BOROK**, Executive Director & Senior Counsel at **GOLDMAN SACHS** and co-founder and co-chair of The P3 Network. The event will be held at The Club at Ivy, 9 West Street, London, and tickets can be purchase on the lgbtbar.org website.

HOUSTON (TEXAS) STATE DISTRICT COURT JUDGE STEVEN KIRKLAND has announced his candidacy as the first openly gay person seeking election to the Texas Supreme Court, the state's highest civil court. (In Texas, there is a separate highest appellate court for criminal appeals.) Kirkland, a Democrat, is contesting for Place 2 on the court, which is expected to become vacant upon Senate confirmation of President Trump's nomination of Texas Supreme Court Justice Don Willett to the 5th Circuit Court of Appeals. So far, the Republican-controlled U.S. Senate has not refused to confirm any of Trump's judicial nominees, no matter how extremely right-wing or lacking in relevant experience. Kirkland, pointing to the Texas Supreme Court's recent outrageous decision in *Pidgeon v. Turner*, stated: "I'm running because the Texas Supreme Court has entered far too many decisions recently that reek of politics and it's time to change that." As to the Texas court's open misconstruction of *Obergefell v. Hodges*, Kirkland said: "They were thumbing their noses at the law and thumbing their noses at the U.S. Supreme Court, all to protect themselves in the Republican primary." Kirkland may have an uphill battle, as no Democrat has been elected to the Texas Supreme Court in decades, and all the Republican incumbents defeated their Democratic challengers in 2016.

LAMBDA LEGAL and the **TRANSGENDER LEGAL DEFENSE & EDUCATION FUND** have announced a joint effort to establish a Name Change Project in Atlanta, based in Lambda's Southeast Regional Office, to assist transgender people in getting legal name changes. Lambda Legal Fair Courts Project Attorney Ethan Rice will be the leader of the Atlanta Name Change Project. The Project will train and coordinate the work of pro bono attorneys providing assistance to people seeking name changes as part of their transition.

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11. Rushin, Stephen, and Jenny Carroll, Bathroom Laws as Status Crimes, 86 Fordham L. Rev. 1 (Oct. 2017) (suggests that bathroom laws may violate the 8th Amendment rights of transgender people by creating status offenses).

"Shepherd" cont. from page 447

Even so, Shepherd sufficiently pled a claim for gender discrimination by alleging that she was paid less than men in her same position and treated poorly by Burnett. Furthermore, Judge Crenshaw held that Shepherd alleged enough facts that would give Tennessee fair notice of potential hostile work environment and religious discrimination claims.

On a final note, Judge Crenshaw mentions in his footnotes that though the 6th Circuit rejected sexual orientation discrimination in *Vickers*, the court recognized gender stereotype discrimination in the same case! Yet, he concluded that Shepherd did not appear to attempt to bring such a claim in her own case. This author is left wondering: What could possibly be more stereotypical than a sexual preference for men? These are just my 2 cents, but they are a woman's 78 cents on the dollar. – *Timothy Ramos (NYLS class of 2019)*

EDITOR'S NOTES

This proud, monthly publication is edited and chiefly written by Prof. Arthur Leonard of New York Law School, with a staff of volunteer writers consisting of lawyers, law school graduates, current law students, and legal workers.

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