L G B T
LAW NOTES
April 2018

"NO LICENSE TO DISCRIMINATE"

Federal Court Finds Funeral Home Unlawfully Discriminated Against Fired Transgender Employee

© 2018 *LGBT Law Notes* & the LGBT Law Notes Podcast are Publications of the LeGaL Foundation.

EXECUTIVE SUMMARY

L G B T LAW NOTES

Editor-In-Chief
Arthur S. Leonard,
Robert F. Wagner Professor
of Labor and Employment Law
New York Law School
185 West Broadway
New York, NY 10013
(212) 431-2156
asleonard@aol.com
arthur.leonard@nyls.edu

Contributors
David Buchanan, S.C.
Brett M. Figlewski, Esq.
Matthew Goodwin, Esq.
Katie Hansson, Univ. of Florida '18
Bryan Johnson-Xenitelis, Esq.
Eric Lesh, Esq.
Chan Tov McNamarah, Cornell '19
Ryan H. Nelson, Esq.
Timothy Ramos, NYLS '19
William J. Rold, Esq.

Production Manager
Leah Harper

Circulation Rate Inquiries
LeGaL Foundation
Centre for Social Innovation
601 West 26th Street, Suite 325-20
New York, NY 10001
(212) 353-9118 / info@le-gal.org
Inquire for rates.

***LGBT Law Notes* Archive**
http://le-gal.org/law-notes-archive

LGBT Law Notes Podcast
Listen to/download the
LGBT Law Notes Podcast
on iTunes ("search LGBT Legal"),
or at http://legal.podbean.com.

© 2018
The LeGaL Foundation
of the LGBT Bar Association
of Greater New York
http://le-gal.org

ISSN
8755-9021

LGBT Law Notes welcomes authors interested in becoming a contributor to the publication to contact info@le-gal.org.

Federal Appeals Court Rules for Transgender Funeral Director in Title VII Discrimination Suit; Landmark Appellate Ruling that Gender Identity Discrimination is Sex Discrimination

By Arthur S. Leonard

A unanimous three-judge panel of the U.S. Court of Appeals for the 6th Circuit ruled on March 7 in *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*, 2018 WL 1177669, 2018 U.S. App. LEXIS 5720, that a Michigan funeral home violated federal anti-discrimination law by terminating a funeral director who announced that she would be transitioning during her summer vacation and would return to work as a woman. The 6th Circuit has appellate jurisdiction over federal cases from Michigan, Ohio, Kentucky and Tennessee.

Rejecting a ruling by U.S. District Judge Sean F. Cox that the funeral home's action was protected by the federal Religious Freedom Restoration Act (RFRA), Circuit Judge Karen Nelson Moore wrote for the court that the government's "compelling interest" to eradicate employment discrimination because of sex took priority over the religious beliefs of the funeral home's owner. The court concluded that the appropriate course of action was to grant the EEOC's motion for summary judgment on the merits of the complainant's discrimination claim, and remand the case for determination of an appropriate remedy for the complainant and further consistent proceedings on a claim that the Funeral Home violated title VII by not compensating female employees equally with male employees for the expense of uniforms consistent with its dress code.

This is the first time that any federal appeals court has ruled that RFRA would not shelter an employer from a gender identity discrimination claim by a transgender plaintiff. Although the 6th Circuit has allowed Title VII claims by transgender plaintiffs in the past under a "gender stereotype" theory, this is also the first time that the 6th Circuit has explicitly endorsed the Equal Employment Opportunity Commission's conclusion that gender identity discrimination is a form of sex discrimination, directly prohibited by Title VII. Judge Moore drew a direct comparison to a Title VII decision by the 7th Circuit in *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017), which held similarly that sexual orientation discrimination is a form of sex discrimination, thus potentially joining in the widening split of federal appellate courts over a broad construction of Title VII to extend to both kinds of claims.

Alliance Defending Freedom's involvement as volunteer counsel for the funeral home makes it highly likely that the Supreme Court will be asked to review this ruling.

The lawsuit was filed by the EEOC, which sued after investigating Aimee Stephens' administrative charge that she had been unlawfully terminated by the Michigan funeral home. After the district court ruled in favor of the funeral home, the EEOC appealed to the 6th Circuit and Stephens, represented by the ACLU, was granted standing to intervene as co-plaintiff in the appeal.

"While living and presenting as a man," wrote Judge Moore, "she worked as a funeral director at R.G. & G.R. Harris Funeral Homes, Inc., a closely held for-profit corporation that operates three funeral homes in Michigan. Stephens was terminated from the Funeral Home by its owner and operator, Thomas Rost, shortly after Stephens informed Rost that she intended to transition from male to female and would represent herself and dress as a woman while at work."

"First," she wrote, "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex."

Rost identifies himself as a Christian who espouses the religious belief that "the Bible teaches that a person's sex is an immutable God-given gift," and that he would be "violating God's commands if he were to permit one of the Funeral Home's funeral directors to deny their sex while acting as a representative of the organization" or if he were to "permit one of the Funeral Home's male funeral directors to wear the uniform for female funeral directors while at work."

"In particular," related Judge Moore, "Rost believes that authorizing or paying for a male funeral director to wear the uniform for female funeral directors would render him complicit 'in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift.'"

As such, Rost claimed that his company's obligation to comply with Title VII should be excused in this case because of the later-enacted Religious Freedom Restoration Act (RFRA), which provides that the federal government may not substantially burden a person's free exercise of religion unless it has a compelling justification for doing so, and that the rule the government seeks to apply is narrowly tailored to burden religious practice no more than is necessary to achieve the government's goal.

The funeral home moved to dismiss the case, arguing that Title VII does not ban discrimination against a person because they are transgender or transitioning, that the funeral home could reasonably require compliance with its dress code, and that requiring the funeral home to allow a "man dressed as a woman" to serve as a funeral director would substantially burden the funeral home's free exercise of religion, as defined by Rost, and violate its rights under RFRA.

Prior to the Supreme Court's 2014 decision, *Burwell v. Hobby Lobby Stores, Inc*., 134 S. Ct. 2751, there was no Supreme Court authority for the proposition that a funeral home, or any other for-profit business, could claim to "exercise religion," but in that case the Court ruled that because business corporations are defined as "persons" in the U.S. Code, they enjoy the same protection as natural persons under RFRA. At least in the case of a closely-held corporation such as Hobby Lobby, with a small group of shareholders who held the same religious beliefs on the issue in question – a federal regulation requiring that employer health plans cover various forms of contraception to which Hobby Lobby's owners took exception on religious grounds – the corporation was entitled to protection under RFRA based on the religious views of its owners. The Harris Funeral Home is analogous to Hobby Lobby Stores, albeit operating on a smaller scale, so Rost's religious views on gender identity and transitioning can be attributed to the corporation for purposes of RFRA.

Interestingly, this would not have been an issue in the case had Stephens brought the lawsuit on her own behalf, without the EEOC as a plaintiff. The 6th Circuit has interpreted RFRA to impose its restriction on the federal government but not on private plaintiffs suing to enforce their rights under federal statutes. Since EEOC is the plaintiff, however, this is a case of the government seeking to impose a burden on the free exercise of religion by a business corporation, and RFRA is implicated.

District Judge Cox, bound by 6th Circuit precedent to find that Stephens had a potentially valid discrimination claim under Title VII (see *Smith v. City of Salem, Ohio*, 378 F. 3d 566 (2004)), nonetheless concluded that ordering a remedy for Stephens would substantially impair the Funeral Home's rights under RFRA, granting summary judgment to the funeral home. In another contested issue in the case, Judge Cox ruled that the EEOC could not pursue in this lawsuit a claim that the Funeral Home's policy of paying for male employees' uniforms but not for female employees' uniforms violated Title VII's sex discrimination provision. Cox held that this claim did not grow naturally out of the investigation of Stephens' discrimination charge, and so must be litigated separately.

The 6th Circuit reversed on both points. As to the uniform issue, the Court found that the EEOC's investigation of Stephens' discrimination claim naturally led to investigating the company's uniform policy, since the question of which uniform Stephens could wear was directly involved in Rost's decision to terminate her. The court reversed the summary judgment and remanded the question back to the district court to determine whether the uniform policy, which the funeral home has since modified to provide some subsidy for the cost of women's uniforms, still violates Title VII.

More significantly, the court found that Judge Cox erred on several key points in his analysis of the company's summary judgment motion.

Cox had determined that the 6th Circuit does not recognize gender identity claims under Title VII, as such, but in rejecting a prior motion to dismiss the case had concluded that Stephens could proceed on the theory that she was fired for failing to conform to her employer's stereotype about how men are supposed to present themselves and dress in the workplace. Rost stated in his deposition that he objected to men dressing as women – which is how he views Stephens in light of his religious belief that gender identity is just a social construct that violates God's plan and not a reality.

After reviewing the court's prior transgender discrimination decisions, Judge Moore concluded that the EEOC's view of the statute to cover gender identity discrimination directly, without reference to sex stereotypes, is correct. "First," she wrote, "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex."

She referred to the 7th Circuit's *Hively* decision, a sexual orientation case, which employed the same reasoning to find that Title VII covers sexual orientation claims. "Here, we ask whether Stephens would have been fired if Stephens had been a woman who sought to comply with the women's dress code. The answer quite obviously is no. This, in and of itself, confirms that Stephens' sex impermissibly affected Rost's decision to fire Stephens."

The court also referred to a landmark ruling by the U.S. District Court in the District of Columbia, *Schroer v. Billington*, 577 F. Supp. 2nd 293 (D.D.C. 2008), which allowed a transgender discrimination claim against the Library of Congress, which had withdrawn an employment offer when informed that the applicant was transitioning.

And, of course, the court noted the Supreme Court's *Price Waterhouse v. Hopkins* ruling (490 U.S. 228 (1989)), stating that Title VII requires "gender" to be "irrelevant to employment decisions." Moore wrote, "Gender (or sex) is not being treated as 'irrelevant to

employment decisions' if an employee's attempt or desire to change his or her sex leads to an adverse employment decision."

Of course, Moore noted, transgender discrimination implicates the sex stereotype theory as well. Referring to *Smith v. City of Salem*, she wrote, "We did not expressly hold in *Smith* that discrimination on the basis of transgender status is unlawful, though the opinion has been read to say as much – both by this circuit and others," and then proceeded to say as much! "Such references support what we now directly hold: Title VII protects transgender persons because of their transgender or transitioning status, because transgender or transitioning status constitutes an inherently gender non-conforming trait."

In light of this holding, the funeral home had to be found in violation of the statute unless it was entitled to some exception or some affirmative defense. One argument made in an amicus brief in support of the funeral home suggested that a person employed as a funeral director could be covered by the constitutionally-mandated ministerial exception recognized by the Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012). The Supreme Court said that it is a component of free exercise of religion that if somebody is being employed to perform religious functions, the government could not dictate the hiring decision. The court rejected this defense, noting that the funeral home has conceded that it is not a "religious organization" and was not claiming the "ministerial exception" for any of its employees. Furthermore, even if the funeral home tried to claim the exception, the court found it would not apply to the position of a funeral director in a for-profit funeral home business. Stephen was not employed to serve a religious function, and the duties of a funeral directly only incidentally involved any religious function in the way of facilitating participation of religious funeral celebrants.

Turning to the RFRA defense, the court first dispensed with the argument that as Stephens had intervened as a co-plaintiff, RFRA had been rendered irrelevant because this was no longer purely a government enforcement case. The EEOC remains the principal appellant in the case, and the court would not dismiss the RFRA concern on that basis.

However, the court found, significantly, that requiring the funeral home to employ Stephens after her transition would not impose a "substantial" burden within the meaning of RFRA. The funeral home argued that the "very operation of the Funeral Home constitutes protected religious exercise because Rost feels compelled by his faith to serve grieving people through the funeral home, and thus requiring the Funeral Home to authorize a male funeral director to wear the uniform for female funeral directors would directly interfere with – and thus impose a substantial burden on – the Funeral Home's ability to carry out Rost's religious exercise of caring for the grieving."

However, the court found, signicantly, that requiring the funeral home to employ Stephens after her transition would not impose a "substantial" burden within the meaning of RFRA.

Rost suggested two ways this would impose a substantial burden. First, he suggested, letting Stephens dress as a woman "would often create distractions for the deceased's loved ones and thereby hinder their healing process (and the Funeral Home's ministry)," and second, "forcing the Funeral Home to violate Rost's faith would significantly pressure Rost to leave the funeral industry and end his ministry to grieving people." The court did not accept either of these as "substantial within the meaning of RFRA."

For one thing, a basic tenet of anti-discrimination law is that businesses may not rely on customer preferences or biases as an excuse to refuse to employ people for a reason forbidden by Title VII. Courts have ruled that even if it is documented that employing somebody will alienate some customers, that cannot be raised as a defense to a valid discrimination claim. "We hold as a matter of law," wrote Moore, "that a religious claimant cannot rely on customers' presumed biases to establish a substantial burden under RFRA."

The court rejected Rost's argument that the EEOC's position put him to the choice of violating his religious beliefs by, for example, paying for a women's uniform for Stephens to wear, or otherwise quitting the funeral business. The court pointed out that there is no legal requirement for Rost to pay for uniforms for his staff. This is distinguishable from the *Hobby Lobby* case, where the issue was a regulation requiring employers to bear the cost of contraceptive coverage. Further, wrote Moore, "simply permitting Stephens to wear attire that reflects a conception of gender that is at odds with Rost's religious beliefs is not a substantial burden under RFRA," because "as a matter of law, tolerating Stephens' understanding of her sex and gender identity is not tantamount to supporting it."

Since the court found no substantial burden, it did not necessarily have to tackle the question of the government's justification for imposing any burden at all. But with an eye to a likely appeal of this case, the court went ahead to determine whether, if it is wrong about this and the Supreme Court were to find that this application of Title VII to Rost's business does impose a substantial burden, it passes the strict scrutiny test established by RFRA.

As to this, the court reached perhaps its most significant new ruling in the case: Having identified gender identity claims as coming within the ambit of sex discrimination claims, the court had to determine whether the government has a compelling interest and that enforcing Title VII is the least intrusive way of achieving that interest. Even the Funeral Home was willing to concede that on a general level the government has a compelling interest, expressed through Title VII, in eradicating sex discrimination in the workplace, but the Funeral Home argued that interest did not justify this particular case, compelling it to let a man dress as a woman while working as a funeral director. "The Funeral Home's construction of the compelling-interest test is off-base," wrote Moore. "Rather than focusing on the EEOC's claim – that the Funeral Home terminated Stephens because of her proposed gender nonconforming behavior – the Funeral Home's test focuses instead on its defense that the Funeral Home merely wishes to enforce an appropriate workplace uniform. But the Funeral Home has not identified any cases where the government's compelling interest was framed as its interest in disturbing a company's workplace policies." The question, according to the court's interpretation of Supreme Court precedents, is whether "the interests generally served by a given government policy or statute would not be 'compromised' by granting an exemption to a particular individual or group."

"Failing to enforce Title VII against the Funeral Home means the EEOC would be allowing a particular person – Stephens – to suffer discrimination, and such an outcome is directly contrary to the EEOC's compelling interest in combating discrimination in the workforce." And, continued Moore, "here, the EEOC's compelling interest in eradicating discrimination applies with as much force to Stephens as to any other employee discriminated against based on sex."

The court specifically rejected the Funeral Home's argument that its religious free exercise rights should take priority as being derived from the 1st Amendment, because that would go directly against Supreme Court precedent, which has rejected the idea that individuals and businesses generally enjoy a 1st Amendment right to refuse to comply with laws because of their religious objections. Congress did not have authority, in the first version of RFRA that it passed and that was invalidated by the Supreme Court, to overrule a Supreme Court decision. What RFRA does is to create a statutory right, not to channel a constitutional right, and the statutory right is circumscribed to cases where a federal law imposes a substantial burden on free exercise without having a compelling justification for doing so. This does, not, according to the 6th Circuit, elevate a business's free exercise rights above an individual's statutory protection against discrimination. (Indeed, Justice Samuel Alito said as much in his Hobby Lobby opinion for the Supreme Court, albeit in the context of race discrimination.)

Finally, as required by RFRA, the court found that requiring compliance with Title VII was the least restrictive means available for the government to achieve its compelling interest in eradicating employment discrimination because of sex. The district court had suggested that the EEOC could pursue a less restrictive alternative by getting the parties to agree to a gender-neutral uniform for the workplace, thus removing Rost's objection to a "man dressed as a woman." "The district court's suggestion, although appealing in its tidiness, is tenable only if we excise from the case evidence of sex stereotyping in areas other than attire," wrote Judge Moore. "Though Rost does repeatedly say that he terminated Stephens because she 'wanted to dress as a woman' and 'would no longer dress as a man,' the record also contains uncontroverted evidence that Rost's reasons for terminating Stephens extended to other aspects of Stephens's intended presentation." It was not just about the uniforms.

The court could have reversed the summary judgment and sent the case back to the district court to reconsider its holding and determine whether a trial was needed, but in fact there are no material facts in dispute once one treats the 6th Circuit's opinion as presenting the law of the case on interpreting Title VII and RFRA. With no material facts to be resolved at this stage, the 6th Circuit directly granted summary judgment to the EEOC on its claim that the Funeral Home violated Title VII and is not entitled to a defense under RFRA. Stephens won on the merits, unless the Funeral Home is successful in getting the Supreme Court to take the case and reverse the 6th Circuit's decision.

The appeal was argued for the EEOC by Anne Noel Occhialinio, and for Stephens by ACLU attorney John A. Knight. Douglas G. Wardlow of Alliance Defending Freedom argued on behalf of the Funeral Home. The case attracted amicus briefs from Lambda Legal, Americans United for Separation of Church and State, Cleveland-Marshall College of Law, Private Rights/Public Conscience Project (New York) and various law firms offering pro bono assistance to amici on briefs.

Judge Moore was appointed to the court by President Bill Clinton. The other judges on the unanimous panel were Helene N. White, appointed by President George W. Bush, and Bernice W. Donald, appointed by President Barack Obama. Showing a recent trend in diversifying the federal bench, the panel was, unusually, made up entirely of female circuit judges. As a result of several appointments by President Obama, half of the active judges on the 6th Circuit are women, the only federal appellate court yet to achieve gender parity. ■

Arthur S. Leonard is the Robert F. Wagner Professor of Labor and Employment Law at New York Law School.

Trump Administration Issues New Transgender Military Policy, Attempting To Sidetrack Lawsuits

By Arthur S. Leonard

In a move evidently intended to evade existing preliminary injunctions while reaffirming in its essential elements President Trump's Twitter announcement from last July 26, categorically prohibiting military service by transgender individuals, the Administration issued three new documents on Friday afternoon, March 23, the date that the President had designated in his August 25, 2017, Memorandum ("Military Service by Transgender Individuals") for his announced policy to take effect. A new Presidential Memorandum "revoked" Trump's August Memo and authorized the Defense and Homeland Security Secretaries to "implement any appropriate policies concerning military service by transgender individuals." Thus, as of the end of March, the policy allowing transgendered individuals to serve and to enlist, first announced by former Secretary of Defense Ashton Carter in June 2016, is in effect, pending the formal adoption of a new policy by Defense Secretary Mattis.

At the same time, Department of Justice (DOJ) attorneys filed with the federal court in Seattle (where one of the challenges to Trump's original policy is pending (*Karnoski v. Trump* before District Judge Marsha Pechman) copies of Defense Secretary James Mattis's Memorandum to the President and a Department of Defense (DOJ) working group's "Report and Recommendations" that had been submitted to the White House on February 23, in which Mattis recommended a version of Trump's transgender ban that would effectively preclude military service for most transgender applicants and some of those already serving, although the number affected was not immediately clear. DOJ asked Judge Pechman to lift her preliminary injunction in response to Trump's "revocation" of his August Memorandum, contending the potential new policy, as explained in the March 23 documents, would not be a categorical ban.

Also on March 23, filing similar documents with the federal district court in Maryland in *Stone v. Trump*, DOJ asked District Judge Marvin Garbis to consider lifting the preliminary injunction he had issued against the original policy announced by Trump, on the ground that its revocation mooted that injunction. Similar filings took place in the two other pending cases.

Mattis's recommendation drew a distinction between transgender status and the "medical condition" of gender dysphoria, as defined in the psychiatric diagnostic manual (DSM-V) generally cited as authoritative in litigation. Mattis is willing to let transgender people enlist *unless* they have been diagnosed with gender dysphoria or are experiencing that condition, which the Report characterizes, based heavily on subjective assertions rather than any evidence, as a condition presenting undue risks in a military environment. Transgender people can enlist if they do not desire to transition and are willing to conform to all military requirements consistent with their biological sex as designated at birth.

Similarly, transgender people currently serving who have *not* been diagnosed with gender dysphoria and do not have that condition can serve on the same basis: that they comply with all requirements for service members of their biological sex. However, people with a gender dysphoria diagnosis are largely excluded from enlistment, with some individual exceptions, regardless whether they have transitioned, while those currently serving who were diagnosed with gender dysphoria *after* the Obama Administration lifted the transgender ban on June 30, 2016, are "exempted" from these exclusions and may serve while transitioning and after transitioning consistent with their gender identity. This is pragmatically justified by the Recommendations due to the investment the military has made in their training, and is conditioned on their meeting all military performance requirements for those in their desired gender presentation. Under the recommended policy, Defense Department transition-related health coverage will continue to be available for this "grandfathered" group, but for no others.

With no factual backup, Trump's across-the-board ban was highly vulnerable to constitutional challenge in light of recent federal court rulings that gender identity discrimination is a form of sex discrimination.

Anticipating that plaintiffs will argue that allowing current transgender personnel to continue serving undermines the rationale for refusing to allow transgender people to enlist, the Report and Recommendations document states: "While the Department believes that its commitment to these Service members, including the substantial investment it has made in them, outweigh the risks identified in this report, should

its decision to exempt these Service members be used by a court as a basis for invalidating the entire policy, this exemption instead is and should be deemed severable from the rest of the policy." The meaning of this is unclear; will DoD start processing these individuals for discharge as soon as a court uses this to invalidate the policy?

The March 23 document release took place just days before attorneys from Lambda Legal and the DOJ were scheduled to appear on March 27 in Judge Pechman's Seattle courtroom to present arguments on Lambda's motion for summary judgment in *Karnoski v. Trump*. Lambda's motion, filed in January, was aimed at Trump's July tweet and August Memorandum, although it anticipated that the Administration would attempt to come up with some sort of documents to fill the fatal gap identified by four federal district judges when they issued preliminary injunctions last fall: Trump's unilateral actions were not based on any sort of "expert military judgment," but rather on his short-term political need to win sufficient Republican votes in the House to pass a then-pending Defense Department spending measure.

Based on the obvious conclusion that Trump's policy was not based on "expert military judgment," the courts then refused to accord it the usual deference that federal courts customarily accord to military regulations and rules when they are challenged in court. Indeed, the only in-depth military study on the subject at the time of Trumps 2017 tweets and Memorandum were announced was that carried out over a period of years by the Obama Administration (including a special study commissioned from the RAND Corporation) before it lifted the transgender service retention ban formally on June 30, 2016, while delaying implementation of new accession standards for transgender enlistees for a year. (Secretary Mattis later extended that deadline an additional six months to January 1, 2018.)

With no factual backup, Trump's across-the-board ban was highly vulnerable to constitutional challenge in light of recent federal court rulings that gender identity discrimination is a form of sex discrimination for purposes of statutory and equal protection analysis. Federal policies that discriminate because of sex are treated by courts as presumptively unconstitutional under the 5th Amendment, putting the government to the burden of showing that they substantially advance an important government interest, and demanding "exceedingly persuasive" proof. The "Report and Recommendations" document filed in Judge Pechman's court was clearly devised to attempt to fill that evidentiary gap through *post hoc* justifications, despite the disclaimer that the group assembled to study the issues and report their recommendations to Mattis and the President were tasked with an objective policy review.

The White House March 23 documents ignited a host of questions. There was no clarity about when the "new" policies recommended by Mattis were intended to go into effect (their implementation would require rewriting and formal adoption in the form of regulations and might be forestalled by the existing preliminary injunctions), and there were many questions about how transgender people currently serving would be affected. Defense Department spokespersons said that the Pentagon would "abide by federal law," which at present consists of the preliminary injunctions against the policies announced by Trump last summer.

Since the preliminary injunctions were all aimed at last summer's tweets and August Memorandum, were they rendered moot by Trump's revocation of those policy announcements? Or would the courts see the proposed new policy as essentially a continuation of what Trump had initiated, and thus covered by the preliminary injunctions? The four district judges had denied requests by the government to stay these injunctions, and two courts of appeals had refused to stay those issued by the judges in Baltimore and Washington, D.C., leading DOJ to desist from seeking a stay of the Seattle and Riverside, California, injunctions. Complying with those injunctions, the Pentagon allowed transgender people to begin applying to enlist in January, and announced that at least one transgender applicant had completed the enlistment process by February. Arguably, the preliminary injunctions would apply to any policy of excluding transgender people from military service pending a final resolution of these cases, giving them a broad reading consistent with their analysis of the underlying issues.

In a signal of what was coming, DOJ attorneys stoutly combatted the plaintiffs' demand in the Seattle case for disclosure of the identity of "generals and military experts" with whom Trump claimed in his July tweets to have consulted before announcing his categorical ban, arguing that after Mattis made his recommendation in February, DOJ would not be defending the policy announced in the summer but rather whatever new policy the President decided to announce, relying upon Mattis's "expert military judgment" and whatever documentation was provided to support it. That led to a series of confrontations over the discovery demand, producing two written opinions by Judge Pechman ordering DOJ to come up with the requested information, and at last provoking a questionable claim of Executive Privilege protecting the identity of those consulted by Trump. See *Karnoski v. Trump*, 2018 U.S. Dist. LEXIS 45696, 2018 WL 1397484 (W.D. Wash., March 20, 2018); 2018 U.S. Dist. LEXIS 43011 (W.D. Wash., March 14, 2018). This dispute awaited future resolution, and logically would now extend to the identity of those involved in the production of the documents released on March 23.

The Administration's strategic moves on March 23 were clearly intended to shift the field of battle in the pending lawsuits. When the lawsuits were originally filed, they had a big fat target in Trump's unilateral, unsupported actions of last summer. By "revoking" his August Memorandum and "any other directive I may have made" (that is, the tweets from July), Trump sought to remove that target and replace it with a new, possibly more defensible one: a policy recommended and eventually adopted as "appropriate" by Mattis

based on his "expert military judgment" in response to the recommendation of his new "study," conducted in secret over a period of months late in 2017. Clearly, the Administration was aiming to be able to rely on judicial deference to avoid having to defend the newly-announced policy purely on its constitutional merits.

This was confirmed at the March 27 summary judgment hearing and the brief subsequently filed by DOJ on April 4 in response to Judge Pechman's order for supplemental briefing announced at the hearing. DOJ now argues that none of the *Karnoski* plaintiffs have Article III standing to continue the litigation as a result of the new policy summarized in Mattis's memo, that there is no need to grant a permanent injunction because the policy challenged in the pending complaint has been "revoked" by the President, and that the anticipated new policy – which DOJ says will not be implemented unless and until the preliminary injunctions are vacated – is different enough from that announced last summer that it is entitled to deference as a result of the "study" upon which it is allegedly based, rather than the political impulses of the President. If Judge Pechman accepts these arguments, the stage will be reset for litigation focused on whatever new policy finally emerges; if not, the question will be whether she grants a permanent injunction against the new policy to the extent it requires exclusion of transgender people from military service without requiring the plaintiffs to file an amended complaint and without accepting DOJ's argument that the plaintiff group lacks standing to challenge the new policy. Similar issues will arise, of course, with respect to the three other cases.

The plaintiffs' supplemental brief takes on and discredits the DOJ argument that the "new" policy leaves it without plaintiffs who have Article III standing. As long as at least one plaintiff has standing, the case can continue, but plaintiffs point out that more than one of the existing plaintiffs would have standing under the version of the policy summarized in the Mattis Memorandum and detailed in the Report. The plaintiffs also explain how the March 23 documents are fully responsive to Trump's August Memorandum directing that Mattis submit an implementation plan for Trump's announced policy. Obviously, the complexities of the issue would require an implementation plan more detailed and nuanced than the raw categorical ban originally announced by Trump, but, plaintiffs argue, it is no less an implementation plan for the policy that Trump announced, trying to avoid some of the constitutional weaknesses and destroy the standing of some of the plaintiffs by "grandfathering" some of those now serving and providing the possibility of some exceptions being made, but nonetheless retaining the essential core of the policy announced last summer. Thus, they argue, there is no mootness here and the motion for a permanent injunction is still viable. Furthermore, they reject DOJ's contention that this now becomes a rational basis case requiring deference to "expert military judgment," summoning case law to support the argument that heightened scrutiny remains the standard so long as the policy is aimed at excluding transgender people from the equal right to enlist and serve in the military. They also challenge the argument that because Trump's March 23 memo says that he is "revoking" the policy announced last summer, the target of the pending litigation has been removed. Inasmuch as the plan is not a "new policy" but actually an "implementation plan" for the previously announced policy, the purported revocation is, in effect, a fiction.

The lingering question is whether the courts will let the Administration get away with this strategem. The so-called "Mattis policy" suffers from the same constitutional flaws as the one it replaces, but the "Report and Recommendations" – cobbled together in heavy reliance on the work of dedicated opponents to transgender military service – has at least the veneer and outward trappings of a serious policy review. The plaintiffs in the existing lawsuits will need to discredit it in the eyes of the courts, exposing it as a litigation advocacy document rather than an objective study supporting a claim of deference to expert military judgment. They make a strong start on this with the supplemental brief Lambda filed with the court on April 4.

Mark Joseph Stern, in a detailed dissection published in *Slate.com* shortly after the document release, credited anonymous Administration sources with revealing that the process of producing the report had been commandeered by Vice President Mike Pence, enlisting Heritage Foundation personnel who have been producing articles opposing transgender rights in a variety of contexts. (Indeed, the Report sites some of their work, and much of the language seems taken from some of those publications.) According to Stern's article, Mattis was opposed to reinstating the transgender ban but was overruled by the White House and is reacting as a soldier to the dictates of his Commander in Chief, unwilling to spend political capital on this issue at a time when cabinet officials not in lockstep with Trump's agenda have been suffering summary dismissals. Mattis has been depicted by many commentators as one of the few cabinet members who has been able to withstand the worst depredations of the White House, and is determined to maintain his position and protect the Defense Department's integrity. Tellingly, the "Report and Recommendations" lacks one of the usual components of such a document: the names and titles/ranks of the individuals who are responsible for its composition and approval. As noted above, this is information that will be demanded in discovery if the judge decides not to grant a permanent summary judgment to Lambda accompanied by a permanent injunction but instead to let a discovery process go forward looking to a possible trial. One eagerly anticipates the possible public cross-examination of certain players in this spectacle, but one suspects DOJ will make every effort to avoid that.

Some are predicting that the new policy will never go into effect. If the courts refuse to be bamboozled by the façade of reasoned policy-making now presented by the Administration, those predictions may be correct. ■

7th Circuit Rules Transgender Asylee Cannot Sue Various Officials over Indiana's Statutory Requirement of U.S. Citizenship to Get a Legal Change of Name

By Bryan Johnson-Xenitelis

A transgender Mexican asylee's suit against Indiana's Governor, Attorney General, Executive Director of the Indiana Supreme Court Division of State Court Administration, and the Marion County Clerk of Court, alleging that Indiana's name-change statute was unconstitutional because it "requires name-change petitioners to provide proof of U.S. citizenship" in violation of his First and Fourteenth Amendment rights, has been dismissed for lack of standing in *Doe v. Holcomb*, 2018 U.S. App. LEXIS 5374, 2018 WL 1124031 (7th Cir., March 2, 2018).

Plaintiff brought suit against defendants in U.S. District Court and moved unopposed to proceed anonymously as "John Doe." He sought an injunction to prevent the defendants from enforcing Indiana's name-change statute's requirement that a petitioner be a U.S. citizen, as Doe wished to change his name from "Jane" to "John" so that his name "conforms to his gender identity and physical appearance, which are male." Chief U.S. District Judge Jane Magnus-Stinson had dismissed Doe's case against all defendants for lack of standing, and Doe appealed.

Writing for a majority of a panel, Circuit Judge Michael Stephen Kanne noted that even if a plaintiff can establish the elements of standing (injury-in-fact, causation, and redressability), the 11th Amendment generally immunizes a state or state officials from suit in federal court and can only be overcome if a plaintiff can "show that the named state official plays some role in enforcing the statute."

Kanne found that Doe's strongest argument was that the Indiana Governor "plays a role in enforcing the name-change statute" as the head of the Bureau of Motor Vehicles, which will not issue ID to an applicant that reflects a different full name than what appears on the person's other legal documents unless the applicant provides a court order approving a full name change. However, Kanne noted that Doe did not sue the Governor to enjoin enforcement of the DMV laws, but rather to enjoin enforcement of the name-change law, holding that "the Governor doesn't do anything to enforce the name-change statute."

With respect to Indiana's Attorney General, Kanne ruled that while the Attorney General is "vested with the broad authority to enforce criminal laws," he "cannot initiate prosecutions; instead he may only join them when he sees fit," and moreover, that there are no criminal penalties for violating the name-change statute, so that did not fall within the Attorney General's enforcement authority. The judge observed that the Attorney General could assist a local prosecuting attorney in a perjury prosecution if Doe falsely claimed that he was a U.S. citizen on a name-change petition, but ruled "that connection is too attenuated, especially considering that the Attorney General could not initiate the prosecution himself."

Judge Kanne found that the Executive Director of the Indiana Supreme Court Division of State Court Administration's "generation and publication of non-mandatory forms are not connected to the enforcement of the name-change statute."

With respect to the Marion County Clerk of Court (who is not protected against suit by the 11th Amendment because she is not a state employee), Judge Kanne found that Doe did allege an injury in fact. He failed to satisfy the causation and redressability provisions because, while the Clerk processes name-change petitions, a purely ministerial function, the Clerk "has no power to grant or deny a petition" and her other duties "can best be characterized as educating and informing the public about the name-change statute's requirements."

Finding that the 11th Amendment barred Doe's suit against all three State officials and that Doe failed to establish standing to sue the Marion County Clerk of Court, Judge Kanne affirmed the District Court's dismissal of the case.

Chief Judge Dianne Wood dissented. She agreed that the Indiana Governor was properly dismissed as a defendant, stating that "from a practical standpoint as it notes, one should not be able simply to sue the Governor every time some part of the state's executive branch does something objectionable."

With respect to the other defendants, Chief Judge Wood stated that, in her view, "the majority's analysis gives insufficient weight to the significant roles played by the Attorney General, Executive Director, and Court Clerk in enforcing the name-change statute and preventing Doe from securing official recognition of his identity," and that she "would give Doe an opportunity to amend his complaint to name other executive-branch officials whose responsibilities include the policing of the name a person uses in order to receive services or deal with the state." For example, she commented that if the Executive Director, with the authority to create forms, issue guidance, and move along petitions, placed at the top of the name-change form that "no traditionally Muslim names could be submitted," and that "the Clerk routinely discouraged or refused to accept applications with such names," that "the chilling effect on name-changes for the group experiencing such discrimination would be powerful . . . enough . . . to support an injunction against that practice."

With respect to the Attorney General, Chief Judge Wood stated that "both perjury and fraud can also be

prosecuted independently" as "Indiana recognizes perjury as a stand-alone crime." She further noted that Doe could face the misdemeanor of "false identity statement," which "punishes knowing material misstatements of identity in connection with official proceedings or investigations, when done with the intent to mislead public servants," stating: "This is a big problem for Doe: if he presents himself in a manner that accords with his gender identity – that is, as John Doe, rather than under his "legal" name, Jane Doe – he is at risk of being prosecuted for a Class A misdemeanor . . . . While these might not be the strictest penalties in the world, [they] lie within the authority of the Attorney General to pursue . . . and they easily support injury-in-fact, causation, and redressability."

In conclusion, Chief Judge Wood stated: "In the end, I believe the majority has attached too much importance to the fact that the state courts are the ones charged with the duty of issuing name-change orders . . . we know that state law presently stands in the way of Doe's name change, because it insists on U.S. citizenship even though Doe is lawfully in the country . . . and cannot safely return to his own country . . . . Doe is alleging that the various state officials are refusing to process his case to correct his name, and that the state court would similarly deny relief unless the underlying law demanding U.S. citizenship is enjoined or otherwise set aside . . . the underlying principle Doe is trying to vindicate is an important one, which has a broader application than may be initially be apparent. I therefore respectfully dissent."

Doe is represented by Shawn Thomas Meerkamper and Ilona M. Turner of the Transgender Law Center, Oakland, California, with local counsel Barbara Baird of Indianapolis, and Thomas Andrew Saenz of the Mexican American Legal Defense & Education Fund, Los Angeles. ■

Bryan Johnson-Xenitelis is a New York attorney addition and adjunct professor at New York Law School, where he teaches "Crime & Immigration."

Federal Judge Finds "Substantial Question" as to Constitutionality of Exclusion of "Gender Identity Disorders" from ADA

By William J. Rold

This is one to watch. In *Doe v. Mass. Dep't of Correction*, 2018 U.S. Dist. LEXIS 35022, 2018 WL 1156222 (D. Mass., March 5, 2018), a transgender inmate identified as "Jane Doe" argues that the state has failed to make "reasonable accommodation" to her gender identity by refusing to transfer her to the women's prison. She invokes protections under both the Americans with Disabilities Act (ADA) and the Vocational Rehabilitation Act (VRA). She also alleges violations of the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

The defendants moved to dismiss the Complaint for failure to state a claim under F.R.C.P. 12(b)(6). U.S. District Judge Richard G. Stearns heard arguments on two aspects of the ADA claim: (1) whether Doe's diagnosis of "gender dysphoria" places her within the exclusionary language of the ADA (denying protection under the ADA for "transvestism, transsexualism, pedophilia, gender identity disorders not resulting from physical impairments, or other sexual behavioral disorders" – 42 U.S.C. § 12211(b)(1); and (2) whether, assuming that it does, "the statutory exclusion can withstand constitutional scrutiny." The defendants declined to advocate for the exclusion, deferring to the United States Attorney General to defend the statute.

Agreeing that the constitutional question was "substantial," Judge Stearns certified the question to the Attorney General under F.R.C.P. 5.1(b) and 28 U.S.C. § 2403. Judge Stearns found that the statutory and constitutional questions were "overlapping," and he therefore deferred ruling on the motion to dismiss until the Attorney General decided whether or not to intervene.

Doe also sought a preliminary injunction, directing defendants to: 1) transfer Doe to MCI-Framingham [a DOC facility for women]; 2) enjoin Defendants from using male correctional officers to conduct strip searches of Jane Doe, except in exigent circumstances; (3) enjoin Defendants from forcing Jane Doe to shower in the presence of men and with a shower curtain that does not adequately cover her; (4) enjoin Defendants from treating Jane Doe differently than other women held by the DOC; (5) train all staff on how to appropriately accommodate, treat and communicate with individuals with Gender Dysphoria within 60 days of this order; (6) enjoin Defendants from using male pronouns when speaking to or about Jane Does; (7) enjoin Defendants from referring to Jane Doe by her former male name (or any abbreviated version thereof); and (8) refer to Jane Doe by her chosen female name. Judge Stearns granted some preliminary relief without an evidentiary hearing

Apparently, Massachusetts prison officials had already started to accommodate Doe in the men's prison, at least sufficiently so that Judge Stearns could characterize the relief not as an affirmative preliminary injunction but rather to "preserve the status quo and to insure that Doe has the continuing benefit of the accommodations DOC has already provided." He wrote: "Mindful of Doe's claim that 'irreparable injury will be likely absent an injunction,'" citing *Respect Maine PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010), he ordered, pending a full adjudication on the merits: (1) use of female corrections officers for searches, consistent with staffing concerns; (2) individual celling for Doe with separate shower time,

subject to exigent circumstances; and (3) an officer to keep males from the shower area when Doe is showering to the extent staffing allows.

Judge Stearns denied Doe's request for a transfer, mandated training, and other preliminary relief, without prejudice, because it was "premature and should await the resolution of the constitutional issue." He nevertheless "encouraged" the defendants "to take further reasonable steps to meet Jane Doe's requests for safe accommodations" and to review their internal policies in the interim.

It is unusual to see a preliminary injunction in a prison transgender case – even one characterized as merely preserving the status quo – if only because the status quo is rarely worth preserving. But this is a judge who sees the water glass partly full and is trying to add to its volume. The tone overall is quite positive.

This case has legs not only for transgender inmates, but for all transgender people seeking protection under the ADA and VRA. Nationwide amici should appear and those with leverage with the Department of Justice should urge an expansive ruling in favor of transgender rights. This is a chance to challenge directly the continuing outrageous grouping of LGBT people with pederasts that still exists in places in the law, to educate the judiciary, and to rid the ADA of its transphobic exclusion.

Doe is fully lawyered-up. Lead counsel is Tiffiney F. Carney, of Goodwin Procter, LLP, Washington, D.C.; also appearing for Doe are attorneys from Goodwin Procter's Boston office; GLBTQ Legal Advocates & Defenders (Boston), and Prisoners' Legal Services. There are amici for Doe from Transgender Equality, Massachusetts Transgender Political Coalition, Disability Rights Education and Defense. ■

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

U.S. District Court Orders Idaho to Amend Birth Certificates for Transgender Applicants

By Timothy Ramos

This past March 31st, social media platforms such as Twitter and Instagram buzzed with messages in support of transgender individuals and the International Transgender Day of Visibility. The holiday celebrates transgender individuals and raises awareness of the discrimination they face worldwide. Using #TransDayofVisibility, thousands of online users shared stories and photos detailing the hardships they have faced as transgender individuals, and the resilience they have shown in response. One obstacle that transgender individuals continue to face in the U.S. is the inability or difficulty to amend their birth certificate so that the listed sex matches their gender identity.

Up until recently, four states — Idaho, Kansas, Ohio, and Tennessee — still did not permit transgender individuals to change the sex listed on their birth certificate. However, on March 5th, the U.S. District Court for the District of Idaho ordered the Idaho Department of Health and Welfare (IDHW) to begin accepting such applications from transgender individuals; the state must comply with the order by April 6, 2018. *F.V. v. Barron*, 2018 U.S. Dist. LEXIS 36550, 2018 WL 1152405 (D. Idaho Mar. 5, 2018). Prior to the Court's order, the IDHW interpreted the state's vital statistics law to prohibit changes to the listed sex on a birth certificate unless an applicant showed there was an error in recording the *sex at birth*. Because Idaho birth certificates reflect the "sex" of a person at birth and do not contain a "gender marker" designation, the IDHW's policy automatically and categorically denied applications by transgender individuals who sought to change the listed sex to reflect their gender identity.

In response to the IDHW's policy, Lambda Legal filed suit in April 2017 on behalf of F.V. and Dani Martin, two transgender women born in Idaho who sought to change their birth certificates to better reflect their names and gender identities. Both plaintiffs had previously taken steps, both medically and socially, to bring their bodies and expressions of gender in line with their female gender identity. This included legally changing their names from traditionally male names to traditionally female ones, and changing their names and gender on their driver's license and social security records. However, when they contacted the Idaho Bureau of Vital Records and Health Statistics to inquire about changing the sex listed on their birth certificates, they were informed that the IDHW did not consider such applications.

The defendants — three IDHW employees variously responsible for the implementation, enforcement, development, and interpretation of Idaho's vital statistics laws — conceded that the IDHW's policy violated the plaintiffs' constitutional rights under the 14th Amendment's Equal Protection Clause (EPC). The court also found that the plaintiffs adequately alleged that they were treated differently from non-transgender people born in Idaho because the IDHW's policy automatically and categorically denied transgender applicants' requests to amend the sex listed on their birth certificates to align with their gender identity; meanwhile, other classes of people (like adoptive parents) were able to amend birth certificates — without recording the amendment — to accurately reflect the legal parentage of a child. Furthermore, the defendants could provide no policy justification for the refusal to make such amendments. Thus, U.S. Magistrate Judge Candy W. Dale's opinion focused primarily on which level of scrutiny to apply. Ultimately, she agreed with the plaintiffs' assertion that intermediate scrutiny applied to Equal Protection claims alleging discrimination against transgender individuals. Judge Dale

rejected the defendants' contention that the Court should apply rational basis review merely because the defendants admitted that the IDHW's policy was not rationally related to a legitimate government interest.

In determining which level of scrutiny to apply, Judge Dale restated that a law is subject to heightened scrutiny review — either strict scrutiny or intermediate scrutiny — when that law classifies on the basis of a suspect class or quasi-suspect class. If the law does not classify on either basis, the law is simply subject to rational basis review. *See Heller v. Doe*, 509 U.S. 312, 319–21 (1993). Under Supreme Court precedent, strict scrutiny is limited to classifications based on race, alienage, and national origin; thus, the only form of heightened scrutiny review possibly available to the plaintiffs was intermediate scrutiny, which has been historically applied to quasi-suspect classifications based on sex and illegitimacy. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Thus, in order for the court to apply intermediate scrutiny to plaintiffs' EPC claim, the court must have found either that: (i) discrimination based on transgender status is discrimination based on sex or gender; or (ii) transgender status is a suspect classification in and of itself. Either way, the plaintiffs maintained that the IDHW's policy was not substantially related to an important governmental objective and would thus fail intermediate scrutiny review.

Judge Dale first found that discrimination based on transgender status is discrimination based on sex or gender that is subject to intermediate scrutiny review. Although the 9th Circuit held that rational basis review applied to classifications based on "transsexual" status in *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977), Judge Dale found the case to be outdated in light of more recent decisions, such as *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000), and *Norsworthy v. Beard*, 87 F. Supp. 3d 1104 (N.D. Cal. 2015), which have ultimately resulted in the conclusion that discrimination based on transgender status is a form of gender discrimination, which in turn is a form of sex discrimination subject to intermediate scrutiny review. Furthermore, Judge Dale pointed out that society's medical understanding of biological sex and gender has advanced significantly since *Holloway*. Previously in her opinion, the judge cited sections of the World Professional Association for Transgender Health's (WPATH) *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*. Most notably, Judge Dale explained that "biological sex" is now determined by numerous elements besides an individual's external genitalia observed at birth; these elements include chromosomal composition, internal reproductive organs, hormone prevalence, and brain structure. In comparison, gender identity is one's intrinsic sense of being male, female, or an alternative gender. Furthermore, a transgender individual is a person who has a gender identity that differs in varying degrees from the biological sex observed and assigned at birth.

Alternatively, Judge Dale found that transgender status meets the four-factor test prescribed by the U.S. Supreme Court to determine whether a class qualifies as suspect or quasi-suspect subject to intermediate scrutiny review. *See United States v. Windsor*, 570 U.S. 744 (2013). Under this test, heightened scrutiny is warranted where the government discriminates against a class that: (i) has been historically subjected to discrimination; (ii) has a defining characteristic bearing no relation to ability to perform or contribute to society; (iii) has obvious, immutable, or distinguishing characteristics; and (iv) is a minority or politically powerless. Other courts have found that, as a class, transgender individuals have met each of these four prongs. *See Adkins v. City of New York*, 143 F. Supp. 3d 134 (S.D.N.Y. 2015); *Evancho v. Pine-Richland School Dist.*, 237 F. Supp. 3d 267 (W.D. Pa. 2017). Judge Dale noted that this was especially true in Idaho, where transgender individuals have no state statutory or constitutional protections from discrimination based on their transgender status in relation to employment decisions, housing, and other services.

While the court's decision is a clear victory for transgender people because Idaho can no longer automatically and categorically deny applications submitted by transgender individuals to amend their birth certificates, it is particularly significant because the court chose to adopt a heightened form of scrutiny — rather than rational basis review — for EPC claims involving governmental classifications regarding transgender status. Although Idaho was one of only four states that had not permitted transgender individuals to amend the listed sex in their birth certificates to reflect their gender identity, many other states have implemented various barriers to make it more difficult for transgender individuals to make such amendments; such barriers are designed to survive rational basis review. In their Response to Motion for Summary Judgment, the defendants implied that they retained the power employ factors in future processing applications to amend birth certificates, including the requirement that an applicant take "appropriate clinical steps to permanently change gender." As stated in Lambda Legal's reply brief, the defendants basically sought to retain authority to deny birth certificate amendments to transgender individuals based on criteria in addition to their gender identity. Allowing the defendants to retain such power would undercut the court's intention to remedy the harm suffered by the plaintiffs and other transgender individuals. As discussed by WPATH's *Standards of Care*, a transgender individual's process of transitioning is often limited to social transitions such as changes in clothing, name, pronouns, hairstyle, and identity documents. "Appropriate clinical steps," otherwise known as medical treatments, may not be utilized for numerous reasons such as lack of necessity, lack of insurance, and other personal or financial factors. Any attempt by the respondents to erect such barriers would likely fall when subjected to heightened scrutiny. ■

Timothy Ramos is a law Student at New York Law School (class of 2019).

Pennsylvania Superior Court Affirms Sperm Donor's Standing to Seek Determination of Paternity and DNA Testing

By Katherine Hansson and Brett M. Figlewski

In *N.A.H. v. J.S.*, 2018 Pa. Super. Unpub. LEXIS 786 (Mar. 16, 2018), the Superior Court of Pennsylvania affirmed a trial court's order granting a petition for paternity and genetic testing for a gay male donor in dispute with a lesbian mother and her spouse.

N.A.H. is a 27-year-old gay man who resided with his lesbian friend, J.S., for a few months, during which time the friends discussed having a child by means of alternative insemination. N.A.H. provided J.S. with samples of semen in the hopes of her conceiving using an at-home insemination kit. The alternative insemination was successful, but N.A.H. and J.S. disagree as to the content of their discussions and any agreement regarding parental rights to the child.

N.A.H. testified that he and J.S. had talked about starting a family ever since they had become friends a number of years prior. After returning to Pennsylvania from time living in another state, N.A.H. asked whether J.S. was still interested in starting a family. N.A.H. testified that he, J.S., and J.S.'s partner, P.K., discussed the family dynamic and that they would be the "mothers and [he] was going to be the father." In addition, N.A.H. testified that he believed he and J.S. "would be more or less the new modern family. With her being gay and me being gay, we figured that this would be the best way that we can start a new generation as surrounding this child with love from her family and my family." N.A.H. testified that, based on a discussion with J.S. and P.K., he thought they "were going to have shared [the child] and work with the child and do what's right for the child."

In contrast, J.S. testified that she and P.K. were to be the "parents of the child" and that N.A.H. would "relinquish his parental rights and be involved in the child's life." J.S. stated that N.A.H. had agreed that P.K. could adopt the child. In addition, she stated that she and P.K. would be financially responsible for the child and not accept any support from N.A.H. Though N.A.H. admitted that they had discussed P.K.'s adoption of the child, the parties never moved forward with adoption.

Seven months into the pregnancy, J.S. became engaged to her partner, P.K., and the two women married *prior* to the child's birth. Shortly after becoming engaged, they served N.A.H. with a letter from J.S.'s attorney that included a "Notice of Defiant Trespass" and instructed N.A.H. to contact J.S.'s attorney if he had any legal questions. J.S., P.K., and N.A.H. agreed to meet with attorneys present to discuss their respective rights when the child was born. It was at this meeting that N.A.H. learned of the proposal that excluded him from the child's life except by permission of J.S. and that he would not be "known as dad" to the child. On this basis, and with his own counsel present, N.A.H. refused to execute the document. J.S. argued that the contract was finalized, but not signed and taken to a notary simply because they "just couldn't agree on a time and place." N.A.H. was not present for the birth and was not included on any paperwork identifying him as the father.

The trial court made a factual finding that "there [was] no meeting of the minds" and "that there was no oral agreement . . . [and] no final agreement reached." Upon this determination, the trial court granted N.A.H.'s petition to establish paternity and for genetic testing.

J.S. filed a notice of appeal and asserted error on part of the trial court for failing to find a valid oral contract for sperm donation. The Superior Court of Pennsylvania affirmed the trial court's decision and found that the record supported its finding that there was no meeting of the minds to enter into an enforceable oral agreement.

The court made clear that Pennsylvania law recognizes the enforceability of an oral contract for sperm donation and affirmed the determination of the trial court that a valid contract had not been formed. The court's analysis rested on principles of contract law as well as the deference granted to the trial court to make findings supported by competent evidence.

Somewhat surprisingly, the court neglected to consider any of the other family law principles that have played such a large role in other recent cases across the country, including those in New York State, namely: 1) estoppel of a party from asserting a right contrary to his or her prior statements and/or conduct; 2) the application of the marital presumption of parentage; and 3) the best interests of the child in determinations of parentage.

Though the court indicated that it might have considered arguments related to the marital presumption, it declined to do so because J.S. failed to provide citation to relevant legal authority. The court's singular reliance on principles of contract law was notable and shifted any potential focus away from the child and solely onto the pre-conception and pre-birth negotiations of the parties. This reliance also served to de-emphasize and decontextualize the realities of family formation for LGBT families, including the equal rights of LGBT spouses and use of alternative insemination and other forms of assisted reproductive technology.

Interestingly, compared to other jurisdictions, the court seemed unperturbed by the prospects of a potential three-parent family, as it did not once mention this potential consequence in its reasoning. The absence of all of these lines of analysis notwithstanding, the case makes clear that unambiguous intent and consent at the outset of family formation remain imperative for would-be LGBT parents. ■

Katie Hansson is a law student at University of Florida (class of 2018); Brett M. Figlewski is the Legal Director of the LGBT Bar Association of Greater New York (LeGaL).

Federal Court Denies Defendants' Motion to Dismiss in Suit by Transgender Maryland Boy

By Katherine Hansson

In *M.A.B. v. Board of Education of Talbot County*, 2018 WL 1257097, 2018 U.S. Dist. LEXIS 40346 (D. Md., Mar. 12, 2018), the U.S. District Judge George L. Russell, III, denied the Defendant school officials' Motion to Dismiss for Failure to State a Claim in a case involving a transgender boy who was forced to use a separate restroom instead of the boys' locker rooms.

The case involves student M.A.B., a fifteen-year-old boy who attends St. Michaels Middle High School in Talbot County, Maryland. M.A.B.'s birth sex is female, but his gender identity is male. He experienced gender dysphoria since early childhood. When M.A.B. turned thirteen, he began to socially transition to life as a boy, including legally changing his name. The School Board and High School assisted in M.A.B.'s social transition by addressing him by his new name, using male pronouns, and conducting a professional development workshop for its staff on the topic of transgender students.

Despite aiding M.A.B. in some ways, Defendants prohibited M.A.B. from using the High School's boys' locker rooms, and initially, its boys' restrooms. Instead, the High School and Board required M.A.B. to use single-use restrooms that they designated as "gender neutral" when he needed to use the restroom or change his clothes for gym class. After *G.G. ex rel. Grimm v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016), ruled that a Virginia school district had to allow a transgender boy to use boys' restrooms, Defendants permitted M.A.B. to use the boys' restrooms. No male students at the High School voiced any discomfort about M.A.B.'s access. In fact, many of M.A.B.'s peers congratulated him.

The Board, however, continued to prohibit M.A.B. from using the boys' locker rooms. Unlike the locker rooms, the designated restrooms that the Board requires M.A.B. to use do not have benches or showers. Meanwhile, the boys' locker rooms have partitioned stalls for changing clothes and partitioned stalls with toilets.

M.A.B. is the only student in the High School who must change clothes in the designated restrooms. Plaintiff alleges that this has resulted in M.A.B. experiencing humiliation, embarrassment, as well as alienation from his peers. In addition, the designated locker rooms are located far away from the locker rooms and gymnasium, causing M.A.B. to be late for classes. Although M.A.B.'s physical education teacher gives him extra time to change for class, unaware substitute physical education teachers forced M.A.B. to explain why he was tardy for class. This required M.A.B. to disclose his transgender status to avoid disciplinary action.

M.A.B. filed the present action against the Board, Kelly L. Griffith in her official capacity as Superintendent of Talbot County Public Schools, and Tracy Elzey in her official capacity as Principal of the High School. He seeks judgment declaring that the policy violates his rights under Title IX, the Fourteenth Amendment, and Articles 24 and 46 of the Maryland Declaration of Rights. Defendants moved to dismiss all counts against them under F.R.C.P. Rule 12(b)(6) for failure to state a claim.

Specifically, the Defendants argued that the court must dismiss all of M.A.B's claims because the Board enjoys sovereign immunity under the Eleventh Amendment. The court held, however, that such immunity does not apply to M.A.B.'s claims against the Board because of a Maryland statute which waives a county board of education's Eleventh Amendment immunity to suit from a plaintiff's discrimination claim under a federal law.

Further, in accord with the First, Sixth, Ninth, and Eleventh Circuits, the court interpreted Title IX to more broadly include discrimination on the basis of transgender status based on *Price Waterhouse v. Hopkins*.

Further, in accord with the First, Sixth, Ninth, and Eleventh Circuits, the court interpreted Title IX to more broadly include discrimination on the basis of transgender status based on *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775 (1989). In *Price Waterhouse*, a Title VII sex discrimination case, the Supreme Court held that plaintiff Ann Hopkins, a woman who was denied partnership in an accounting firm, had an actionable claim against that firm because the firm denied her a promotion for failing to conform to gender stereotypes.

In addition, the district court agreed with M.A.B. that intermediate scrutiny should be applied to his equal protection claim rather than rational basis review, because the policy constitutes a form of sex discrimination

and because transgender status is a quasi-suspect classification. The court went on to hold that the school board's policy fails heightened scrutiny, and that the Defendants' argument which alleged the policy was in place to protect M.A.B. was flawed for four reasons.

"First, unlike a boy who decides to change clothes in a single-use restroom for greater privacy, barring M.A.B. from changing in the boys' locker room harms his health and well-being . . . ," wrote Judge Russell. "Second, Defendants' argument overlooks the very existence of the Policy. It requires M.A.B. to change his clothes in the designated restroom, against his doctor's medical advice, and M.A.B. risks discipline if he does not comply. Conversely, boys who have privacy concerns have the option of changing clothes in a single-use restroom or stall if they want greater privacy. Third, their argument further overlooks the entire context surrounding the Policy. It singles M.A.B. out, quite literally because it does not apply to anyone else at the High School, and marks him as different for being transgender . . . Fourth, even if some boys feel humiliated, embarrassed, or alienated for deciding to change clothes in a single-use restroom or stall, changing there still serves Defendants' privacy concerns because those boys still enjoy greater privacy."

In addition to denying Defendants' Motion to Dismiss, the court also refused to grant M.A.B.'s Motion for Preliminary Injunction, because M.A.B. is not currently enrolled in physical education during this school year and he will not need to use the locker room for any other purpose in the imminent future. Presumably, if this matter is not resolved satisfactorily as the new school year approaches, M.A.B. can apply for preliminary injunctive relief.

M.A.B. is represented by Jennifer Lauren Kent (lead attorney) from Free State Justice, Baltimore, Joshua Block from the ACLU LGBT Rights Project, and Laura McMahon DePalme, FreeState Legal Project, Baltimore. ■

Louisiana Appeals Court Applies *Obergefell* Retroactively to Uphold Revised Birth Certificate for Child of Married Lesbian Couple

By Chan Tov McNamarah

A married lesbian couple has a baby — but the birth certificate only lists the child-bearing spouse as a parent. Her wife then secretly amends the certificate to include both names. The couple part ways and the birth certificate revision is discovered. Can the original birth certificate be restored? According to a March 7 decision by a panel of the Louisiana Fourth Circuit Court of Appeals, the answer is "no." The decision, *Chaisson v. State*, 2018 WL 1180906, 2018 La. App. LEXIS 433 (La. App. 4th Cir., March 7, 2018), rejected the birth mother's desperate attempts to reverse her ex-wife's surreptitious amendment, and clarified the retroactive implications of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) on the birth certificates of children born to same-sex married couples prior to 2015.

Appellant, Effie M. Chaisson, and Elizabeth Ann Nelson were married in New York in 2011. In 2014, Chaisson gave birth to a child in New Orleans. The opinion by Judge Tiffany G. Chase refers to the child as G.E.C.. G.E.C's birth certificate only listed Chaisson as the child's mother; Nelson was not named. At trial, Chaisson would testify that she had "purposefully left Nelson's name off the birth certificate," by "deliberately failing to inform the hospital staff that she was married when she gave birth."

While the couple was still married — and unbeknownst to Chaisson — Nelson applied to be included on G.E.C.'s birth certificate. As proof that she and Chaisson were married at the time of G.E.C.'s birth, Nelson provided the couple's 2011 New York marriage license. On February 13, 2017, Louisiana Registrar of Vital Records issued an amended birth certificate listing both women as parents.

On February 24, 2017, Chaisson filed a petition for mandamus seeking to compel the Registrar of Vital Records to restore G.E.C's original birth certificate and invalidate the amended one. At the initial writ hearing on March 6, 2017, the Registrar appeared solely through counsel. The trial court denied Chaisson's request to introduce testimony and denied her mandamus petition, finding that the birth certificate amendment was not a discretionary decision rendered by the Registrar. Instead, the court emphasized that the two women "were married at the time of conception and delivery," thereby compelling the birth certificate's amendment. As such "[Vital Records] treated this case the same as they would another case."

In response, Chaisson filed a motion for a new trial, maintaining that the trial court had erred in denying the introduction of testimony at the hearing. The trial court granted the motion for a second hearing, where both the Registrar and Chaisson's witnesses testified. The trial court again denied the writ of mandamus and Chaisson then appealed.

Judge Chase began her opinion by laying out Chaisson's three assignments of error: "(1) the trial court had erred in dismissing the writ of mandamus to restore G.E.C.'s original birth certificate; (2) the trial court erred in dismissing the writ of mandamus based on its factual finding that married couples were treated equally, regardless of sexual orientation, in the procedure employed to amend a birth certificate; and (3) the trial court committed legal error in denying her original writ of mandamus and failing to make her alternative writ peremptory when the Registrar only appeared through his counsel of record."

In her first assignment of error, Chaisson alleged that the trial court erred in denying her writ of mandamus, because the law did not allow the Registrar to administratively amend G.E.C.'s birth certificate. She argued that the Registrar had improperly amended the birth certificate based on his discretion and not the law. Specifically, Chaisson contended that a male seeking to amend a child's birth certificate to be included as the father has to either "(1) file an affidavit of acknowledgement of paternity signed by both mother and father or (2) must obtain a court order to amend the birth certificate."

Judge Chase began her response by establishing that *Obergefell* required the equal treatment of same-sex couples. At trial, the Registrar testified that it was Vital Record's policy to "accept a marriage license to amend a birth certificate to add a parent, if the couple was married at the time of birth," and that this policy does not require the consent of both parents. Having presented the marriage license proving that she and Chaisson were married at the time of G.E.C.'s birth, Nelson had correctly amended the birth certificate alone. Therefore, finding insufficient evidence to establish that the Registrar's reliance on the marriage license as proof for amending G.E.C.'s birth certificate was improper, Judge Chase found the first assignment of error without merit.

As the second issue in her appeal, Chaisson asserted that the trial court erred in dismissing the writ of mandamus based upon a factual finding that the law to amend the birth certificates was applied equally to all married couples regardless of sexual orientation. Chaisson argued that *Obergefell* did not apply to the present situation, as it was silent as to the retroactive application of the law to amend birth certificates of children born to same-sex couples married prior to 2015.

Judge Chase found the Supreme Court case *Pavan v. Smith*, 137 S. Ct. 2075 (2017), instructive. There, two married same-sex couples had children through anonymous sperm donors and had sought to list both parents on the children's birth certificates. The Arkansas Department of Health refused, only issuing birth certificates listing the birth mother and declining to include the same-sex spouses as the other parent. In response, the Supreme Court held that "differential treatment infringes *Obergefell*'s commitment to provide same-sex couples 'the constellation of benefits that the States have linked to marriage.'" Because Arkansas' presumption of parentage required the placement of the husband's name on the birth certificate, even when the child was conceived by an anonymous sperm donor, the Court reasoned that birth certificates represented more than "a mere marker of biological relationships." Therefore it held that "Arkansas may not, consistent with *Obergefell*, deny married same-sex couples that recognition."

Judge Chase reasoned that as was the case in *Pavan*, Louisiana's presumption of parentage is solely tied to the marriage contract in existence at the time of the child's birth, and is not based on biological relation. Therefore, though Nelson was not biologically related to G.E.C. the Registrar was, in fact, legally required to extended the same benefit — presumption of parentage — to both same-sex and opposite sex couples. This was further supported by the Registrar's testimony that Nelson's name "should have been included in the original birth certificate but that information was withheld at the time of G.E.C.'s birth." Consequently, Judge Chase found Chaisson's second assignment of error meritless.

For her final assignment of error, Chaisson contended that the trial court had erred in denying her writ of mandamus and failing to make the alternative writ peremptory when the Registrar failed to personally appear at the first hearing. She contended that La. C.C.P. art. 3865 provided that once a mandamus is filed, the trial court must either "order the issuance of an alternative writ directing the defendant to perform the act demanded or show cause to the contrary." That is, the writ is either peremptory or alternative. The order setting the writ of mandamus for hearing in the trial court had ordered the Registrar "to appear and show cause why he should not be compelled to restore the birth certificate of G.E.C. to its original form and content." Because the Registrar had only appeared through counsel at the initial trial, and had thereby waived service of pleading, Chaisson argued that the trial court was required to issue an alternative writ ordering the Registrar to restore the original birth certificate.

Judge Chase was unconvinced. First, she noted that nothing in the order setting the writ of mandamus for hearing had compelled the Registrar to personally appear or testify at the hearing. Moreover, La. C.C.P. provided: "after the hearing, the court may render judgment making the writ peremptory." The permissive word "may," wrote Judge Chase, indicated that the trial court had the discretion to decide whether or not to make the writ peremptory once the hearing had been held. The trial court found that since the Registrar appropriately appeared through counsel, and was not subpoenaed to provide testimony at the initial hearing, the court was not required to make the alternative writ peremptory based on the Registrar's failure to attend.

Looking to the totality of the record, Judge Chase held that the trial court's failure to make the alternative writ peremptory at the first hearing was a harmless error. By granting Miss Chaisson's motion for a new trial, the trial court had corrected any error that may have existed. Thus Chaisson's final assignment of error had no merit.

Accordingly, finding that all Chaisson's assignments of error were without merit, and that the Registrar had appropriately applied the same procedure to amend a birth certificate of a child, regardless of the parents' sexual orientation, the appellate court affirmed the trial court judgment. ■

Chan Tov McNamarah is a law student at Cornell Law School (class of 2019).

Federal Court Denies Summary Judgement to Defendants in Death of Inmate after Sexual Assignation

By William J. Rold

Danny Oscar Hensley was 23 years old and within 7 months of release when he was murdered by another inmate in a Kentucky State prison. His father, Danny Ray Hensley, sued for violation of his son's civil rights and in tort under Kentucky law, in *Hensley v. Bossio*, 2018 WL 1248002 (E.D. Ky., March 9, 2018). U.S. District Judge Henry R. Wilhoit, Jr., denied summary judgment to supervisory and classification defendants, and he set a final pre-trial conference date for February of 2019.

Defendant Heather Bossio made initial classification reviews under the Prison Rape Elimination Act ["PREA"], under which the deceased Danny Hensley was categorized as "high risk of being sexually victimized by other inmates." His murderer, Randy Bowman (63 years old) was classified as "high risk abuser" – already serving a 45-year sentence for killing another inmate. Despite their classifications, Bowman and Hensley were housed in the same dorm. When they went together to see Bossio to request to be cellmates for Hensley's "safety," she denied the request because of the PREA classifications; but she continued their confinement in the same dorm and said they could "spend time together."

Defendant Holly Finch is Bossio's supervisor. On the day of the murder, Bowman entered Hensley's cell (contrary to rules) and put a towel over the window (also contrary to rules). They engaged in sex, after which Bowman physically assaulted Hensley, cut him multiple times, and strangled him. A video of the corridor showed officers patrolling the halls, seeing the towel and not entering the cell – followed by Bowman's walking up and down the corridor with Hensley's blood visibly staining his t-shirt. Various "John Doe" officers were named, later identified, according to PACER.

Only Bossio and Finch moved to dismiss, on qualified immunity grounds. The officers who blithely walked by during the murder and filmed the scene from a distance did not. Bowman was found guilty of murdering Hensley and sentenced to life without parole.

Judge Wilhoit treated the motion as one for summary judgment under F.R.C.P. 56, not dismissal for failure to state a claim under F.R.C.P. 12(b)(6), because Bossio filed an affidavit and other documents. It seems that Judge Wilhoit was offended by the motion, using terms like "vehement" and "strident" to describe it. At one point, referring to the patrols and videotape, he wrote about the defendants: "Hensley was brutally assaulted and killed under their collective noses." He found that the criteria for protection from harm claim was satisfied as to Bossio under *Farmer v. Brennan*, 511 U.S. 825, 634 (1994). "Summary judgment is not appropriate if there is a genuine factual dispute relating to whether [the defendant] committed acts that allegedly violated clearly established rights." *Flagner v. Wilkinson*, 241 F.3d 475, 481 (6th Cir.), cert. denied, 534 U.S. 1071 (2001).

Judge Wilhoit found that Bossio, although "flatly" denying all allegations, knew of the risk levels of the aggressor and the victim and refused to allow them to cell together – thereby drawing the very inference required by *Farmer*. Then, knowing that Bowman was serving time for murdering another inmate, she "told them they could 'spend time together' and did not take any other action or follow up." This is sufficient to withstand summary judgment on qualified immunity. It is up to a jury to decide whether Brssio's tepid response was ignoring the obvious and suspicious on its face. It also does not matter that Hensley withdrew a request for protective custody (so did the transgender plaintiff in *Farmer*), or that he did not identify a particular assailant. It is the risk to a particular class of vulnerable inmates, not the particular assailant or the particular victim, that is germane under *Farmer*, citing *Taylor v. Michigan Department of Corrections*, 69 F.3d 76, 81 (6th Cir. 1995).

Bowman's and Hensley's sexual orientations are not mentioned in the opinion – nor are they particularly relevant to this protection from harm case. Although transgender inmates like Farmer, are most prone to assault, it is enough that the victim be identified as high risk, for whatever reason.

Judge Wilhoit then does something unusual: he refuses to grant Bossio's supervisor summary judgment either, although the allegations against her are not as strong, finding that "there is enough in the record at this time to keep Finch in the case based on her own acts or omissions . . . . As discovery has not concluded, it is not for the court to speculate what facts will come to light as to Finch's knowledge of the events given rise to this lawsuit." Judge Wilhoit finds that the affidavits in support of the motion themselves create the factual issues that preclude summary judgment.

Judge Wilhoit bookends his scholarly opinion with quotations from Winston Churchill and Nelson Mandela on the treatment of criminals as a test of society and knowing a nation by its jails. Certainly, these scholars, both extremely well read and one having experienced imprisonment, knew that they were paraphrasing Feodor Dostoevsky in his writings decades earlier (after four years in Siberia's gulags) in *The House of the Dead* (1862): "The degree of civilization in a society can be judged by entering its prisons."

The Hensley Estate is represented by Craig Henry, PLC, Louisville. ■

Man Who Mistook His Laptop for a Potential Bride Loses Bid to Ban Rainbow Flags from the House of Representatives' Office Buildings

By Arthur S. Leonard

Chris Sevier, a lawyer who is also one of America's most imaginative *pro se* plaintiffs, previously earned notoriety by seeking marriage licenses in several jurisdictions to wed his laptop, arguing that after the Supreme Court's *Obergefell* decision his fundamental right to marry was being denied by various clerks and registrars without any compelling justification. In his latest *pro se* adventure, *Sevier v. Lowenthal*, 2018 WL 1472495, 2018 U.S. Dist. LEXIS 48724 (D.D.C., March 26, 2018), Sevier sought a court order for the removal of "Gay Pride Rainbow Colored Flags" from "the halls and public access ways of federal legislative buildings," where he contends they were being unconstitutionally displayed by four members of the House of Representatives outside their official offices.

"According to Sevier," wrote U.S. District Judge Randolph D. Moss in his opinion granting the defendants' motions to dismiss and disposing of other motions on file, "display of the flag violates the Establishment Clause, discourages him from lobbying Congress, and violates his rights to equal protection and substantive due process."

By his own count, Sevier has made "similar claims" in more than fifteen other lawsuits directed at other public officials who display Rainbow flags at their offices. He also asks in this case that the court "declare that the holdings in *United States v. Windsor* and *Obergefell v. Hodges* are intellectually dishonest and amount to acts of judicial tyranny and judicial malpractice." (To which we say thanks to Chief Justice John Roberts and the late Associate Justice Antonin Scalia for the incendiary language in their dissents in *Obergefell* which can only encourage such claims.)

Sevier's Establishment Clause claim rests on his argument that, given his "religious worldview" that "homosexuality is obscene, immoral, [and] subversive to human flourishing," he "is offended by their presence," which make him "feel unwelcome," because he does not "adhere to their particular religious orthodoxy." Judge Moss explains, "The 'religious ideology' that Sevier has in mind is homosexuality itself," which he characterizes as a religion. "He contends that 'the homosexual church' is 'the largest denomination' of 'the overall church of "western expressive individualism postmodern moral relativism." Thus, anybody displaying a Gay Pride Rainbow flag is making a religious statement, which should not in his view be done in a government office building. Moss's summary of Sevier's views goes on at some length in the opinion.

Chris Sevier previously earned notoriety by seeking marriage licenses in several jurisdictions to wed his laptop.

The Defendants' motions are premised on the arguments that Sevier lacks standing to sue them over this issue and that he is pursuing a "nonjusticiable political question" in any event. The court had previously denied a motion by Sevier to stay ruling on the dismissal motions until after the Supreme Court issues its decision in *Masterpiece Cakeshop*," presumably because he hopes that opinion will lend support to his 1st Amendment claim in some way.

As Sevier characterizes himself as a "lobbyist" who needs to have access to the House office buildings to do his work, Moss decided that he had standing to raise a challenge to the display of flags that made him feel "unwelcome." He also rejected the Defendants' argument that the political question doctrine deprived the court of jurisdiction to consider "whether the actions of members of Congress inside the halls of the House may in fact violate the Establishment Clause."

But, he held, Sevier had failed to state a claim, either under the 1st Amendment or other constitutional provisions he had cited, because he had offered "no legal support" for his assertion that "homosexuality" is a "sect/denomination of the 'sex-based self-asserted' religion of 'western postmodern expressive individualism moral relativism." Sevier had offered the court massive documentation of news clippings and affidavits from "his supporters expressing their opposition to homosexuality," many stated on religious grounds. After acknowledging that courts have had difficulty in articulating a clear definition of what constitutes a "religion," Moss asserted that "common sense" forecloses Sevier's claim.

"Whatever else religion might entail," he wrote, "it at minimum requires adherence to one or more fundamental beliefs. 'Homosexuality,' by contrast, is not a set of beliefs at all. It is a description of a person's sexual orientation. Similarly, the argument that acceptance of homosexuality constitutes a 'religion' – if that is what Sevier means to assert – also fails. The gay rights movement bears no trappings of 'religion' as that concept is widely understood, and Sevier has not plausibly alleged that a reasonable person would perceived the display of the rainbow flags as religious in nature. Nor has Sevier alleged that

participants in the gay rights movement consider it 'religious' or, indeed, that there are any self-identified adherents to the 'religion' he posits. That Sevier's *own* beliefs may derive from his religion does not transform any contrary view of the subject into religious expression." Moss concluded that the Establishment Clause's meaning is "not so capacious" as Sevier alleges.

The court also rejected Sevier's attempt to bolster his claims by reference to his failed lawsuits seeking marriage licenses. "Even without passing on Sevier's right to human-laptop marriage, it is safe to say that government activities that remind Sevier of his alleged constitutional injury do not create new constitutional injuries in their own right."

The court also rejected Sevier's contention that the court could issue a condemnation of various Supreme Court decisions. "It goes without saying," wrote Moss, "that it is not the role of this Court – or any lower court – to review the merits of binding Supreme Court precedent." Although he rejected most of the pending motions, including intervention motions, Judge Moss did grant motions to file amicus briefs in support of Sevier to two organizations: the National Alliance of Black Pastors, and the Coalition of Doctors Defending Reparative Therapy.

For those eager to explore more Sevier litigation, see *Sevier v. Thompson*, 2018 WL 1378803 (D. Utah, Jn. 26, 2018), in which the redoubtable plaintiff wanted the court to order Utah officials to award him a marriage license for nuptials with his computer, and a declaration that "sexual orientation is a religious doctrine predicted on unproven faith based assumptions that are unproven and that sexual orientation is not based on immutability." He sought to have the court enjoin the state from complying with *Obergefell*. Contingently, in case he couldn't get that relief, he and his co-plaintiffs sought an order that the state issue a marriage license for three adults to enter into a polygamous marriage. The district court referred this case to U.S. Magistrate Judge Evelyn J. Furse, who recommended dismissal on grounds of lack of standing and fail to state a justiciable claim. ■

Alabama Justice Granted Partial Injunction against Ethics Committee in Suit Sparked by his Anti-Marriage Equality Statements

By Matthew Goodwin

An anti-Marriage Equality and Alabama Supreme Court Justice, Tom Parker, won a partial victory last month in his lawsuit against Alabama's Attorney General (AG) and Judicial Inquiry Committee (JIC) in which he alleges defendants infringed his First Amendment right to free speech by investigating anti-*Obergefell* comments he made on a public radio show in the fall of 2015. *Parker v. Judicial Inquiry Comm'n. of Alabama*, 2018 WL 1144981, 2018 U.S. Dist. LEXIS 34261 (M.D. Ala., March 2, 2018).

Chief U.S. District Judge W. Keith Watkins allowed the JIC to continue to prohibit public judicial commentary about " . . . a pending or impending proceeding in Alabama . . . . " However, Judge Watkins enjoined as overly broad the JIC's prohibition of public comment by "Alabama judges on pending or impending proceedings in *any* court" or "prohibiting public comment [by Alabama judges] when comments cannot reasonably be expected to affect the outcome or impair the fairness of a proceeding in Alabama." (Emphasis supplied).

In the fall of 2015, incumbent Parker, as part of his re-election campaign, stated on the radio: "'We have right now, before the Alabama Supreme Court, a further petition by those probate judges who were before the court earlier asking that their religious liberty rights be defended. Let's see if our court will rise up and do that.'" Parker was referring to the petition of Alabama probate judges asking that their "religious liberty rights" be defended and they be allowed to deny marriage licenses to same-sex couples following *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which mandated state recognition of same-sex marriages.

He went on to comment on the ability of states to serve as "'a check on the federal government,'" and that "'one check could be a state's refusal to accept the legitimacy of *Obergefell*, in the same way Wisconsin refused to accept the U.S. Supreme Court's decision in *Dred Scott v. Sandford* back in 1857.'"

In sum, Judge Watkins held Parker's speech was private political speech and that strict scrutiny was the proper analytical framework.

These and others of Parker's comments prompted the Southern Poverty Law Center to file a complaint with the JIC. The JIC then opened a judicial conduct investigation to ascertain whether Parker violated provision 3A(6) of Alabama's Canon of Judicial Ethics. In pertinent part Canon 3A(6) provides that "[A] judge should abstain from public comment about a pending or impending proceeding in any court . . . . "

While the investigation was still ongoing, Parker sued in federal court. Judge Watkins initially granted the AG's/JIC's motion to dismiss on *Younger* abstention grounds. In *Younger v. Harris* (1971), the Supreme Court held that except in a narrow set of cases, federal courts should not

enjoin state criminal proceedings. In *Sprint Communications Inc. v. Jacobs* the Supreme Court further refined *Younger*, holding abstention is appropriate only in cases involving "state criminal proceedings, civil enforcement proceedings, and civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions."

While Parker's appeal of this dismissal was pending in the 11th Circuit, the JIC dropped the Parker investigation. On remand, Judge Watkins ruled the case had not been mooted, as the harm alleged by Parker was capable of repetition. Parker thus renewed his motion for a preliminary injunction prohibiting the JIC from enforcing any portion of provision Canon 3A(6) against him.

Judge Watkins' analysis began by disposing of the JIC's and AG's argument that Parker's speech was "government speech," and thus unprotected, because he was an incumbent justice of Alabama's Supreme Court. Judge Watkins looked to two Supreme Court decisions, *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015), and *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), both of which considered constitutional challenges to judicial ethical rules in other states. " . . . *White* . . . struck down a prohibition on a 'candidate for judicial office, including an incumbent judge,' from 'announc[ing] his or her views on disputed legal or political issues[.]" In *Williams-Yulee* the Court upheld a Florida restriction prohibiting judicial candidates from personally soliciting campaign contributions.

In sum, Judge Watkins held Parker's speech was a private political speech and that strict scrutiny was the proper analytical framework. Because Canon 3A(6) "is a content-based restriction" on Parker's speech, the AG and JIC were required to demonstrate the restriction served a compelling state interest and was narrowly tailored to further that interest. Furthermore, it became the defendant's burden to show (1) Parker was substantially unlikely to prevail on the merits of his claim at trial; (2) Parker would not be injured irreparably without the injunction; (3) that the damage would cause the JIC more harm than Parker and the AG; and, (4) the injunction would be adverse to the public interest.

Judge Watkins found Parker substantially likely to succeed on the merits of his constitutional challenge. While the court accepted the AG's argument that Alabama has a compelling interest "in preventing a judge from 'improperly forecasting how he or she will rule' in a specific decision," it found Canon 3A(6) was not narrowly tailored to serve that purpose. Canon 3A(6) problematically "removes from the orbit of protected speech any discussion of ongoing or impending court proceedings" anywhere in the world. Judge Watkins wrote that it was hard to see how Parker speaking about a proceeding in an Angola court, for example, could reasonably be said to undermine the public's confidence in judicial proceedings in Alabama.

More broadly, Judge Watkins found Canon 3A(6) deficient for equating proceedings with issues. In this context the Court wrote, "[a]t the trial on this case, the court would be interested to know if any party seriously contends that a judicial candidate in Alabama or elsewhere is precluded from publicly giving his or her opinion on the death penalty generally, even though doing so necessarily implies giving an opinion as to the constitutionality of the procedure."

Judge Watkins moved on to find that Parker would be irreparably harmed without some injunction, although not one as broad as Parker sought. The inquiry for Judge Watkins on this prong was whether Canon 3A(6) chills speech.

The AG and JIC argued Parker's speech was not being harmed because the JIC dropped its investigation and such investigation was unlikely to recur, and Parker continued to give provocative talks "similar to the one that initially got him in trouble" so his speech was clearly not chilled.

Judge Watkins disagreed and wrote that if Canon 3A(6) did not chill speech, at the very least it threatened to do so and "gives the regulator indeterminate ammunition to attack a judicial candidate over speech on *issues* (as opposed to speech purely concerning *proceedings*).

Moving onto the third prong, Judge Watkins saw the equities to be balanced as (1) the need for candidates for public office to have freedom to express their views on matters important to the electorate; (2) "judges deciding cases in accordance with law rather than with any express or implied commitments that they may have made to their campaign supporters or to others[;]" (3) the "unquestioned right of voters to complete, unfettered . . . information about the candidates they must vote on."

Judge Watkins found the balanced equities to militate in favor of granting the injunction. However, he viewed Parker's proposed injunction as "overbroad and underinclusive" (overbroad because he failed to show that Canon 3A(6) is unconstitutional in all circumstances and underinclusive because it sought only to enjoin defendants from applying Canon 3A(6) to Parker).

Judge Watkins thus decided "[d]efendants will be able to enforce Canon 3A(6) against any judge who publicly comments about a pending impending proceeding in Alabama, but will be enjoined from applying the prohibition to speech regarding proceedings in courts outside of Alabama *and* will be enjoined from enforcing the Canon if the judge's public comment cannot reasonably be expected to affect the outcome or impair the fairness of a proceeding in Alabama."

Whether Parker's speech in October 2015 would have been open to discipline under Judge Watkins' modified Canon 3A(6) was not addressed by the opinion.

Because Parker was likely in Judge Watkins' view to prevail on the merits of his constitutional claim and was granted a preliminary injunction, Judge Watkins denied the JIC's motion for partial summary judgment as to the constitutionality of Canon 3A(6). ■

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

New York Federal Court Concludes "Most Employees Do Not Expect to Be Regularly Called by a Slur or Questioned on Their Sexuality"

By Eric Lesh

Mourad Raji, a gay French citizen, brought suit *pro se* in the federal court in Manhattan against Defendants Societe Generate Americas Securities LLC (SG Americas) and Thomas Jacquot, alleging employment discrimination against him on the basis of his sexual orientation in violation of both the New York State and the New York City Human Rights Laws. The facts alleged by Mr. Raji reveal a truly hostile work environment that, if proven true, clearly violate laws of the City and State. District Judge Analisa Torres, who was nominated by President Obama in 2012, agreed, partially denying the Defendants' motion for summary judgment in *Raji v. Societe Generalte Americas Securities LLC*, 2018 WL 1363760, 2018 U.S. Dist. LEXIS 36715 (S.D.N.Y., Feb. 28, 2018).

In December 2011, Mr. Raji came to New York City to participate in a French-American exchange program that placed him as an intern in SG Americas's offices. According to Raji, while he was working at SG Americas his colleague Thomas Jacquot and other co-workers discriminated against him on the basis of his sexual orientation by "calling him derogatory names, making disparaging remarks about gays and lesbians, giving him negative performance reviews, reducing his workload, and refusing to provide him with a letter of recommendation." The named Defendants accepted the allegations as true "for the purposes of this motion only."

According to Raji, from his first day of the job, Jacquot began every day by greeting Raji with a French equivalent to the slur "faggot." On other occasions Jacquot and other SG Americas employees "made fun of" co-workers and their family members "because of their perceived sexual orientation." Shortly thereafter, Raji started receiving complaints about the quality of his work and was given less work and less responsibility.

Plaintiff filed suit against Defendants in February 2015. As part of discovery, Raji produced a letter from his therapist – dated approximately three months after initiating his lawsuit – stating that he "appeared depressed and very affected" by his internship. Defendants then moved to preclude this letter from the therapist, arguing that it constitutes inadmissible hearsay and is unfairly prejudicial. Judge Torres agreed with the Defendants that the letter was "neither written contemporaneously with treatment nor for the purposes of medical diagnosis or treatment and thus did not fall under any of the exceptions to the hearsay rule."

The Defendants also moved for summary judgment against all claims. The court granted the motion with respect to retaliation claims and with respect to the discrimination claim brought under New York State Law. To make out a discrimination claim under state law, a plaintiff must show that they "suffered an adverse employment action." The court held that there was no "materially adverse change in the terms and conditions of employment" since Mr. Raji was hired for an eighteen-month internship with no guarantee of being permanently hired by SG Americas at the end of the program and because there was nothing in the record suggesting that his workload was reduced "*because* he was gay."

Interestingly, Raji's discrimination claim under New York City law fared much better. Here the court held that New York courts have made clear that City law does not require "materially adverse employment actions" for employment discrimination claims to succeed. Rather, all that is required is a demonstration of "differential treatment," requiring a showing that a plaintiff was "treated less well than other employees because of" his sexual orientation. The court determined that a jury could find that "most employees do not expect to be regularly called by a slur or questioned on their sexuality" and much of the conduct alleged could amount to more than "petty slights" as required by law.

As for Raji's hostile work environment causes of action, the court denied the Defendants' summary judgment motion under *both* State and City law. The court had "no trouble concluding that Defendants' actions, as alleged by Plaintiff, amount to 'severe and pervasive' harassment." The court concluded that, as alleged, Raji had raised a triable issue of fact as to whether SG Americas "knew, or in the exercise of reasonable care should have known, about the harassment yet failed to take appropriate remedial action.'"

Interestingly, Defendants in their arguments on hostile work environment, argued that any actions or comments made before February 18, 2012, were time-barred due to the NYSHRL and NYCHRL's three-year statute of limitations and thus, the court should not consider whether Mr. Jacquot asked Plaintiff if he was gay on his first day of work in December 2011. *In a footnote*, the court rejected this argument, concluding that the NYCHRL's ""generous" continuing violations doctrine is applicable here and renders all of Plaintiff's claims timely." ■

Eric Lesh is the Executive Director of the LGBT Bar Association of Greater New York (LeGaL).

Brooklyn Federal Court Refuses to Dismiss Transgender Bus Driver's Discrimination Suit Against Local Bus Company

By Arthur S. Leonard

Chief U.S. District Judge Dora L. Irizarry (E.D.N.Y.) has rejected a motion by Brooklyn Transportation Corporation to dismiss a Title VII/NYSHRL/NYCHRL complaint filed by a transgender bus driver who suffered a prolonged suspension from work without pay when her new manager issued an incorrect medical certification form using her former male name, which caused delays in renewing her commercial driver's license that were exacerbated when the company, promptly notified of the error, dragged its feet in issuing a corrected form. *Blair v. Brooklyn Transportation Corporation*, 2018 U.S. Dist. LEXIS 54718, 2018 WL 1581974 (March 30, 2018).

The Brooklyn-based defendant, a school bus transportation service provider, hired Blair as a bus driver in 2007. Blair's gender, gender identity and gender expression were all female when she was hired, and her co-workers all referred to her as Jennifer Blair, but her legal name at that time was still Keith Edward Blair, which was reflected on employment-related documentation and paychecks. "Thus," wrote the judge, "Defendant was aware of Plaintiff's transgender status." She changed her name legally in 2009 and updated her employment paperwork relating to her commercial driver's license, but at that time she "was not permitted to change the gender marker on her driver's license."

She began working under a new manager, William Lewis, in the summer of 2013. She alleges that Lewis, who had access to employee personnel files, "repeatedly tried to get her attention while she was at work and made inappropriate comments toward her based on sex. In February 2014, Lewis issued Plaintiff's medical certification form under her former name . . . . Plaintiff needed this certification form to obtain medical clearance in order to continue operating a bus. The medical certification form utilized by Defendant is a handwritten form with a space to write in the employee's name, social security number, company, and position, among other details." Because Blair is diabetic, she was required to obtain a physical exam every six months.

Until February 2014, she had received her medical certification form with no issues. She promptly notified the company about the error on the form Lewis had issued, but it did not reissue the paperwork, "even though Defendant was aware this form was necessary for Plaintiff to obtain a physical exam to review her commercial driver's license." Then she received a letter in June from the company informing her that she was not qualified to continue driving because her medical clearance had lapsed. She went to the designated medical provider and "convinced" them to call the company to verify information necessary for her to get the required examination, and then learned that there were new requirements for an endicronologist exam for diabetic drivers to be re-certified, and the earliest appointment she could get was for July 29. She was then cleared after that exam, but paperwork delays by the relevant state agencies didn't conclude the processing of her medical certification until hear the end of October. As a result, she was suspended from driving (without pay) from June 4 to October 29, and the company had made no effort to find alternative non-driving work for her to do.

Blair filed a Title VII charge with the EEOC, received a reasonable cause determination, and, after conciliation attempts by the EEOC failred, filed suit under Title VII, supplementing her claim with New York State and City Human Rights Law claims. (The City law expressly forbids gender identity discrimination, while the state law has been construed in a regulation to cover gender identity discrimination.) The company moved to dismiss, alleging she had failed to state a cause of action.

Judge Irizarry rejected every argument advanced by the company, finding that Blair had made sufficient factual allegations in her EEOC charge and her complaint, considered together, to raise an inference of discriminatory motivation by the Company, which is sufficient to survive a motion to dismiss.

Judge Irizarry rejected every argument advanced by the company.

Concluded the judge, "While Plaintiff's factual allegations do not directly discuss how other similarly situated non-transgender diabetic employees are treated differently, accepting all allegations in the Complaint as true, the Court can draw an inference that other employees received their medical certification forms with their correct names as Plaintiff had for years. Defendant could not operate as a bus company if it schemed to strip all of its drivers of their commercial driver's licenses. Defendant's argument that there is a complete absence of any discrimination is unsupported by the allegations contained in the Complaint." Now the case will proceed to discovery, unless the company comes to its senses and offers a sufficient settlement proposal.

Blair is represented by Gillian Allyn Kassner and Neil Kenneth Roman of Covington & Burling LLP and Katherine Lauren Bromberg of the New York Legal Assistance Group. ■

Australian Court Holds Appeals Tribunal Erred in Assuming Gay Man Could not Legitimately Marry a Woman

By David Buchanan

A decision of Australia's Administrative Appeals Tribunal (AAT) holding that a homosexual man could not have genuinely entered a heterosexual relationship with a woman because sexuality is fixed at birth has been overturned on appeal. The AAT was severely criticized for applying "a construct of its own making," particularly in relation to its views of the objects of the "gay rights movement" – and then applying those views to the case at hand.

In *Abboud v Minister for Immigration and Border Protection*, [2018] FCA 185, the appellant's husband, originally from Lebanon, had been granted a protection visa on the basis of his homosexuality and associated fear of persecution in Lebanon. He became an Australian citizen. Subsequently the appellant, a woman also from Lebanon, applied for a partner visa based on her marriage to her husband, an Australian citizen (her sponsor). Because of delays in making that application, the appellant needed the AAT's approval of her application. The AAT rejected the application, finding that the relationship between the appellant and her husband was not genuine. An application to the Federal Circuit Court of Australia to set aside the AAT's decision as irrational, illogical or unreasonable was rejected.

Amongst its reasons, the AAT said: "It seems to the Tribunal that the gay rights movement has, for decades, fought for the acceptance of homosexuality as a sexual orientation from birth, *not* something that the sponsor appears to be claiming is a matter of choice or will or accident. If the applicant can choose to be a heterosexual man, then presumably he can again choose at some time in the future to be a homosexual man again. He could also have chosen not to be a homosexual man while he was in Lebanon and hence not have been in a position where he had to flee his country for fear of persecution on the basis of that homosexuality. Certainly, if he had told the delegate that his homosexuality was a matter of choice and something he could change and become a heterosexual man, his claims for the protection of the Australian government and community would have been rejected." (emphasis in the original)

On appeal from the FCCA, Jagot J of the Federal Court of Australia said the AAT's process of reasoning involved assumptions, pre-conceptions or pre-judgments which prevented it from engaging with the appellant's claims that her marriage was genuine and the evidence supporting those claims, such as the child of the marriage. The AAT proceeded on a premise comprising its views of what the "gay rights movement" contended as if it was a universal truth, disabling it from engaging with the material before it. Alternatively, the AAT's reasoning was affected by illogicality of the kind required to constitute jurisdictional error.

Jagot J said "it is not apparent what relevance the 'gay rights movement' might have to the circumstances of the marriage". If the AAT was referring to developments in Australia, Jagot J thought it "unclear what relevance those developments might have to the circumstances of the appellant and the sponsor, who were both born and raised in Lebanon." Her Honour continued, "(I)f it is the case that the 'gay rights movement' fought for homosexuality to be accepted as a sexual orientation from birth and not a matter of choice, . . . it is also not apparent that the sponsor was claiming he had 'chosen' to be homosexual when he lodged his protection visa application and had now 'chosen' to be heterosexual. This is a construct of the Tribunal's own making based on its essential premise about human sexuality, apparently derived from its views about the position of the 'gay rights movement' being that sexuality is fixed at and immutable from birth. The problem is that the Tribunal has treated its premise – that men are born and remain heterosexual, homosexual or 'genuinely bisexual' so that a man born homosexual can never enter into a genuine relationship with a woman – as a universal truth applicable to all men. As a result, the Tribunal could not engage in a meaningful way with the material before it. All the Tribunal could do (and . . . repeatedly did) was impose on the material its own constructs which were a necessary consequence of its essential premise."

Jagot J went on to criticize the AAT in detail for applying subsidiary generalizations arising from "its own construct" without engaging with the facts of the case. While considering the finding that the husband was conflicted about his past sexuality was not unreasonable, Jagot J found that the AAT used that finding to conclude that the husband was not genuinely committed to be the heterosexual partner of his wife. This, Jagot J concluded, "exposes both kinds of jurisdictional error – extreme illogicality and failure to engage with the material before it." Her Honour found that the adverse credit findings made against the husband were founded on this irrational and logically unconnected reasoning process.

The FCCA's and the AAT's decisions were set aside and the matter remitted to the AAT, to be decided by a different Tribunal member "to avoid an appearance of bias". The decision can be accessed at http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2018/2018fca0185.

Readers are referred to strikingly similar Federal Court of Australia decisions in 2016 and earlier in 2018, noted at *LGBT Law Notes* September 2016, 364 and February 2018, 77. ■

David Buchanan is a Senior Counsel Barrister for Forbes Chambers in Sydney, Australia.

Federal Judges Issue Mixed Decisions on Transgender Inmate's Physical and Mental Health Care Claims; Ignore Issue of Unreasonable Restraints

By William J. Rold

Pound, Virginia, will not be found on promotional lists for transgender tourism. This town of ~1000 people, located in the toe of southwest Virginia near the Kentucky border, banned dancing without a permit until the ordinance was declared unconstitutional in *Elam v. Bolling*, 53 F.2d 854, 863 (W.D.Va. 1999) (with a nod to the movie *Footloose*). It is also the site of "Red Onion State Prison" and the place of incarceration of transgender inmate Terah C. Morris.

Proceeding *pro se*, Morris brought at least two separate lawsuits concerning her diagnosis and treatment for gender dysphoria. U.S. Magistrate Judge Pamela Meade Sargent issued two successive Report and Recommendations [R & R] on February 13 and February 14, 2018, in two cases that largely overlap as to issues and some defendants: *Morris v. Mrs. Fletcher*, 2018 WL 1163465 (W.D. Va., February 13, 2013); and *Morris v. Carey*, 2018 U.S. Dist. LEXIS 23952 (W.D. Va., February 14, 2018). Judge Sargent says that pleadings are largely a "stream of consciousness recital of factual allegations." The same could be said (with a little more tact) for Judge Sargent's statement of facts, particularly in the first case, where they consume 12 of the 15 pages of the opinion. District Judge Moon's decision accepting the Magistrate's R&R is reported at 2018 WL 1158419 (W.D. Va., March 5, 2018).

In *Morris v. Mrs. Fletcher*, the court says that the issues are limited to whether three "remaining" defendants can be liable for failure to initiate hormone treatments for Morris. The nurse, who also appears in the second case, where she is likewise dismissed as a defendant, had no authority to order hormone injections without a doctor's prescription. The remaining two, both physicians, argue that there is no material fact for the jury because Morris had no definitive diagnosis of gender dysphoria. Their affidavits aver that the physician (Dr. Smith) deferred to the psychiatrist (Dr. McDuffie), who says he is unqualified to render an opinion, which should come from a specialist in gender dysphoria, but he believes Morris may be "malingering," based on the DSM-IV. The DMS-IV (1994) is two editions out of date, particularly regarding gender dysphoria. The DSM-IV(R) (2000) is newer; but the DSM-V (2013) is the current edition. And it substitutes the outdated concept of "gender identity disorder or "GID" with the current usage "gender dysphoria." Nevertheless, the remnants of outdated professional thinking prevail, as both physicians confuse homosexuality with gender identity, noting that Morris must be malingering because she has female fantasies as well as male.

Judge Sargent eventually grants both doctors summary judgment on the grounds that there is a difference of opinion in diagnosis and no definitive showing of deliberate indifference to the need for hormones or for more frequent than monthly mental health sessions. This R & R was adopted in full by District Judge Norman K. Moon on March 5, 2018, making Judge Sargent's R & R the following day all the more remarkable, because Dr. McDuffie was a defendant in both cases.

In *Morris v. Carey*, Judge Sergant found that Morris had stated plausible claims against McDuffie and some seven other defendants (of 15) as to denial of her serious mental and physical health needs over the last two years (which overlap with the period covered in the first case). Judge Sargent recommends that the case proceed against the state's chief psychiatrist, the regional supervisor, a contractual psychiatrist (McDuffie), a masters-level psychologist, and four other mental health employees. Morris claims that her requests for diagnosis and treatment went unmet while at the prison, a contention the defendants do not seem seriously to contest under the law as it has developed, maintaining merely that psychotherapy alone was enough. Morris was never placed on hormones or referred to an endocrinologist. Instead, she was told, repeatedly, that she was "acting out" and seeking "secondary gain." Officials told her "we don't see the feminine in you."

She said she was moved to a watch cell with no camera to conceal the restraints. She claims extreme anxiety, suicidal ideation, and hallucinations.

Both R & R's suggest the persistence in Virginia of a "freeze frame" policy of treatment of transgender patients. They rely repeatedly on the absence of prior medical diagnosis, pharmacy records, and the "self-reported" nature of Morris's complaints. Morris says she has never received an individualized evaluation or treatment plan, despite multiple requests and grievances. Defendants referred to Morris' condition as a "self-reporting gender identity disorder."

The R & R does not refer to any defense expert submission (as

Are you reading this in the stacks of your law library?
Wouldn't you rather be reading it at your desk?
LeGaL Members enjoy current issues from the comfort of their browsers. Join today at le-gal.org!

there might not be on a motion to dismiss), but they did file an affidavit from the Prisoner Ombudsman on Morris's alleged failure to exhaust her administrative grievances. Judge Sargent reviews 4th Circuit case law on deliberate indifference, but she omits the leading transgender case of *De'Lonta v. Angelone*, 330 F.3d 630 (4th Cir. 2003). (Judge Sargent also refers to Morris by male pronouns throughout the R & R.) Nevertheless, the R & R recommends that Morris be allowed to proceed on her deliberate indifference claim. Half of the defendants are ripe for dismissal due to inadequate allegations of personal involvement, but the state's Chief Psychiatrist remains, since there seems to be no policy to triage Morris to a provider with appropriate training.

Judge Sargent also finds that Morris's multiple grievances – some of which were taken to the highest level – were adequately exhausted, rejecting the defendants' argument that she needed to grieve each denial of an appointment separately to preserve her 8th Amendment claims. Instead, Judge Sargent groups the claims into one large single deliberate indifference charge.

Both Dr. McDuffie and Plaintiff Morris appealed Judge Sargent's second R & R to the District Court. Judge Moon adopted the second R & R in full, but he wrote an opinion on his *de novo* review. Judge Moon rejected McDuffie's argument that McDuffie had insufficient personal contact with Morris to remain in the case. He also found deliberate indifference to serious medical needs to be adequately pleaded, writing: "Dr. McDuffie knew that Morris suffered from GID and that failing to treat him could lead to serious harm, but refused to diagnosis [sic] or treat Morris in order to avoid the [VDOC] having to pay for the treatment or because the VDOC has an implicit policy not to provide such treatment." Judge Moon also fails to mention *DeLonta*.

Morris's complaint states that she was repeatedly placed in five-point restraints by the masters-level defendant, who also falsified records about it. ["Five-point restraints" add a restraint to the thighs, chest, or pelvis, when a "patient" allegedly continues to "buck" after restraint of both arms and both legs.] She said she was moved to a watch cell with no camera to conceal the five-point restraints. She claims extreme anxiety, suicidal ideation, and hallucinations.

In this writer's view, Morris also stated a plausible 8th Amendment claim for abuse of restraints. It is nearly impossible to read the R & R without seeing the smoke from this medieval practice as described. Essential Standards for Accreditation – NCCHC, P-I-01 (2008; 2014) – include: physician involvement, documented evaluation by a qualified medical and mental health provider every 15 minutes, and "least restrictive" use of restraints. Five-point restraints are not authorized by the Standards. Patients requiring additional management to protect against self-harm should be transferred to an emergency room or medical facility. Daily reports should be made to the medical director and the warden on use of restraints.

Although Judge Sargent cites *Williams v. Benjamin*, 77 F.3d 756, 761 (4th Cir. 1996), for deliberate indifference generally, she does not mention that this case has extensive discussion about abusive use of restraints, and it reversed the granting of summary judgment to defendants who placed an inmate in four-point restraints for 8 hours. Id. at 764-68. As to Morris's objection to the five-point restraints, Judge Moon wrote that he "cannot discern a material, specific, or meritorious objection" to Judge Sargent's failure to recognize a claim. He also does not cite *Williams v. Benjamin* – or anything else on this issue.

It is doubtful that Morris can go much further without counsel. She will need expert testimony to survive summary judgment on medical and mental health care; and the restraints issue presents the kind of supervisory liability on policy and training that *pro se* litigants cannot easily manage. Morris filed an appeal with the 4th Circuit, *pro se*, on April 2. ■

CIVIL LITIGATION *notes*

CIVIL LITIGATION NOTES

By Arthur S. Leonard

Arthur S. Leonard is the Robert F. Wagner Professor of Labor and Employment Law at New York Law School.

U.S. COURT OF APPEALS, 8TH CIRCUIT – Pressing forward in light of the 7th and 2nd Circuit rulings in *Hively* and *Zarda* that sexual orientation claims are cognizable under Title VII of the Civil Rights Act of 1964, Lambda Legal has filed an appeal in *Horton v. Midwest Geriatric Management, LLC*, 2017 U.S. Dist. LEXIS 209996, 2018 WL 6536576 (E.D. Mo., Dec. 21, 2017), in which U.S. District Judge Jean C. Hamilton held that 8th Circuit precedent required dismissal of a gay man's Title VII sex discrimination claim. In what Lambda attorney Greg Nevins described as "textbook discrimination by any standard," the employer offered a job to Mark Horton and then rescinded the offer when it learned that he is gay. Assisting Nevins with the appeal are Lambda attorneys Omar Gonzalez-Pagan and Sharon M. McGowan, with co-counsel Mark S. Schuver and Natalie T. Lorenz of Mathis, Marifian & Richter, LTD, of Belleville, IL.

ALABAMA – Chief U.S. District Judge W. Keith Watkins has granted in part and denied in part a motion to dismiss a constitutional challenge to Alabama's "Sex Offender Registration and Community Notification Act," (ASORCNA), which had been previously described in a court opinion as one of the most "comprehensive, debilitating" sex offender statutes in the United States. (*See McGuire v. Strange*, 83 F. Supp. 3d 1231, 1236 (M.D. Ala. 2015). In this case, *Doe v. Marshall*, 2018 WL 1321034 (M.D. Ala., March 14, 2018), Judge Watkins concluded that plaintiffs should be allowed to proceed with their Due Process Claim that the draconian geographical housing and working conditions imposed by the law on those convicted of enumerated sex offenses infringed on the fundamental right to live with family members, with their 1st Amendment compelled speech claim regarding the required inclusion of the phrase "Criminal Sex Offender" on drivers' licenses, and with their 1st Amendment overbreadth claim concerning the statute's internet reporting requirements. However, Watkins granted the state's motion to dismiss the claim that the statute improperly creates an irrebuttable presumption that those convicted of enumerated sex crimes pose a threat to society, relying on 11th Circuit and Supreme Court precedents rejecting similar challenges to other states' registration laws, and also dismissed a claim that aspects of the law are void for vagueness, finding that the challenged requirements were spelled out clearly enough to inform individuals subject to the law what they had to do to comply with it. The court also found that certain named defendants enjoyed qualified immunity from liability under 42 U.S.C. sec. 1983, because the plaintiffs failed to show that the defendants violated a clearly established right in their implementation of the provisions in question. Plaintiffs are represented by Joseph Mitchell McGuire of Montgomery, Alabama.

ALABAMA – A lesbian's allegations that she was subjected to unlawful sex discrimination by her employer, a company that operates two McDonald's franchise restaurants in Alabama, were rejected by U.S. Magistrate Judge Staci G. Cornelius in *Whitt v. Berckman's Foods, Inc.*, 2018 U.S. Dist. LEXIS 44961, 2018 WL 1399263 (N.D. Ala., March 20, 2018). Adrian Whitt began to work as a shift manager at the Defendant's Bessemer restaurant on March 31, 2013, but quit that job in October, only to resume working for the Defendant at its Brighton location, where there is some dispute about her starting date, either December 2014 or early January 2015. She was terminated on July 31, 2015, allegedly for stealing money from the deposits during the time she had been employed at the Bessemer restaurant. She filed suit under Title VII, asserting that she was fired for failing to conform to sex-stereotypes, that she had been subjected to a hostile environment for the same reason during her employment at the Brighton store, and that she was also the victim of tortious conduct by the employer – invasion of privacy, intentional infliction of emotional distress, and negligent and/or malicious retention, supervision, and training – in violation of state law. It was not difficult for Whitt to state a claim of sex stereotyping, since her supervisor in the Brighton store had allegedly made remarks to her that sound in part like verbatim quotes of the comments made to Ann Hopkins, the successful sex discrimination plaintiff in *Price Waterhouse v. Hopkins*, the 1989 case in which the U.S. Supreme Court held that sex stereotyping by an employer could be evidence of unlawful motivation under Title VII. Part of the Defendant's summary judgment motion asserted that the Title VII claim was actually a sexual orientation claim, not actionable under 11th Circuit precedents, but Judge Cornelius rejected this argument, finding that the allegations clearly fell within the sex stereotype theory, which has expressly been endorsed by the 11th Circuit as a form of sex discrimination (in a case involving a suit by a transgender woman). However, the judge nonetheless granted the employer's summary judgment motion. For one thing, she found that Whitt had not been able to establish that the "legitimate nondiscriminatory" reason cited for her discharge – the theft of money from deposits – was a pretext for a discriminatory discharge. Whitt claimed that she was not employed at

the time the alleged thefts occurred, but the employer produced paystubs suggesting that she was. "These documents establish, at the very least, Defendant believed Plaintiff was employed at the time of the theft. That belief is all that is required," wrote Judge Cornelius. "For purposes of Rule 56, the court is not concerned with whether Plaintiff actually committed the offense but whether Defendant honestly believed Plaintiff engaged in the misconduct." The court cited an 11th Circuit precedent, *Damon v. Fleming Supermarkets of Florida*, 196 F.3d 1354 (11th Cir. 1999) – "An employer who fires an employee under a mistaken but honest impression that an employee violated a work rule is not liable for discriminatory conduct," said the court in that case – and, quoting another, the "sole concern is whether unlawful discriminatory animus motivates" a termination. Although the court found that Whitt's direct supervisor made many comments that could support a hostile environment claim, Whitt's evidence failed to establish that when viewed cumulatively they amounted to an actionable hostile environment because she failed to show that they interfered with her ability to work. "Even if Plaintiff had presented enough evidence demonstrating that Pass's comments were severe or pervasive," wrote the judge, "she has not presented evidence that the 'cumulative effect' of Pass's conduct 'unreasonably interfered' with Plaintiff's job performance. Pass's comments may have bothered Plaintiff or been humiliating, but more is required for Plaintiff to make a showing that those comments were so severe or pervasive that Plaintiff's terms or conditions of employment were altered." Thus illustrating the point that Title VII is not an anti-harassment statute; it is an anti-discrimination statute, and the discrimination has to be with regard to terms or conditions of employment, not, as such, whether supervisors are inadequately civil to employees. (One can't help suspecting that geography has something to do with this decision. The alleged pervasiveness of the supervisor's statements, and their blatancy, might well produce a different conclusion elsewhere than that reached by a judge in Alabama, a state where hostility to LGBT rights is at its height.) The court also found that the allegations of the complaint were insufficient to state causes of action for the tort claims. Whitt is represented by Birmingham attorneys Charity Gilchrist-Davis and Roderick T. Cooks.

ARIZONA – U.S. District Judge John J. Tuchi granted a default judgment to the Equal Employment Opportunity Commission (EEOC) and awarded damages of $50,000 to each of two complainants, while ordering injunctive relief against the complainants' employer, 5th and Wine (corporate name Scottsdale Wine Café, LLC), in a hostile environment sex discrimination and retaliation case. According to a press release from the EEOC, the two individuals were victims of sexual harassment "because of their actual or perceived sexual orientation," and one suffered a retaliatory discharge after he complained about the "egregious name calling, comments, innuendos and touching." After one of the employees threatened legal action, he was discharged – a textbook case of unlawful retaliation. The case is *E.E.O.C. v. Scottsdale Wine Café, LLC*, No. CV-17-00182-PHX-JJT (D. Ariz., Order signed March 21, 2018). The court's order, which was not released for publication but can be found on the Westlaw docket entry for the case, includes injunctive relief against such future misconduct by the company and its employees and requires adoption of a written anti-harassment policy, establishment of procedures for its enforcement, training, posting of notices, and so forth. The case was brought as part of EEOC's targeted effort to enforce the non-discrimination rights of LGBT individuals under Title VII – an enforcement priority that one anticipates being ended once Senate confirmations yield a Republican majority on the five-member Commission, since the Trump Administration's position, articulated in a memorandum by Attorney General Jeff Sessions and in amicus briefs, is that federal bans on discrimination because of sex do *not* cover sexual orientation and gender identity discrimination claims. The Administration's position has been rejected by the 2nd and 7th Circuits, and case law in the 9th Circuit does not pose an insuperable barrier to district courts confronting this issue, although the 9th Circuit has yet to issue an opinion on the scale of *Hively* or *Zarda*. Judge Tuchi's Order does not mention sexual orientation, merely stating: "I have found 5th & Wine violated Title VII by (1) harassing Wyatt Lupton and Jared Bahnick, and (2) retaliating against Wyatt Lupton."

CALIFORNIA – In *Robinson v. Berryhill*, 2018 WL 1366638 (N.D. Cal., March 16, 2018), U.S. Chief Magistrate Judge Joseph C. Spero produced a lengthy order in response to the appeal by a person living with AIDS from the Social Security Administration's determination that he was not entitled to disability benefits. Judge Spero concluded that the Administrative Law Judge had committed numerous errors, requiring a grant in part of the plaintiff's motion for summary judge, denial of the Social Security Commissioner's cross-motion, and remand for further administrative proceedings. Judge Spero criticized the ALJ for substituting boilerplate conclusions for the necessary detailed review of the factual record, found that the ALJ erred in some of her credibility findings, and that the record did not clearly support the finding that Robinson had sufficient residual functional capacity to perform work available

in the national economy despite his symptomatic and potentially disabling physical and mental conditions. Since most appeals of denials of benefits by HIV-positive plaintiffs are routinely denied by the courts due to evidence that an individual is coping with HIV infection through treatment with anti-viral drugs, this unusual case merits attention for the detailed discussion by Judge Spero of the lapses by the ALJ, whose identity is not indicated in the Westlaw report of the opinion, which also does not indicate whether Robinson is represented by counsel.

CALIFORNIA – An employee suffering from HIV/AIDS and other health problems who was discharged from her position as a Senior Claims Representative in the Alameda-Contra Costa Transit District's Risk Management Department lost her appeal of the Alameda County Superior Court's summary judgment against her disability discrimination claim under the California Fair Employment and Housing Act (FEHA) in *Newton v. Alameda-Contra Costa Transit District*, 2018 Cal. App. Unpub. LEXIS 2177 (Cal. 1st Dist. Ct. App., Div. 2, March 28, 2018). There is no mention of counsel in the court's opinion, so Sabrina Newton may have been representing herself in this lawsuit. She was hired in 2007. Wrote Judge Stewart for the court of appeal, "During her employment with the District, Newton took many leaves, some quite lengthy, for various medical reasons." Indeed, in a relatively short period of time she exhausted all the leave time she had under relevant statutes and employer policies; nonetheless, the District accommodated her situation with extended leaves beyond those statutorily authorized. At some point, it became clear that she was too disabled to return to work, and she applied for long-term disability benefits. Although the District had been planning to discharge her, it held up on doing that until she had been approved for long-term disability benefits. The District assisted her in applying for the benefits, and in the application process, of course, both she and her doctor certified that she was disabled from working and didn't expect ever to return to her job. The district finally terminated her employment formally on March 5, 2012, retroactive to December 2, 2011, the date on which it had been informed that she was deemed eligible for long-term disability benefits. Given this history, it is not surprising that the Superior Court rejected her FEHA disability discrimination claim. In order to be protected from employment discrimination, one must be capable of performing the essential functions of the position, and as of December 2, 2011, she had long since gone on record that she was unable to work. She argued that her claim should be held to have accrued several months earlier, when the District first notified her that it was denying her request for additional medical leave and was planning to terminate her employment, but the court of appeal agreed with the trial court that this was not the relevant date, since the District forbore from terminating her employment until she secured long-term disability benefits. The court pointed out that she failed to provide evidentiary support for a variety of other discrimination claims she was asserting, and thus had waived her right to appeal the summary judgment as to them.

DISTRICT OF COLUMBIA – In *Coclough v. Akal Security, Inc.*, 2018 U.S. Dist. LEXIS 52954, 2018 WL 1542048 (D.D.C., March 29, 2018), a discharged security officer formerly employed by the security contractor for the D.C. Superior Court building sues for retaliation, discrimination because of sex and sexual orientation, and a violation of D.C.'s whistleblower statute. Janice Coclough's complaint describes a history of six years of employment including numerous allegations of sexist and harassing comments and activities by her male co-workers and supervisors, posing impediments to her advancement and retaliation in response to her reporting of abuses in payroll recording-keeping. Her EEOC charge under Title VII alleged retaliation for engaging in protected activity; the only box she checked on the complaint form was "retaliation" but some of her narrative related to sexual harassment and discrimination, including the comment that co-workers speculated about her relationship with a woman with whom she took her lunch break, noting that she had "not disclosed my preference." The EEOC issued a right to sue letter without finding that her charge was substantiated. Her complaint named both the corporate employer and various supervisors as defendants. Ruling on the motion to dismiss, U.S. District Judge Beryl A. Howell dismissed claims against the named supervisors, as the statutes involved only run against the employer entity, not individuals. She also dismissed the sex discrimination claims under Title VII, accepting defendant's argument that these claims had not been administratively exhausted because the focus of her EEOC charge was on retaliation, and other potential charges were at best adverted to obliquely. However, the judge rejected defendant's argument that all the discrimination claims in the case were preempted due to the collective bargaining agreement covering the terms and conditions of employment of the security staff. The court concluded that Coclough's claims arose from statutory rights under Title VII and D.C. statutes, and did not require any interpretation of the collective bargaining agreement. Thus, Coclough's Title VII retaliation claim and her discrimination claims under D.C. law survived the motion to dismiss. The court similarly rejected

a preemption argument regarding the D.C. Whistleblower law, and found that it was not clear from the face of the complaint that this claim was time-barred as alleged by the defendants, so refused to dismiss on that ground as well. Coclough is represented by Darrell Chambers of Chambers Firm, Silver Spring, MD, and Douglas Stuart Rosenbloom of Takoma Park, MD.

DISTRICT OF COLUMBIA – Lambda Legal has filed suit on behalf of a lesbian couple who were denied the ability to serve as foster parents by an agency affiliated with the U.S. Conference of Catholic Bishops which is funded by the U.S. Department of Health and Human Services. The stated reason for turning them down was because their same-sex family does not "mirror the Holy Family." The Establishment Clause issues in *Marouf v. Azar*, filed in the U.S. District Court for the District of Columbia on February 20, are glaring. Lambda attorneys working on the case include Camilla B. Taylor, Kenneth D. Upton, Jr., and Jamie Gliksberg, joined by pro bono co-counsel Ken Choe, Jessica L. Ellsworth, Alali Dagogo-Jack, Jennifer A. Fleury and James A. Huang of the law firm Hogan Lovells. Details about the clients and the lawsuit can be found on lambdalegal.org/incourt/cases/marouf-v-azar.

FLORIDA – U.S. Magistrate Judge Patrick M. Hunt has issued a "Report and Recommendations" concluding that a federal civil rights suit filed against a Broward County Park employee who called police to eject a man who insisted on loudly singing an "anti-gay" song while sitting in the part should be dismissed on grounds of qualified immunity. *Watkins v. Central Broward Regional Park*, 2018 U.S. Dist. LEXIS 50962 (S.D. Fla., March 26, 2018). Eric Watkins was sitting in an open shelter in the park working on some papers and singing a song containing the following lyrics (exact quote from the court's opinion): "Rude bwoy no promote no faggot 1 bwoy dem haffi dead. Send fi di matic and the di Uzi instead. Shoot dem faggot bwoy done shot dem dead. A Fag come here with any skin must peel. Burn him up bad like old tire wheel." The song, purportedly of Jamaican origin, was slightly altered by Watkins, who is from the Virgin Islands. Upon defendant Meryl Wishnoff's call, a police officer arrived and asked Watkins to leave the Park, allegedly stating, "The manager of the Park don't want you on the premise no more (sic)." The officer allegedly threatened Watkins with arrest if he did not leave and stay away from the Park. After leaving the Park, Watkins prepared a lawsuit against Wishnoff, but since he did not know her name, called the Park office and ended up speaking with the Park manager, Dunkin Finch, who refused to give out Wishnoff's name and also denied Watkins' request not to be banned from the Park. Watkins ended up suing "the Park," Finch, and Wishnoff under 42 USC 1983 for violation of his First Amendment rights. In considering individual defendants' motions to dismiss, Magistrate Judge Hunt determined that it boiled down to the question whether Watkins' song was protected speech or unprotected "fighting words," and concluded that the relevant question was whether "an individual actually or likely to be present could reasonably have regarded the words . . . as a direct personal insult," citing *Cohen v. California*, 403 U.S. 15 (1971). In both a prior report concerning Finch's motion, and this report concerning Wishnoff's motion, he concluded that "it is unclear whether Watkins' recital of the 'anti-gay song' was protected in this context" and characterized it as a "close call. There is certainly no case law that is particularized to the facts of the case, at least none presented by Watkins," who is apparently suing *pro se*. Judge Hunt said that it "was precisely this lack of clarity that entitled Defendant Finch" to qualified immunity in his prior report, and similarly entitles Wishnoff to have the complaint against her rejected, since a public employee loses their qualified immunity for the performance of discretionary acts only if a constitutional violation is clearly established in controlling case law, because "if the law did not put the official on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is proper," quoting *Saucier v. Katz*, 533 U.S. 194 (2001).

GEORGIA – A heterosexual man alleging harassment and retaliatory discharge in response to his complaints about the conduct of his gay supervisor (and that supervisor's gay manager) may have survived a motion for summary judgment on his claims under Title VII in *Good v. Omni Hotels Management Corporation*, 2018 U.S. Dist. LEXIS 43600 (N.D. Ga., March 15, 2018), as U.S. Magistrate Judge Alan J. Braverman issued a Report and Recommendation to the district court finding that material issues of fact precluded granting the defendant hotel summary judgment on most of Michael Good's claims. The Magistrate did recommend awarding summary judgment on a claim of retaliatory harassment, however. According to Good's allegations, his gay supervisor, Marlon Denmark, made inappropriate comments and fondled Good's genitals when Good used the restroom during a facilities tour that Denmark was giving him shortly after he began working at the hotel, and subsequently during the tour, even though Good had indicated to Denmark that he "did not go that way," Denmark forcibly performed oral sex on Good in another restroom. Good alleges that when he complained to Denmark's supervisor, John Johnson, also gay, Johnson said that Good

should have had sex with Johnson instead and expressed upset at having to deal with the situation, although he did take steps that effectively ended further sexually-orientation misconduct by Denmark towards Good. Good claims that these incidents and his subsequent complaints about them created a hostile environment and that Denmark subsequently subjected him to hostile treatment, including various disciplinary write-ups. Although some of his complaints brought responses from management, ultimately he announced he was quitting, then was persuaded by the Human Resources Department to rescind this, but was ultimately discharged on Johnson's recommendation after a mix-up about whether Good was scheduled to work a shift for which he didn't show up. In a long and detailed analysis of all the factual allegations and company responses, Judge Braverman concluded that there were sufficient material facts in dispute to allow Good to proceed on his hostile environment sexual harassment claim. Braverman found that circuit precedent supported the contention that a single incident of forcible oral sex performed on an unwilling employee after the supervisor had fondled his genitals could potentially meet the "severity" test in a situation where the small number of incidents might fall short under the "pervasiveness" test. The judge also found material fact issues about whether Good's delays in reporting these incidents were reasonable under the circumstances, and whether the employer was entitled to various defenses based on its anti-harassment policy and its responses to the situation. Braverman also concluded that material factual disputes precluded granting summary judgment on Good's claim that his ultimate discharge was retaliatory, and noted the possible application of the "cat's paw" theory of liability in light of the hotel manager's decision to discharge Good based on Johnson's recommendation without making any independent investigation before taking action. In effect, Good is claiming that he is a straight employee who was railroaded out of a job by gay supervisors due to his unwillingness to play along with their "sexual games." Good is represented by Adam J. Conti and Michael Thomas McCulley of Adam J. Conti, LLC, Atlanta. The defendant is represented by Charles L. Bachman, Jr. of Gregory, Doyle, Calhoun & Rogers, LLC, of Marietta, and Sheandra Rashida Clark of Atlanta.

INDIANA – In an unusual same-sex harassment case under Title VII brought by a female employee claiming that her female supervisor had created a hostile environment and that her discharge after complaining about it was retaliatory, U.S. District Judge Sarah Evans Barker granted the employer's motion for summary judgment, finding that the alleged conduct by the supervisor failed to qualify under the "severe or pervasive" test as developed in 7th Circuit case law, lack of evidence that the plaintiff was singled out for harassment "because of her sex," and the employer's good faith belief in the reason stated for the discharge: plausible allegations that the plaintiff had made threats of violence against the supervisor and another employee, in violation of the company's published zero-tolerance policy for employees engaging in or threatening to engage in violent acts. *Baker v. Blue Sky Casino, LLC*, 2018 WL 1566806, 2018 U.S. Dist. LEXIS 53755 (S.D. Ind., March 30, 2018). The plaintiff tried to support her same-sex harassment claim by asserting her suspicion that the supervisor was a "homosexual," but the supervisor filed a sworn statement that she was "happily married to a man and recently gave birth to a new child." The court describes this in a footnote without any discussion – just letting it hang there as if this was proof of lack of any same-sex interest, thus discounting plaintiff's suspicions based on the sexually-charged nature of several incidents upon which she relied to ground her complaint, at least one of which, discounted by the court, signaled possible same-sex interests in a joking manner. The opinion makes fascinating reading, and illustrates yet again that Title VII, as it has been developed by the Supreme Court and the lower federal courts, is not a workplace "civility" code and a fair amount of sexual banter can be tolerated by employers, even if it makes some employees uncomfortable, before the threshold of actionable discrimination under Title VII has been crossed. Furthermore, of course, only "discriminatory" harassment is outlawed by the statute, requiring the plaintiff to prove that she was victimized "because of . . . sex." Baker is represented by Andrew Dutkanych, III, of Biesecker Dutkanych & Macer LLC, Evansville.

INDIANA – "Amber Hamilton was shot in the face during an altercation that transpired after a group of individuals entered the Steak'n Shake restaurant where she was eating and verbally threatened and taunted her and her brother over a period of approximately thirty minutes. Steak'n Shake employees witnessed the escalation of threats and verbal abuse, but did not take action until it seemed that a physical altercation was imminent, at which point the acting manager told the group they needed to leave the premises. Moments later, the altercation turned physical inside the Steak'n Shake, at which time, the Steak'n Shake employees summoned help. Hamilton was shot less than a minute later." It turns out that the altercation originated when the new party launched their verbal assault due to Hamilton's brother's sexual orientation. In Hamilton's subsequent negligence tort action against the Steak'n Shake, the trial judge determined that the culmination

of this incident was not foreseeable to Steak'n Shake, so its employees' failure to intervene at an earlier point did not breach any duty to Hamilton and her brother as business invitees. The trial court granted summary judgment to Steak'n Shake. Reversing, the Court of Appeals held that although there may have been no duty under recent Indiana precedents during the *early* stages of the incident, at some point earlier than when the employees intervened a duty had arisen because a potentially violent outcome had become foreseeable. The court drew on a recent Indiana case where the court held that a homeowner did not have a duty to foresee the possibility that somebody would behave violently during a party in her home, but when she saw a guest lying unconscious on the floor, she had a duty to summon help. The court agreed that, in general, the Steak'n Shake would not have a duty to anticipate that its customers would turn violent, but once there were strong signs that a confrontation was leading to that result, they had a duty to intervene, well before actual violence was clearly imminent. The court reversed the trial judge's summary judgment order, and remanded the case for trial on remaining the issues of negligence and proximate cause. *Hamilton v. Steak'n Shake Operations, Inc*., 92 N.E.3d 1166 (Ind. App., March 7, 2018).

LOUISIANA – Without issuing an opinion explaining their decision, a majority of the Supreme Court of Louisiana refused to issue a writ of certiorari to the First Circuit Court of Appeal to review a decision that had ruled invalid an executive order that Governor John Bel Edwards issued upon taking office, prohibiting discrimination because of sexual orientation or gender identity in the state government and requiring state contractors to include such a prohibition in their contracts. Chief Justice Bernette J. Johnson entered a partial dissent, stating that in her view "the rulings below adopt an unreasonably restrictive view of executive authority and of the separation of powers envisioned by the Louisiana Constitution. Requiring state agencies and state contractors to treat Louisiana citizens equally is not an *ultra vires* legislative act by the executive branch." But Attorney General Jeff Landry, who instigated the lawsuit, claiming that the Governor had engaged in prohibited legislative activity and improperly invaded the Attorney General's discretion in approving government contracts, carried the day. *Louisiana Department of Justice v. Edwards*, 2018 WL 1443842 (La. Sup. Ct., March 23, 2018), denying review in 233 So.3d 76 (La. 1st Cir. Ct. App. 2017).

MICHIGAN – *In re Churchill/Belinski*, 2018 Mich. App. LEXIS 592, 2018 WL 1343986 (Mich. App., March 15, 2018), is a troubling opinion to read; even the court would concede that, as the *per curiam* opinion says that the court is "reluctantly . . . required to affirm" a ruling by the Clare Circuit Court to take jurisdiction over three children and transfer custody to "their respective fathers, granting parenting time to respondent [mother], and directing respondent to participate in psychological therapy with a provider of her choice." The proceedings in Clare Circuit Court, responding to a petition by one of the fathers, included a jury trial and verdict upon which the trial court was acting. (There is no mention in the opinion whether the respondent was ever married to the petitioner or either of the children's fathers, although there is mention that the petitioner admits to having engaged in abusive conduct towards the respondent in the past.) The central issue is whether one of the children, a boy identified in the opinion as OTC, was being pressured by his mother to be a girl against his will after he had expressed some interest in that possibility. There was evidence that OTC had at times expressed such a preference, dressed accordingly, and occasionally asked to be called be a female name, but he was inconsistent as to this and there was some evidence that the mother had pushed him towards a feminine identity with too much fervor and, ultimately, against his wishes. Another one of the children, SLB, who identifies as gay, "has expressed stress therefrom to respondent that his teacher did not notice, and was absent from school briefly after the 2016 Presidential election." (How many gay kids fearfully stayed away from school after Trump was elected? The opinion does not specify the ages of the children.) The third child, said the court, was erroneously believed by respondent to be autistic. In other words, there was evidence in the record from which a jury could conclude that the children should not be residing principally with their mother, and that professionals should exercise some judgement about the conditions under which she could have parenting time. There was also some evidence to support the claim that the fathers were better able than the mother to provide psychological support the children needed. On the other hand, the court of appeals was concerned about the quality and credibility of some of the evidence, and was critical of both parties as to how they characterized the facts in their appellate briefs. "We note at the outset," wrote the court, "that we do not agree with any party's summation of the evidence in this matter. Respondent contends that even if everything in the petition were to be found completely accurate, it would not articulate a basis for taking jurisdiction. While somewhat tenuous, we disagree. Likewise, petitioner contends that the evidence in this matter was 'overwhelming.' The evidence was nothing even remotely of the sort, and indeed we affirm *only* because the applicable standards of review or mandatory inferences we are required

to draw in petitioner's favor [because he prevailed at trial] leave us with no other option. Amicus [not identified in the opinion] contends that this is a case of a child being taken away from a loving and concerned parent strictly for being transgendered. However, although the testimony leaves little doubt that the case worker was deeply uncomfortable with the concept, in fact the allegations were exactly the opposite: that the child was in fact *not* transgender and respondent was harming the child by *forcing* a gender identity onto the child rather than permitting one. On that last point, we emphasize that our decision in this matter, aside from our confinement by standards of review and mandatory inferences, is also based on our conclusion that the law absolutely cannot countenance, and absolutely deems abusive, forcing a particular gender on a child against the child's wishes, *no matter in which way the gender is forced*. In other words, it would constitute abuse to force a child who *is* transgender to conform to any particular gender identity, as well. Finally, we emphasize that the complex and strange facts of this case otherwise may limit any applicability of this opinion to any other cases." Ultimately, a brief summary cannot do justice to this case, so it is left to the interested reading to seek out the full opinion of the court. Since it is not officially published, the best source for a full-text decision will be one of the electronic databases. The ultimate resolution was that there was evidence in the record from which a reasonable fact-finder could go either way, meaning that an appellate court was not in a position to do other than affirm the trial court's decision.

MICHIGAN – U.S. District Judge David M. Lawson has granted a motion by three companies that maintain social media platforms to dismiss a lawsuit brought by victims and family members of deceased victims of the Pulse Night Club shooting in Orlando, Florida, perpetrated by Omar Mateen on June 12, 2016. Most of those killed or wounded were LGBT people celebrating at the Club that night. *Crosby v. Twitter, Inc*., 2018 WL 1570282 (E.D. Mich., March 30, 2018). The plaintiffs alleged that the defendants provide social media platforms use by terrorist groups to spread their messages of violence and hate, and should be held liable on the theory that those messages were viewed by Mateen, who thereby became radicalized to carry out the attack. Their causes of action were asserted under federal statutes on aiding acts of international terrorism and providing material support to terrorists and foreign terrorist organizations, as well as some state law tort claims. The corporate defendants are Twitter, Facebook, and Google. Their joint motion raises 42 U.S.C. Section 230 of the Communications Decency Act as a complete defense. (The provision relieves providers of interactive media of liability for what users post on the media, where the providers do not exert editorial control over user postings.) Wrote Judge Lawson, "There are many conclusions that can be drawn from the facts alleged in the amended complaint about the ethics and moral responsibility of those maintaining social media sites, including the defendants. But because the plaintiffs have not pleaded facts that plausibly establish *legal* claims for which relief can be granted, the Court will grant the motion and dismiss the case." Rather than relying on Section 230, the court provides a detailed account of the plaintiffs' factual allegations and explains how under current civil pleading requirements they fall short of factual pleading regarding key elements of the causes of action under the various federal statutes, partly because not enough facts are known that would establish an actual causal connection between social media postings by international terrorist groups and the specific acts of Mateen on the fateful night. ISIS can publicly claim that he was a "warrior" in their cause, but the court is not willing to rely on that as satisfying the pleading requirement of alleging *facts* (as opposed to speculation) that could establish a causal link to conduct for which defendants can be held liable. He also found that the allegations fell short of meeting the scienter requirements of the "aiding and abetting terrorism" statute, the conspiracy allegations, or the material support allegations, with causation being a weak link in the allegations. "In this case," he wrote, "the allegations that Mateen viewed some literature and videos produced by ISIS is not sufficient to sustain any inference that either the defendants, or ISIS, or any individual or entity directly associated with ISIS, had any discernible direct involvement in the Orlando attack. Instead, the complaint suggests, at most, that the defendants merely were aware of a generalized risk that persons associated with or sympathetic to ISIS's cause could, at some point, derive some benefit from their services, and that, at some point (by all accounts only after the attack) ISIS became aware of and expressed its approval of the attack. Those tenuous connections do not suffice to sustain the required inference of proximate cause." For the same reason, Judge Lawson found proximate cause problems with the state tort claims of negligent infliction of emotional distress and wrongful death. He concluded, quoting from the Supreme Court's leading opinion on civil pleading requirements, *Twombly*, "Because the plaintiffs . . . have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed."

MINNESOTA – Former hockey coach Shannon Miller was awarded $3.74 million in damages by a federal jury on her discrimination lawsuit against

the University of Minnesota Duluth over hear discharge. Miller, who sued along with two other lesbian coaches who had been dismissed, contended that the real reason for her discharge was gender discrimination (including sexual orientation discrimination) and retaliation for her complaining about sexual harassment. The trial judge narrowed the claims for trial before the jury, stating that there was no jurisdiction over the sexual orientation claims, despite concluding that "plaintiffs's sexual orientation claims – and in particular, their hostile environment claims – are their strongest." The likelihood is that the damage award will be reduced in post-trial motion practice or on appeal. *BloombergBNA Daily Labor Report*, March 16.

MISSOURI – Because the 8th Circuit has, since 1982, rejected claims of sexual orientation and gender identity discrimination under Title VII, a *pro se* plaintiff's attempt to assert such claims as part of a Title VII case were dismissed by U.S. District Judge Henry Edward Autrey in *Brown v. Express Scripts*, 2018 WL 1295482, 2018 U.S. Dist. LEXIS 40783 (E.D. Mo., March 13, 2018). However, the plaintiff's claim that she was subjected to sexual harassment and harassment based on gender stereotyping, could proceed as sex discrimination claims.

MONTANA – U.S. District Judge Susan P. Watters has accepted a recommendation from Magistrate Judge Timothy Cavan to grant the state's motion for summary judgment in *Collier v. Fox*, 2018 WL 1247388 (D. Mont., March 9, 2018), adopting Findings and Recommendations, 2018 WL 1247411 (D. Mont., Feb. 22, 2018), a challenge to the constitutionality of Montana's ban on plural marriage. Nathan and Vicki married in South Carolina in 2000, and remain married today. "Nathan is also in a committed romantic relationship with Christine [Parkinson]," wrote Judge Cavan, "and they desire to legally marry. Vicki and Christine are aware of Nathan's relationship with one another, and each consents to be married to Nathan simultaneously." They have been living together and "raising their eight children jointly for several years." Nobody has threatened them with prosecution, but when Nathan and Christine applied for a marriage license, they were turned down by the Yellowstone County clerk, who wrote them that their request "could not be granted because granting the license would place the Colliers in violation of Montana Law," specifically Mont. Code Ann. Secs. 45-5-611 and 612, which make it a crime to enter into a multiple marriage or to marry somebody who is already married to somebody else. Judge Cavan found that they lacked standing to challenge these laws, because nobody is prosecuting them or threatening to do so, and Montana has never prosecuted anybody under these laws. Further, wrote Judge Cavan, the Supreme Court's decision in *Reynolds v. U.S.*, 98 U.S. 145 (1878), rejecting a constitutional challenge to the Utah territory bigamy law, has never been overruled and is still cited as good law, despite its antiquity. The Colliers were pinning their hopes on *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), in which the Supreme Court identified the right to marry as a fundamental right under the 14th Amendment Due Process Clause, whose denial would also offend equal protection. The Colliers particularly pointed to Chief Justice Roberts' comment, in dissent, that "it is striking how much the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage." However, Cavan wrote, Roberts had also stated that he did "not mean to equate marriage between same-sex couples with plural marriage in all respects. There may well be relevant differences that compel different legal analysis." Cavan pointed out that Roberts' dissent "is not binding precedent, and it certainly cannot be said to have overruled *Reynolds*." This writer found both holdings – standing and binding precedent – to be disingenuous. The Colliers were denied a marriage license, which is an injury for purposes of Title III – or at least it was deemed so in dozens of cases leading up to *Obergefell*. Furthermore, *Reynolds* was a suit against the federal government under the 5th Amendment, not a 14th Amendment case, and it predates a raft of subsequent Supreme Court decisions construing the 14th Amendment's liberty and equality guarantees, making its reasoning practically obsolete. And the precise question presented in the two cases is different. Not that we are suggesting that an appeal to the 9th Circuit would necessarily be successful . . . .

NEW MEXICO – In a lengthy opinion on pretrial motions in *United States ex rel Hernandez-Gil v. Dental Dreams LLC*, 2018 U.S. Dist. LEXIS 51359 (D.N.M., March 28, 2018), U.S. District Judge Judith C. Herrera worked her way through a complex multi-claim case brought by a gay dentist who worked for about two weeks in a New Mexico dental clinic that is part of a large chain of such operations employing about 200 dentists during the relevant time, before being discharged and instigating this lawsuit. Included among the claims are a sexual harassment claim involving the office manager, Clint Sandoval, who plaintiff Dr. Jose Hernandez-Gil claims began to subject him to unwanted physical contact after discovering that plaintiff is gay. He reported this to the Regional Manager, Edith Pinto, telling her that he had been receiving positive feedback until he yelled at Sandoval and told him "never to touch him again," after which Sandoval wrongly complained to her about the

plaintiff's performance. He claims Pinto "ignored his concern and made no direct response." This happens in the context of the plaintiff's discovery that the dentist he had replaced had been engaged in fraudulent Medicaid billing practices, and that he had been encouraged to perform procedures on patients that were not needed or that had been billed by his predecessor and not performed; that the company imposed quotas on dentists that made fraudulent billing virtually a company practice; that his whistleblowing activities with respect to this ultimately contributed to his discharge. Another part of the story is that the plaintiff suffers from "generalized anxiety disorder" and post-traumatic stress disorder, for which the presence of a trained service dog recommended by his doctors helps to alleviate his symptoms, but the clinic management forbids pets and, although formally not classifying service dogs as pets, made things difficult about the presence of the well-behaved dog. The complaint is wide-ranging over many statutory claims, federal and state – New Mexico's Human Rights Law specifically forbids sexual orientation discrimination – and the case is complicated by the various corporate entities involved in this dental clinic empire. The plaintiff (and the federal government), represented by a team of attorneys, sued everybody in sight on multiple statutory theories, and a good part of the motion practice involved paring down the case to appropriate claims against appropriate defendants. Ultimately, however, Dr. Hernandez-Gil's sexual orientation and disability discrimination claims survived the defendant's summary judgment motions and the case continues.

NEW YORK – Michael Fagan Kuhnmuench, a self-identified heterosexual man who had been dismissed from a job as Executive Assistant to Lin Shi, a gay entrepreneur with numerous business interests, sued for sex and sexual orientation discrimination, retaliation, aiding and abetting of the same, interference with protected rights, denial of overtime pay, and violations of employee records maintenance and notice requirements. The suit in the U.S. District Court for the Southern District of New York was premised on federal question jurisdiction, invoking Title VII of the Civil Rights Act and the Fair Labor Standard Act, but many of the claims were stated under state and local law, including the New York State and City Human Rights laws, which expressly prohibit sexual orientation discrimination. *Kuhnmuench v. Phenix Pierre, LLC*, 2018 WL 1357383 (S.D.N.Y., March 15, 2018). Phenix Pierre, LLC, was the corporate employer of Kuhnmuench. According to his complaint, the plaintiff was originally hired to be Shi's English language tutor in January 2016, but was subsequently engaged to be a full-time Executive Assistant, with a wide portfolio of duties in connection with Shi's many businesses. It seems that Shi was flirtatious, enjoyed "coming on" to plaintiff, despite plaintiff's asking him to desist and touching him more than the plaintiff was willing to tolerate. Plaintiff alleges that "Shi told plaintiff multiple times that he 'should have hired a gay boy' instead of Plaintiff, a heterosexual male." And, finally, Shi discharged Plaintiff without any cause in a letter of May 11, 2016, effective May 26. Plaintiff alleges that on or about May 13, 2016, Shi told him, "Maybe I should find a gay boy assistant or another queen girl to work for me." In other words, this looks like a possible hostile environment claim for the plaintiff, and an open and shut case of sexual orientation discrimination in the discharge, especially now that the 2nd Circuit has ruled in *Zarda v. Altitude Express* that sexual orientation claims are covered under Title VII. The only catch is federal jurisdiction. It seems that Phenix Pierre does not have at least 15 employees, and the court found no basis in the complaint for cumulating the employees of all Shi's businesses in order to meet the statutory minimum. Further, U.S. District Judge Laura Taylor Swain found, the complaint fell short on specific factual allegations sufficient to establish "employer" status under the Fair Labor Standards Act, which applies only to businesses that have a nexus with interstate commerce. So the court dismissed the federal claims on jurisdictional grounds, and declined to assert supplemental jurisdiction over the state and local law claims. The slip copy of the opinion from Westlaw did not mention whether plaintiff was represented by counsel or proceeding *pro se*.

NEW YORK – U.S. District Judge Mae A. D'Agostino has partly denied Defendants' motion to dismiss Title VII and New York State Human Rights Law sexual orientation employment discrimination claims by a lesbian police officer against the City of Ithaca in *Crews v. City of Ithaca*, 2018 WL 1441282, 2018 U.S. Dist. LEXIS 45929 (N.D.N.Y., March 21, 2018). Office Sarah Crews, openly gay and self-described as gender-nonconforming throughout her employment in the IPD, claims to have encountered a hostile environment because of her sexual orientation, with particular stress on the Department's "Search and Jail Policies," under which the IPD dictates circumstances in which prisoners are to transported and otherwise attended to by officers of the same sex. In Crews' case this has left her vulnerable to "fabricated sexual harassment claims" and prompted her to protest the policies as failing to take into account the reality of lesbian and gay police officers. Judge D'Agostino recounts in detail the factual allegations about Crews' adverse experiences working in the IPD attributable to her sex and sexual orientation, not least that because there are few women

serving in the IPD but a larger than usual proportion of female prisoners, she has drawn proportionately much more duty escorting and dealing with prisoners than the male officers. Crews also recites several incidents over the course of her employment that might be characterized as sexual harassment of her by male officers, and various disciplinary charges against her that she claims to be retaliatory responses to complaints she made about discriminatory incidents and policies. Judge D'Agostino concluded that most of these claims had been adequately pled to avoid pre-trial dismissal, although she concluded that the incident allegations, viewed over the entire course of Crews' employment, did not meet the test of pervasiveness and none were severe enough to constitute an actionable hostile environment in violation of Title VII. She also narrowed down the number of actionable retaliation incidents due to statute of limitations issues. The judge did, noting the 2nd Circuit's recent *Zarda v. Altitude Express* decision (see 883 F.3d 100), reject Defendants' contention that the Title VII claim must be dismissed because the statute does not forbid sexual orientation discrimination, while agreeing that the chief of police, also named as a defendant, would have to be dismissed from the Title VII counts, as that statute imposes liability solely on employer entities, not individuals. (On the other hand, those claims asserted under the NYS Human Rights Law against the chief could be maintained.) In all, Crews' suit emerged largely unscathed from the court's rulings on the dismissal motion. The court declined to rule on Defendants' motion to dismissal a 14th Amendment claim, which, although expressly invoking only the Due Process Clause, the court found it to sound, based on factual allegations, in Equal Protection. Since the motion address this count only in terms of Due Process, it was deemed premature to rule on the motion without appropriately directed argument from the parties. Crews is represented by Edward Kopko of Ithaca.

NEW YORK – *Pro se* plaintiff Mariah Lopez, a homeless transgender woman, is suing the New York City Department of Homeless Services (DHS) and Project Renewal, Inc., which operates a private shelter serving exclusively LGBTQ clients, called Marsha's House, pursuant to a contract with DHS. *Lopez v. City of New York*, 2018 U.S. Dist. LEXIS 43533, 2018 WL 1371164 (S.D.N.Y., March 15, 2018). Lopez is asserting claims under the Americans with Disabilities Act (ADA) for failure to accommodate and retaliation. She had previously sued in state court, and was denied a preliminary injunction, then missed the deadline to appeal that ruling. The ultimate dispute here in federal court is over a decision by the staff at Marsha's House to require that she be transferred to a shelter capable of providing a higher level of mental health services than they can provide. The case was originally filed because of a dispute that arose when Lopez was sent by DHS to Marsha's House and insisted on bringing a dog with her. Marsha's House does not allow pets, but does allow "service animals." Lopez claimed the dog was a service animal, the staff at Marsha's House disagreed and threatened to remove Lopez, but the federal district court issued a TRO requiring the City to permit Lopez's service animal into Marsha's House and ultimately that issue was resolved in favor of Lopez. The forced transfer-out to a shelter is the central dispute now, with Lopez alleging that it is retaliatory because of the complaints she has raised at Marsha's House (including the past dispute about her service dog). U.S. District Judge Valerie Caproni referred pending motions to Magistrate Judge Andrew Peck, who recommended rejecting the City's motion to dismiss the ADA claims, and to grant Project Renewal's motion on the failure to accommodate claim and under Title II of ADA, Peck having found that Title II did not apply to a non-governmental entity such as Project Renewal, but to deny Project Renewal's motion as to the retaliation claim. There is a material issue of fact over the reason for the transfer – is it for bona fide medical reasons, or just a response to Lopez being a difficult resident to deal with. Judge Caproni adopted the recommendations in full, so Lopez's suit against the City continues, primarily on the claim that her right to stay at Marsha's House is being subjected to an unlawful retaliatory transfer decision. Judge Caproni notes at several stages of the opinion the need to overlook various deficiencies in Lopez's suit papers and actions because she is *pro se*. This sounds like a case that could significantly benefit from the assistance of *pro bono* counsel for Lopez.

NORTH CAROLINA – Sexual orientation discrimination claims may not be brought under Title VII in federal courts within the 4th Circuit, ruled U.S. District Judge Martin Reidinger in *Snyder v. Ohio Electric Motors, Inc.*, 2018 U.S. Dist. LEXIS 42719, 2018 WL 1353124 (W.D. N.C., March 15, 2018). Randall R. Snyder, Jr., *pro se*, claimed to have been discharged for his same-sex partner being present at a company lunch, and he also claims that one his co-workers searched Snyder's company-issued cell phone and found images he deemed worth turning over to the local police, resulting in Snyder being charged with some (unspecified) felonies. He named as defendants several co-workers as well as the company, and Judge Reidinger granted a motion to dismiss as to the individual defendants, noting the 4th Circuit's ruling that only "employer" as defined by the statute, not individual employees, can be held

liable for violating Title VII. And the court declined Snyder's invitation to strike out into new territory and allow sexual orientation claims under Title VII. "While two Courts of Appeals have recently held that Title VII prohibits discrimination on the basis of sexual orientation," citing *Zarda* and *Hively*, "the Fourth Circuit has held that 'Title VII does not prohibit conduct based on the employee's sexual orientation, whether homosexual, bisexual, or heterosexual. The Court is bound to follow the Fourth Circuit's precedent" and the case must be dismissed.

NORTH CAROLINA – In a rare reversal of a Social Security disability benefits denial, U.S. Magistrate Judge Dennis L. Howell found two bases for remanding for reconsideration the denial of benefits to Tammy Latrell Gilchrist, who is living with HIV. *Gilchrist v. Berryhill*, 2018 WL 1277748, 2018 U.S. Dist. LEXIS 39592. Both errors pertained to the criteria and analysis used by the Administrative Law Judge (ALJ) in determining whether Gilchrist is disabled from working within the meaning of the Social Security Act. Judge Howell found that the ALJ "erred by failing to address whether Plaintiff's HIV 'medically equaled' Listing Sec. 14.08," agreeing with the plaintiff that the ALJ's failure to address this issue was "clearly erroneous," mandating a remand for proper findings. "A review of the record reveals with respect to Listing Sec. 14.08, the ALJ's analysis in its entirety provides as follows: "The claimant has positive HIV. However, she has not suffered from the opportunistic infections, neoplasms, encephalopathy, wasting syndrome or other symptoms associated with this condition as required in Section 14.08." Not specific enough, wrote the court, which was "not persuaded that the ALJ's analysis was sufficient," and quoted the 4th Circuit, stating in *Patterson v. Commissioner of Social Security*, 846 F. 3d 656, 663 (2017), an ALJ must "show his work," not merely state conclusions. In another serious error, the ALJ failed to give appropriate weight to the unanimous conclusion of three treating physicians that Gilchrist was too disabled to work, including her HIV specialist, Dr. Harley. "On December 12, 2014, Dr. Harley handwrote a note that states the following: 'Miss Tammy Gilchrist meets medical criteria for permanent disability due to a combination of fibromyalgia, HIV, and chronic nausea." He also submitted a letter on May 6, 2015, noting that the Plaintiff was recently denied disability because of a high CD4 count and no history of opportunistic infections or other AIDS-related complications. But, wrote Judge Howell, "Dr. Harley notes that HIV impacts the body in many ways other than through the suppression of the immune system. For instance, HIV causes fatigue due to chronic inflammation. Also, the medications required to control HIV may cause complications as well. Plaintiff suffers from chronic nausea, which has required medication treatment for years, and fibromyalgia, which causes diffuse and debilitating pain. Dr. Harley concludes that Plaintiff has some very significant health issues that will not improve, even with optimum medical management." The ALJ gave "little weight" to "the treating doctors' disability statements and to the specific functional limitations they imposed on Plaintiff because they were inconsistent with other evidence in the record," in the ALJ's opinion. But, wrote Judge Howell, "Dr. Park, a specialist in pain, and Dr. Harley, a specialist in infectious disease, were entitled to greater weight. Second, in weighing Dr. Park's and Dr. Harley's medical opinions, the ALJ should have but failed to consider that both doctors are specialists in their field." He also observed that the ALJ's "attempt to discount the pain Plaintiff experiences is not credible in light of the fact that she is treated regularly by a pain specialist, Dr. Park. In fact, Dr. Park noted that Plaintiff has *failed* conservative measures and is on chronic opioid therapy." This failure to accord proper weight requires a remand.

OHIO – Following up on the victory in *F.V. v. Barron*, 2018 U.S. Dist. LEXIS 36550, 2018 WL 1152405 (D. Idaho Mar. 5, 2018), reported above (which held that transgender people have a 14th Amendment right to obtain appropriately amended birth certificates), the ACLU LGBT Rights Project, ACLU of Ohio, and Lambda Legal have teamed up to challenge Ohio's retrograde birth certificate policy, seeking a federal court order that the state make it possible for transgender people to obtain amended birth certificates that reflect their gender identities and do not "out" them by indicating that the certificate has been amended with respect to sex. The case, filed in the U.S. District Court in Cincinnati on March 29, is *Ray v. Himes*, Case No. 2:18-cv-00272-MHW-CMV. It has been assigned to District Judge Michael H. Watson, who was nominated to the court by President George W. Bush.

OHIO – Anastasia Holub, a transgender woman who had been employed as a Licensed Practical Nurse (LPN) and Charge Nurse by Saber Healthcare Group at two of its Ohio facilities, sued the company under Title VII and Ohio's anti-discrimination law for sexual harassment, gender discrimination, retaliation and wrongful termination based on gender discrimination, as well as a tort claim for intentional infliction of emotional distress. (The court does not explicitly identify the nature of the facilities, but from the incident described it sounds like a nursing home or similar residential facility.) In *Holub v. Saber Healthcare Group, LLC*, 2018 U.S. Dist. LEXIS

35458, 2018 WL 1151566 (N.D. Ohio, March 2, 2018), she suffered summary judgment on some of her claims, but survived District Judge Christopher A. Boyko's decision on others. She was employed by Saber from 2011 until her termination in August, 2014. She twice applied for and was granted leave under the Family and Medical Leave Act, but was discouraged from taking leave and a supervisor made negative comments related to her leave. She also alleged that Rudwick employees, including supervisors, "insisted upon referring to Plaintiff as 'he', 'him' and 'mister.'" In the incident that led to her termination, one of Rudwick's residents became "nonresponsive." "Plaintiff was informed by a coworker, Demetrius Glass, of the situation and both Plaintiff and Glass proceeded to the resident's room. Plaintiff left to retrieve the resident's chart to determine if the resident had signed a 'Do Not Resuscitate' order. While Plaintiff was retrieving the chart, Glass, a trained State Tested Nursing Assistant (STNA), began administering CPR. Plaintiff then called 911 after confirming that the patient did not have a DNR order and CPR was continued until additional medical personnel arrived." She was discharged, purportedly for having left the scene during the medical emergency. Defendant's motion for summary judgment on the sexual harassment claim was premised on the argument that neither Title VII nor the Ohio anti-discrimination law forbid sexual orientation discrimination, but Judge Boyko, noting *Price Waterhouse* and 6th Circuit precedent, pointed out that as a transgender person, Holub was not asserting a sexual orientation claim but, rather, a claim of discrimination based on a "failure to conform to socially-constructed gender expectations," which "is proscribed by Title VII" and, therefore, the Ohio law as well, as Ohio courts follow Title VII case law in construing their statute. The court found that Holub had alleged facts sufficient to support a claim of harassment because of her gender non-conformity. However, the judge granted summary judgment to the employer on the gender discrimination claim, both under Title VII and Ohio wrongful termination law, in connection with the discharge, finding that Holub's factual assertions fell short because she could not allege that she was replaced by "someone outside the protected class." However, the court found a good basis for her claim that her termination was retaliatory because of her gender nonconformity! This is because she adequately raised the issue of pretext with respect to the purported reason for the discharge. Arguably, leaving the room to check the patient's chart for a DNR was her proper function in the situation. Her supervisor testified that STNA's such as Glass are "not qualified to read a patient's chart," and the situation called for a quick determination whether there was a DNR on file. Holub was the only one present who could do that, and the charts were not kept in the residents' rooms, so she had to leave briefly to consult the chart. Since she offered evidence to show that the Defendant's explanation for her discharge was pretextual, the court refused to grant the employer summary judgment on that claim. She also had a good claim for retaliation in violation of the FMLA, found Judge Boyko, given the adverse comments about her taking leave and the timing of her discharge in close proximity to the last leave. Finally, however, the court found inadequate allegations to support a common law claim of intentional infliction of emotional distress, not surprising because courts do not find that a wrongful discharge or harassment based solely on statements can be the basis for such a claim in the absence of outrageous conduct by the employer. Holub is represented by Brian D. Spitz and Frederick M. Bean, Spitz Law Firm, Beachwood, OH, and Marian K. Toney City of the Cleveland Department of Law.

OHIO – Michael Chapman was convicted by a Summit County Common Pleas Court jury on a charge of second degree felonious assault as a result of a severe beating he administered to another man in a sports pub restroom, sparked by a confrontation concerning the presence of a transgender man in the restroom. *State of Ohio v. Chapman*, 2018 WL 1568787 (Oh. 9th Dist. Ct. App., March 28, 2018). Chapman and other witnesses presented different versions of what happened in their testimony, but the jury evidently believed the version offered by the transgender man, under which Chapman yelled, when the transgender man entered the restroom, "is that that fucking tranny?" and then, according to the transgender man, "came flying out of the stall at me and had me up against the wall," at which point the victim got in between him and Chapman, told Chapman to calm down and tried to separate them. Chapman told the victim, "Nobody tells me what the fuck to do" and hit the man, knocking him across the room. The transgender man testified that Chapman got on top of the victim and hit him repeatedly, "probably 15 or 16 times," and the transgender man testified that he did not see the victim push or try to punch Chapman. The victim also testified, having sustained serious injuries that still lingered at the time of trial. He admitted that there were "holes in my memory" from that night, but he remembered someone yelling something "along the lines of, where is this fucking tranny? I'm going to kiss his ass." And he recalled telling that person that "nobody needs to get in a fight." The next thing he remembers, he was getting knocked out and waking up on the bathroom floor. Chapman claimed self-defense, testifying that he was attacked by the victim after his comments about the transgender man being in the restroom. At trial, Chapman's brother testified that their 'brother-in-law's sister' is

transgender, they had known her for "at least six years" and there was no "angst or animosity among them." This was countered on cross-examination of the brother by evidence of a Facebook post: "The brother read the post and described the associated pictures as follows: 'If you belong in this bathroom. * * * It is a picture of a male restroom. And if you follow my daughter or my wife in this bathroom – picture of a woman's bathroom – you're going to need this bathroom. And it's a picture of a handicapped sign." Defense counsel objected on relevancy grounds, and the trial court overruled the objection. Chapman raised several points of error on his appeal, all rejected by the Court of Appeals as not meritorious.

PUERTO RICO – U.S. District Judge Carmen Consuelo Cerezo signed an Order on March 28 granting a motion for summary judgment by Lambda Legal in its suit seeking appropriate birth certificates for transgender individuals in *Gonzalez v. Nevares*, Civil 17-1457CCC (D. Puerto Rico). Lambda filed suit a year ago on behalf of three transgender Puerto Ricans and a local advocacy group, Puerto Rico Para Tod@s, challenging the constitutionality of a prior ruling by Puerto Rico's Supreme Court that had rejected a claim that transgender Puerto Ricans are entitled to obtain new birth certificates correctly identifying their gender identity with revealing their transgender status. In her order, Judge Cerezo stated that the court will be separately issuing an Opinion "related to the uncontested material facts and its conclusions of law, including a declaration that the forced disclosure of plaintiffs' transgender status violates their fundamental right to informational privacy," which appears to be the legal theory upon which she finds unconstitutional Puerto Rico's current policy of in effect requiring transgender Puerto Ricans to reveal their transgender status any time they need to use their birth certificate. "It will also state which method or relief is required to correct the gender marker on plaintiffs' birth certificates to accurately reflect their gender identity, without revealing their transgender status." Implementation of the ruling will await issuance of the court's opinion. Lambda's press release announcing the order quoted their staff attorney, Omar Gonzalez-Pagan, who is working on the case: "This is a tremendous victory for our clients and all transgender people born in Puerto Rico." The reference to those born in Puerto Rico is significant, of course, because there is extensive migration from Puerto Rico, a U.S. commonwealth, to the mainland, and those born in Puerto Rico but living elsewhere have been stymied in getting new birth certificates by the archaic local rules. Lambda has been systematically attacking the refusal by a handful of remaining states to update their birth certificate policies to take account of gender transition, and recently achieved a federal district court victory in Idaho and filed a new case in Ohio, both events reported elsewhere in this issue of *Law Notes*.

TENNESSEE – The Court of Appeals of Tennessee has denied an attempt by a group of state legislators to keep alive a controversy about the proper interpretation of Tenn. Code Ann. Sec. 68-3-306 (2013), in the context of the divorce of a lesbian couple who had a child through donor insemination. *Witt v. Witt*, 2018 Tenn. App. LEXIS 161, 2018 WL 1505485 (March 27, 2018). Sabrina and Erica Witt married in Washington, D.C., in 2014, and had a child in Tennessee through donor insemination who was borne by Sabrina in January 2015. Erica was not listed on the birth certificate at that time, inasmuch as Tennessee (one of the four states in the 6th Circuit who were defendants in *Obergefell*) did not recognize same-sex marriages then. Several months later, the U.S. Supreme Court decided *Obergefell v. Hodges*, 135 S. Ct. 2584, recognizing that same-sex couples have a constitutional right to marry and to enjoy the full constellation of marital rights. In February 2016, Sabrina filed for divorce and alleged in her petition "No biological child of the Defendant born to this marriage," implicitly denying any parental rights to Erica. Erica countered with an answer alleging that she is a legitimate parent of the child under Tenn. Code Ann. Sec. 68-3-306, which provides that the child born to a married woman is the legitimate child of the woman and her husband. Erica contended that under *Obergefell* she was entitled to parental status using a gender-neutral interpretation of the statute, as necessary to preserve its constitutionality (which at one point in the litigation she was challenging), pointing to Tenn. Code Ann. Sec. 1-3-104, which provides that "Words importing the masculine gender include the feminine and neuter, except when the contrary intention is manifest." The trial court initially rejected Erica's argument, but the state's Attorney General, having intervened to defend the statute, endorsed a gender-neutral reading as a valid method of saving its in light of *Obergefell*. Members of the state legislature repeatedly sought to intervene to defend the literal language of 68-3-306 and argue that it is constitutional to limit parentage to biological parents, but their every attempt was denied by the trial court and, ultimately in this new opinion, by the court of appeals. The ground of denial at this point is mootness. After the trial court accepted the state's gender-neutral interpretation of 68-3-306, Sabrina and Erica agreed to the terms of their divorce including provision of parenting time for Erica, and the trial court entered a final divorce decree. In its March 27 ruling,

the Court of Appeals said that as neither party has appealed the divorce decree, the case is finished and the legislators' attempt to intervene is moot. There is no live litigation in which to intervene. So there!

WEST VIRGINIA – In *Cooper v. Mirandy*, 2018 WL 1250493, 2018 U.S. Dist. LEXIS 29919 (D.W.Va., March 12, 2018), U.S. District Judge Frederick P. Stamp, Jr., rejected a claim by Randy Cooper, serving a life sentence with the possibility of parole after pleading guilty to the first degree murder of his sister, that the Parole Board had violated the Americans with Disabilities Act for taking his HIV-positive status into account in deny his latest parole petition. Judge Stamp had referred the petition to a magistrate judge for a recommendation, and his March 12 opinion affirms the magistrate's report and recommendation. The court cited *Thompson v. Davis*, 295 F.3d 890 (9th Cir. 2002), in which the court held that the ADA "does not categorically bar a state parole board from making an individualized assessment of the future dangerousness of an inmate by taking into account the inmate's disability." Judge Stamp agreed with the magistrate that "there is no evidence that the Parole Board considered the petitioner's HIV status when it denied him parole in August 2014. In his objections to the Report & Recommendation, the petitioner contends that a report from the Huttonsville Correctional Center describing his HIV condition was used by the Parole Board in making their decision, and that the respondent [HCC Warden Patrick Mirandy] made discriminatory statements about people with HIV. However, according to the transcript of the parole interview, the petitioner's HIV status was not discussed or even mentioned in the interview. Thus, this Court finds that this claim has no merit." What? Does the lack of discussion of Cooper's HIV status during his interview with the Parole Board have any evidentiary value on the question whether they took his HIV status into account in making their decision, when the documents presented to them by the respondent did mention his "HIV condition"? We don't see the relevance of this comment by the court. And, of course, the 9th Circuit quotation does not dispose of the issue either, especially in light of another statement from that opinion: "The ADA prohibits a public entity from discriminating against a qualified individual with a disability on the basis of disability."

CRIMINAL LITIGATION NOTES

By Arthur S. Leonard

CALIFORNIA – In what may be a pointless waste of prosecutorial and judicial resources, the California 3rd District Court of Appeals ordered that a trial court hold a probable cause hearing to determine whether a man who pled guilty to "committing a lewd or lascivious act upon a child" should be required to submit to HIV testing, even though the actual conduct charged against him could not possible result in the transmission of HIV. *People v. Tankersley*, 2018 WL 1372657, 2018 Cal. App. LEXIS 1774 (March 19, 2018) ("not to be published"). The prosecution concerns two incidents involving the same female minor, who testified that Tankersley had rubbed "on her vaginal area over her clothes" on two occasions. This was held to violate Pen. Code. Sec. 288(a). For some reason, his defense counsel made no objection to the court's order that Tankersley submit to HIV testing, but the Court of Appeal noted California precedent holding that this would not waive defendant's right to raise the issue on appeal. The statute authorizing HIV testing, Section 1202.1, requires the trial court to order such testing within 180 days of conviction of any of a list of penal code sections, including section 288, "if the court finds that there is probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim." The trial judge made no such finding on the record in this case, and on appeal the state conceded the point, but, wrote Judge Duarte for the appellate panel, "we will presume an implied finding of probable cause by the court." However, the judge continued, "there is nothing in the record to suggest a transfer of bodily fluids." One would think this would end the matter: vacate the testing order and be done with the issue. But no, wrote Duarte: "Controlling authority – *[People v.] Butler* – requires this matter to be remanded for a probable cause hearing. As our Supreme Court stated in *Butler*: "Given the significant public policy considerations at issue, we conclude it would be inappropriate simply to strike the testing order without remanding for further proceedings to determine whether the prosecution has additional evidence that may establish the requisite probable cause." The court provides no further explanation for what on its face sounds like a wasteful procedure. One speculates that the justification is that this was a plea bargain and perhaps the prosecution had evidence of conduct that could transmit HIV but did not present it because of the defendant's willingness to plead to a lesser offense. But the court's recitation of the factual record, as the judge noted, does not indicate any conduct by the defendant that would transmit HIV, so one is left with a mystery at this point.

CALIFORNIA – U.S. District Court Judge William H. Orrick denied a petition for a writ of habeas corpus by Ricardo Torres, who had been convicted in a jury trial of aggravated assault as a hate crime committed in May 2012

CRIMINAL LITIGATION *notes*

outside a gay bar in Castroville, where he and another man severely beat a gay man who had previously been in the bar, while repeatedly calling him "faggot." A bartender had testified to seeing Torres and another man (who was prosecuted for his role in the beatings) still in the bar at closing time, apparently agitated about having been "touched" by other men in the bar. *Torres v. Frauenheim*, 2018 U.S. Dist. LEXIS 34778, 2018 WL 1142006 (N.D. Cal., March 2, 2018). Torres claimed that various instructions given to the jury had violated his constitutional right to a fair trial under the 5th, 6th, and 14th Amendments. Orrick was not convinced. The jury instructions that were given were standardized instructions that have been upheld many times before by the courts, and in this case all the claims concerning jury instructions that Torres had preserved during the trial had been thoroughly analyzed and rejected in direct appeal by the California Court of Appeal. "I find the state appellate court's assessment entirely reasonable and consistent with the evidence of record," wrote Orrick, who in response to another one of Torres's arguments, wrote, "Like the California Court of Appeal, I do not see how the wording of either CALCRIM No. 370 or 1354 is ambiguous, confusing, or prejudicial. As stated above, challenged instructions may not be judged in artificial isolation, but must be considered in the context of instructions as a whole and the trial record. Torres has failed to show either how the jury misapplied CALCRIM Nos. 370 and 1354, or how the challenged instructions lowered the prosecution's burden of proof. The state appellate court's rejection of these claims was reasonable and is entitled to deference under the AEDPA."

CALIFORNIA – A recurring problem for many years in California has been the casualness with which trial courts order people convicted of sex-related offenses to submit to HIV testing without the court making the requisite factual findings that the conduct for which they were convicted could plausibly be a vector for HIV transmission. A statute requires such a finding. This was a problem in *People v. Alvarado*, 2018 Cal. App. Unpub. LEXIS 1376 (5th Dist. Ct. App., March 1, 2018). Victor Alvarado was convicted for "committing a lewd act on a child under the age of 14." The case was about a man touching a girl's private parts, but did not involve any penile-vaginal contact or even penetration by a finger. But since it fell within the broad category of one of the sex crime section in the Penal Code on the statutory list that might qualify for an HIV-test order, the judge ordered it, without making an explicit finding on the record that "there is probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim." Another relevant provision says that probable cause is established when the facts "would lead a person of ordinary care and prudence to entertain an honest and strong belief that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim." The state agreed in this case that there was no such evidence in the record. The court ordered a remand to give the prosecution a chance to introduce any additional evidence it might have pertinent to the necessary factual findings. "Although Alvarado suggests that a remand is unnecessary as the record is unequivocal there was no transference of bodily fluids between Alvarado and S., we will apply the remedy delineated by our Supreme Court" in *People v. Butler*, 31 Cal. 4th 1119 (2013). In this case, that strikes us as a waste of judicial and prosecutorial resources. There were other issues in this appeal, but this is the only one relevant for *Law Notes*.

CALIFORNIA – Presiding Judge William W. Bedsworth's opinion for the California 4th District Court of Appeal, Division 3, in *People v. Parkerson*, 2018 WL 1475256 (March 27, 2018), begins thus: "Appellant Randy Lee Parkerson strangled Zoraida Reyes to death while they were having sex in the back of his car. At trial, appellant claimed Reyes wanted him to choke her to enhance her sexual stimulation, and her death was just an accident. Despite this, the jury convicted him of second degree implied malice murder. On appeal, he contends reversal is required because the jury's instruction on his accident defense and the lesser included offense of involuntary manslaughter were flawed. We disagree and affirm the judgment." Why is this case reported in *Law Notes*? Because Reyes was a transgender woman, and Parkerson's defense included the claim that he had no malice against transgender women. Indeed, he claimed, "he went on a prolonged methamphetamine binge after losing his job in early June of 2014" and "the drug use made him crave sex with transgender women, and on June 10 he met Reyes through an online website. Reyes agreed to give appellant a 'blow job' for $10 and told him where to meet her in Santa Ana." O.K., we know this is starting to sound like a script for a bad T.V. crime drama. We are wondering about the literary talents of the judicial clerk who drafted this opinion. Anyway, according to Reyes' testimony, as recounted in the opinion, "he received oral sex from Reyes in his car. Then he asked Reyes for anal sex. According to appellant, Reyes agreed to let him anally penetrate her, so they started doing it 'doggie style' in the back seat of the car. During the intercourse, Reyes told appellant she wanted to be choked, and appellant obliged. He wrapped his right arm around her neck and squeezed it between his bicep and forearm. At various times after that, Reyes made gagging sounds and grabbed

appellant's arm, which 'freaked appellant out' because he thought he was hurting her. In fact, each time that happened, appellant momentarily released his arm from around Reyes's neck. However, she told him to keep choking her, and he complied because he was 'caught up in the moment.' As appellant was reach his climax, Reyes' knees gave out and the full weight of his body came down on her back. He continued to choke and thrust into her as she lay face down on the back seat. When he finished, he realized Reyes was not moving or breathing. He was very scared and didn't know what to do. During his police interview [months later] he insisted he was not into rough sex and had no intention to hurt, much less kill, Reyes." But he was "hopped up" on meth and not thinking clearly, so instead of calling the police, he drove around with Reyes' body in his car until he found a place to leave the body. After the body was discovered, it took months of detective work for the police to track him down, mainly using cellphone records. "In closing argument, the prosecutor conceded there was insufficient evidence to prove appellant had the specific intent to kill Reyes, and therefore he could not be convicted of first degree murder." But a second degree implied malice murder charge was premised on Reyes having acted "in conscious disregard for her life," and the prosecutor argued that he had proved all the elements for such for that offense. The defense was that Parkerson was "merely a pawn in Reyes' dangerous game of erotic asphyxiation, and he was not guilty of anything because her death was an accident," a defense evidently rejected by the Orange County Superior Court jury. The opinion goes into detailed explanation of various kinds of jury charges in a case like this, concluding that the charge delivered to this jury was not seriously flawed and that "by convicting appellant of second degree murder, the jury demonstrated their agreement" with the prosecutor's argument that "the appellant's conduct transcended criminal negligence, the mental state required for involuntary manslaughter, and reflected a conscious disregard for human life, the mental state required for implied malice murder." The court pointed out that Parkerson's counsel did not ask the jury to convict on manslaughter, but rather "took an all-or-nothing approach to the case and maintained appellant was not guilty of anything because Reyes' death was simply an accident." As a result of this defense strategy, the court found, any technical errors regarding the manslaughter charge were "manifestly harmless." Parkerson, who was represented by appointed counsel on appeal, was sentenced to 15 years to life in prison.

FLORIDA – Anybody looking for a detailed account of the quagmire an insured can find himself in when disputing a denial of benefits by an insurance company should read *Johnston v. Aetna Life Insurance Co.*, 2018 U.S. Dist. LEXIS 34622 (S.D. Fla., March 1, 2018), in which U.S. District Judge Cecilia M. Altonaga describes Roy Neil Johnston's litigation over denial of short term and long term disability benefits under the policy sold by Aetna to his employer. Johnston was employed as a psychiatrist, and ended up on disability when severe migraine headaches made it impossible for him to continue working. In the litigation he initiated to challenge Aetna's denial of his long term disability benefits claim, Aetna challenged his credibility because, among other things, his doctor wrote him a prescription for PrEP, a medication that significantly reduces a person's risk for being infected with HIV. With something like migraine headaches, the evidence largely consists of self-reporting of symptoms by the insured. In this case, wrote the court, "Aetna argues Johnston's self-reporting of his symptoms cannot be trusted because of what Aetna perceives are inconsistencies in Johnston's statements and his physicians' records as they relate to an extraneous matter – Johnston's dating and sexual behavior. In particular," continued the court, "Aetna points to a July 2016 sworn statement from Johnston that he had not had sexual relations or been on a date in a year, which Aetna believes is inconsistent with a physician's note dated October 2015, at which time Johnston was tested for HIV and assessed as 'engaging in high risk sexual behavior.' Johnston explains he first asked his physician in December 2014 about being prescribed a medication known as PrEP. 'According to the CDC, daily PrEP reduces the risk of getting HIV from sex by more than 90 percent' but is 'less effective when not taken consistently.' In order to be prescribed PrEP, an individual must be HIV negative and at 'high risk for HIV,' requirements satisfied in Johnston's case by his doctor having 'diagnosed/assessed him with high risk sexual behavior.' Johnston explains his statement regarding his lack of sexual activity is not mutually exclusive with wanting to take precautions in the event he did engage in sexual activity. The Court finds Aetna has not presented the Court with sufficient information to show an inconsistency between Johnston's July 2016 sworn statement and his October 2015 physician's note. Without knowledge of what exactly Johnston communicated to his doctor, and its context, the Court does not find the doctor's 'diagnosis/assessment' of high risk sexual behavior in October 2015 to be facially inconsistent with Johnston's July 2016 declaration he had not had sexual relations in the past year. There is not necessarily an inconsistency between Johnston's statement and his physician's notes. Moreover, this 'issue' is an unrelated matter." There are, as one can imagine, a myriad of issues explored in the

opinion. "Ultimately," wrote the judge, "the parties' dispute regarding the pre-existing condition clause" – which Aetna was relying upon to deny LTD benefits for the migraine condition – "centers on a genuine issue of material fact – whether Johnston took prescription medication for migraine during the look-back period. Without this critical information, the Court cannot decide whether Aetna was correct in denying LTD benefits based on the pre-existing condition exception. As a result, although Johnston meets the test of disability as laid out in the Policy, the Court cannot grant summary judgment" on his LTD claim. However, the court did grant summary judgment to Aetna on another count of the complaint dealing with Aetna's termination of STD benefits.

GEORGIA – Here's a sad tale. Raymond and Tameka McKoy had three children together. During their marriage, Tameka, who is bisexual, introduced several women into their relationship, including Lauren Hudson, who lived in Chicago but came periodically to visit in Georgia during 2012. During the visits, Hudson had a sexual relationship with both Tameka and Raymond, together and individually. Tameka learned that Raymond was having an affair with another woman (who became pregnant) and they began to have frequent arguments. In May 2013, they separated and began living apart, with an informal arrangement of shared custody. About a month later, Hudson came to stay with Tameka for three weeks. On June 15, Raymond came to Tameka's apartment and argued with Tameka and Hudson. Tameka called the police to get him to leave. All parties were apparently participants in the pervasive gun culture in Georgia, so this ended badly, and Raymond shot Hudson to death about a week later, after the two women and the children had returned home late at night from a friend's party. Raymond, armed, had shown up unannounced, seeking to bring a child home with him. He got into an argument, and claimed self-defense for the shooting, noting that Hudson was holding a gun when she died which he claimed she had drawn against him, but evidence at trial was divided as to this and the jury evidently did not believe him. The final fatal bullet was fired by Raymond into the back of Hudson's head from above as she bent over from three prior bullet wounds. Raymond testified in his own defense, but when the prosecutor indicated after a recess that he would cross-examine Raymond using a journal that Raymond kept (which had arguably been illegally seized by the police), defense counsel objected. The court ruled that even if the journal was illegally obtained, it could be used for purposes of impeachment of Raymond's direct testimony to show inconsistent statements. Raymond then refused to submit to cross-examination, and the trial judge instructed the jury to ignore all of his direct testimony. He was found guilty of malice murder. Although Raymond did not challenge the sufficiency of the evidence supporting his conviction, the Georgia Supreme Court automatically reviews all murder convictions and found the evidence in the trial record sufficient to support the jury's verdict. The court overruled Raymond's objection to the trial court's decision letting the prosecutor admit his unlawfully seized journals for impeachment purposes. The court said it needn't rule on this objection, because the journals were never actually admitted because of Raymond's refusal to submit to cross-examination, so they were never shown to the jury. The court also ruled that it was appropriate for the trial judge to strike Raymond's direct evidence and instruct the jury to disregard it as if he had never testified, stating that once Raymond "withdrew his consent to be cross-examined as a witness, he could no longer be treated as a witness at all," and that this did not deprive him of his due process right to defend himself, because five other witnesses testified for the defense, all supporting his self-defense theory of the case. Raymond was represented by counsel throughout. *McKoy v. State of Georgia*, 2018 Ga. LEXIS 175, 2018 WL 1324327 (Ga. Sup. Ct., March 15, 2018).

NEW YORK – Michael Davis pleaded guilty to second-degree murder in February, admitting that he killed Josie Berrios, a ransgender woman whose burned body was found at a construction site on Dryden Road. On March 23, he was sentenced to 25 years in prison in Tomkins County Court, according to the *Ithaca Journal* (March 24). However, District Attorney Matt Van Houten, who expressed gratification that the court imposed the maximum sentence, announced last summer that there was no evidence that would have supported the classification of the charged offense as a hate crime.

PRISONER LITIGATION NOTES

By William J. Rold

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

UNITED STATES COURT OF APPEALS – 6TH CIRCUIT – Transgender inmate Richard McBee, a/k/a Unique Taylor, *pro se*, appeals the dismissed claims and denial of preliminary injunctions of U.S. District Court for the Eastern District of Kentucky, Judge William O. Bertelsman, presiding. The disposition in the consolidated appeals in *McBee v. Campbell County Det. Ctr.*, 2018 U.S. App. LEXIS 6647 (6th Cir., March 15, 2018), was by Order not for

publication before Circuit Judges Alan E. Norris, John M. Rogers and Jane Branstetter Stranch. McBee had filed a tangle of claims in the district court, including allegations that she suffered discrimination and retaliation and denial of medical treatment because she is transgender. Judge Bertelsman divided the lawsuit into five separate lawsuits and ordered a filing fee *in forma pauperis* of 20% of McBee's commissary account to be paid for each case – or X 5, or 100% of her account – until all the filing fees were paid. He also assessed a "strike" under the Prison Litigation Reform Act [PLRA] for dismissed claims. The court of appeals took jurisdiction over the entire matter, even though some orders appear to be interlocutory and not usually appealable. Much of the decision seems not germane to *Law Notes* readers inasmuch as it concerns routine "access to court" allegations not unique to LGBT prisoners. The court of appeals found the claims to be "interlocking" insofar as it pertains to retaliation for exercise of First Amendment rights and discrimination for being transgender. The court declines to consider exhaustion of administrative remedies under the PLRA because it is an affirmative defense and the failure to exhaust is not apparent on the face of the Complaint(s) – in fact McBee alleges that defendants intimidated her from filing grievances, citing *Ross v. Blake*, 136 S. Ct. 1850, 1860 (2016). While McBee filed different claims against different defendants, they should not have been severed under F.R.C.P. 18(a) or 20(a)(2), because the allegations are that "these various constitutional violations are part of an interrelated 'series of transactions or occurrences.'" The court also notes that, while severance decisions are reviewed under an abuse of discretion standard, the decision to take all of McBee's commissary account was an abuse of discretion on these facts because there is no suggestion that McBee was attempting to manipulate the "strikes" or filing fees provisions of the PLRA. Rather, "McBee alleged a single overarching case of retaliation and discrimination, and was prejudiced by the district court's severance of that case into its constituent components." The court of appeals ordered the cases un-severed, with corresponding adjustments and credits to McBee's commissary account. The court of appeals also vacated the district court's "strike," because it was not imposed after a final dismissal, citing *Taylor v. First Med. Mgmt.*, 508 F. App'x 488, 497 (6th Cir. 2012). Finally, the court of appeals expresses "concern" over the length of time it took the district court to screen this case (11 months). While it did not impose a deadline, it said in dicta that ten months would "exceed any understanding of as soon as possible," citing *Wheeler v. Wexford HealthSources, Inc.*, 689 F.3d 680, 682 (7th Cir. 2012). It is a pity in this writer's view that a decision like this, which would be useful to many *pro se* litigants, will remain officially unpublished, albeit accessible on Lexis behind a paywall. That, however, seems to be a pattern nationwide.

UNITED STATES COURT OF APPEALS – 8TH CIRCUIT – Failure to follow the sex offense victim shield protection of F.R.Evid. 412 is harmless error for prison rape victims in the Eighth Circuit under *Walker v. Kane*, 2018 U.S. App. LEXIS 6743, 2018 WL 1371940 (8th Cir., March 19, 2018). Plaintiff-appellant Maurice Walker was raped in prison, and he appealed a jury verdict in favor of two corrections officers on his claims that they failed to protect him from harm. On appeal from the U.S. District Court for the Eastern District of Missouri, Judge Catherine D. Perry, presiding, the opinion of the court of appeals was written by Circuit Judge Duane Benton, for himself and Circuit Judges Steven M. Colloton and Ralph R. Erickson. The occurrence of Walker's rape by Jerome Nash was stipulated. Walker (5'6" and 160#) had been double-celled with Nash (6'+ and 200#+). According to Walker, he told defendant officers White and Amonds that he feared Nash, to which Amonds replied she would "lock him up" if Nash caused any problems and White said "you'll be all right." White testified he did not remember Walker or any conversations. Amonds said she told Walker to let her know if Walker had any problems with Nash, because she knew him to be a "bully." She denied knowledge that Nash was violent or a sexual predator. The trial lasted one day (transcript 187 pages). The jury's "deliberation" time took 64 minutes according to the PACER trial record. Except for the factual background, all of the appeals court opinion concerns two evidentiary rulings: admission of prior bad acts of one officer allegedly going to credibility; and admission of complaints about Walker by prior cellmates. In fact, almost all of the opinion deals with the first question, and concerns White's falsification of evidence in prior inmate incidents. The first part of the opinion is recommended to those Eighth Circuit practitioners who wish to follow in excruciating detail the Circuit's rulings on preservation of evidentiary questions, motions *in limine* as satisfying the need for an offer of proof under F.R. Evid. 103(a)(2), the admission of specific evidence of prior bad acts on credibility under F.R. Evid. 608(b), and the range of trial judge discretion. Eventually the court affirmed the exclusion of White's prior falsifications as more prejudicial than germane under F.R. Evid. 403, because, although it is a "close question," White's testimony, "taken as a whole," essentially denied any recollection of Walker. The officers' only witness was an Officer Baker, who was in charge of cell assignments. Walker testified he told Baker he was afraid of Nash, but Baker said he never spoke to

PRISONER LITIGATION *notes*

Baker about the cell assignment. Baker testified that he assigned "aggressive" inmates like Nash "with others who are at least not timid." Over objection under F.R. Evid. 412(b)(2) – which excludes in civil cases evidence about sexual behavior or predisposition of the victim unless its probative value "substantially outweighs" the prejudice – Judge Perry allowed Baker to testify about Walker's past "aggressive behavior toward cellmates." He said that he placed Walker and Nash in the same cell, knowing that Walker's past three cellmates "came one at a time . . . over a period of time, complaining, begging to get out of the cell because of him intimidating and coercing them, pressuring them." The record does not explicitly say for what Walker was "pressuring" his cellmates. While the court of appeals cites the correct section of F.R. Evid. 412 – (b)(2) – its authority and analysis is under F.R. Evid. 412 (b)(1), which covers criminal trials, citing *United States v. Wardlow*, 830 F.3d 817, 820 (8th Cir. 2016). Sub-section (b)(1) does not contain the "substantially outweighs" language of sub-section (b)(2). Finally, the court of appeals finds the admission to be harmless error, even if erroneous, because it was "brief" and did not "explicitly reference" sexual behavior. What a naïve holding on these facts in a prison milieu! What if putting a mid-sized prisoner who abused smaller (or "timid") inmates in a cell with a much larger inmate was intended to teach the mid-size one a lesson? To let him see what it is like to be on the other side of aggression? Walker's counsel argued that the decision to cell Walker and Nash together was irrelevant to the protection from harm claim. This writer is in no position to question trial counsel's trial decisions, but we raise the question anyway: what if it wasn't "irrelevant"? What if it was the very point? What if Baker, (alone or with supervisory encouragement) in assigning cellmates actually made the inference of risk required for protection from harm liability in *Farmer v. Brennan*, 511 U.S. 825, 834 (1984)? Then, the court of appeals decision is not just naïve. It is putting its imprimatur on what amounts to correctional "cock fighting" [no pun intended]. Is it acceptable to put physically imposing known aggressors with mid-size cellmates, as long as classification keeps the "timid" ones away? This opinion, which is officially published, gives barely a page to this point. Yet that page is written so broadly that it suggests only the rapes of the most vulnerable may get to a jury in the future. Walker was represented by appointed counsel Shelby Louise Hewerdine, Jason Scott Meyer, and Barbara A. Smith of Bryan Cave, LLP, St. Louis Office.

ARIZONA – *Pro se* plaintiff Roosevelt Marquize Sherrod sued Arizona prison officials for failure to treat his alleged HIV/AIDS, which he said was diagnosed at a juvenile facility. U.S. District Judge Diane J. Humetewa adopted U.S. Magistrate Judge Eileen S. Willett's recommendation that several defendants be dismissed for failure to serve over a number of years, and she granted summary judgment to the remaining defendants in *Sherrod v. Ryan*, 2018 WL 1391750, 2018 U.S. Dist. LEXIS 45442 (D. Ariz., March 20, 2018). Judge Humetewa found that Sherrod failed to show he had a serious medical condition, since he could not produce the juvenile test results, and he had been tested repeatedly for HIV with negative results while in state custody. Sherrod had one abnormal platelet test due to a failure with the collection tube, according to the physician's affidavit; but subsequent tests were within normal limits. The physician also said that Sherrod showed no signs of cancer, which Sherrod also maintained he had. Judge Humetewa found no deliberate indifference, without commenting on the propriety of defendant treating physicians' providing both factual and expert testimony in their affidavits. It is plain that Sherrod was going to get nowhere without serving everyone involved and having an expert to create an issue of fact on deliberate indifference. It is also plain that the plaintiff was a very anxious patient. There is no discussion of post-test counselling after HIV testing (required by medical standards even when the test result is negative) or whether mental health screening was performed for clinical indications of need for intervention/reassurance in this case.

CALIFORNIA – U.S. Magistrate Judge Barbara A. McAuliffe recommends granting summary judgment against *pro se* inmate Billy Coy Cochran in his effort to seek a name change in *Cochran v. Sherman*, 2018 U.S. Dist. LEXIS 30600 (E.D. Calif., February 26, 2018). Cochran says he has multiple "disorders," including PTSD, gender dysphoria, and misophonia (literally, "hatred of sound," a condition not recognized by the DSM or the ICD). He seeks to change his name to "Gabriel Christian Hunter," for religious reasons, after an epiphany of religious conversion made his prior name unacceptable. He also claims it is not sufficiently "male affirming." Judge McAuliffe does not explain what the latter means in this context – she does note that she reviewed over 800 pages of summary judgment submissions from Cochran – something this writer declines to do. Summary judgment is recommended for failure to exhaust administrative remedies under the Prison Litigation Reform Act – although Cochran apparently filed well over a dozen of them. The gist of Cochran's problem in an extraordinarily long opinion was not taking the grievances through the third level of California's three-tiered grievance system or submitting

them with so much extraneous material that it was unclear what was sought, in violation of California's rule that grievances deal with only one subject. Cochran, according to Judge McAuliffe, failed to correct procedural errors in his submissions. There is discussion of the exceptions to exhaustion in *Ross v. Blake*, 136 S. Ct. 1850, 1859 (2016), none of which are found to apply. Although Cochran says the failure to allow the name change violates his rights as an LGBT person as the eighth reason his rights were violated, the case is apparently not made in the discussed submissions or in the opinion –which appear to treat the point as at most incidental. Dismissal is recommended without prejudice.

DELAWARE – Last month, *Law Notes* covered a decision involving transgender inmate David A. Allemandi, a/k/a Hermione Kelly Ivy Winter, proceeding *pro se* on various issues, including her health care rights and safety, in *Allemandi v. Munoz*, 2018 U.S. Dist. LEXIS 718986 (D.Del., February 5, 2018), reported in *Law Notes* (March 2018 at page 142). We encounter her again before the same judge on the same date on an entirely different issue in *Allemandi v. Hyde*, 2018 U.S. Dist. LEXIS 18680, 2018 WL 716984 (D. Del., February 5, 2018): her refusal to participate in a mandatory sex offender treatment program. Allemandi has since changed her name legally, so *Law Notes* refers to her as Winter hereafter. U.S. District Judge Leonard P. Stark refers to *McKune v. Lile*, 536 U.S. 24, 35-39 (2002), as the controlling case. He relies on Justice O'Connor's concurring opinion in a 4-1-4 decision, without identifying the fact that there was no majority ruling. In *Lile*, unlike here, however, there could be no criminal consequences arising from the offender's participation in the sex offender program – either in taking of "good time" or in filing new charges based on disclosures made in program sessions. In Winter's case, good time was taken by refusal to participate; and she would have been required to reveal uncharged crimes, including ones that had mandatory referral to prosecution, such as sex offenses involving juveniles. It would seem that Winter should have been allowed to challenge her loss of privileges and the like by her refusal to participate under the very case cited by Judge Stark. Moreover, Judge Start is very likely wrong in allowing Winter to proceed with a section 1983 claim on her loss of good time. An inmate cannot obtain restoration of good time in a section 1983 case. She must file a petition for a writ of *habeas corpus* in the district where she is incarcerated. *Edwards v. Balisok*, 520 U.S. 641 (1997), *Heck v. Humphrey*, 512 U.S. 477 (1994), and *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). Judge Stark cites as authority the following: "See, *e.g., Capers v. Governor of New Jersey*, 525 F.App'x 69 (3d Cir. May 7, 2013)." After citing authority only to the contrary, *Capers* said merely it "might" be possible to plead for an injunction against *future* loss of good time, but it made clear that recovery of time already taken was barred by *Edwards* and *Heck* [emphasis added]. Judge Stark's use of "See, e.g.," suggests this remedy is routine when it is not. It is likely to face a motion to dismiss as soon as defense counsel appears. In short, the opinion appears to reject a plausible claim and point toward one likely to lose, when giving this *pro se* plaintiff leave to refile.

GEORGIA – This case, involving the request of a transgender inmate for advanced treatment, including surgery, is particularly notable for two reasons: (1) the district court overruled a magistrate's recommendation that the case be barred by the "three strikes" rule of the Prisoner Litigation Reform Act [PLRA]; and (2) the court allowed initial screening to proceed to claims against the highest departmental officials in the Georgia DOC. In *Cassady v. Dozier*, 2018 U.S. Dist. LEXIS 43216, 2018 WL 1370602 (M.D. Ga., March 16, 2018), U.S. District Judge Marc T. Treadwell overruled the recommendation of U.S. Magistrate Judge Charles H. Weigle that Dana Marie Cassady, a/k/a David Dwayne Cassady, *pro se*, could not proceed *in forma pauperis* under the PLRA because she had "three strikes" and had not shown "imminent danger" under 28 U.S.C. 1915(g) to warrant an exception. The discussion is limited to the exception, without evaluating whether the prior "strikes" were appropriate. Cassady alleged that surgery is "essential" and that its denial poses imminent danger because: (1) it exposes the Plaintiff to heightened health risks due to interactions with her "chronic obstructed pulmonary disease, asthma, and hypertension"; (2) it will become increasingly inadequate to deal with gender dysphoria, which the Plaintiff alleges intensifies with age and is "more pronounced today than ever before" due to her age and circumstances; (3) as a result, the Plaintiff's mental health needs are not being addressed, and her "inability to reduce or modulate [her] internal anguish is likely to result in emotional decomposition and further self-harm." Judge Treadwell found this sufficient for an exception to the three strikes rule, under the specificity requirements of *Brown v. Johnson*, 387 F.3d 1344, 1350 (11th Cir. 2004). In Cassady's numerous grievances, the state maintained that her existing hormone treatment, which included hormonal "chemical castration," was sufficient – although several treating providers said that only sexual confirmation surgery would suffice. Judge Treadwell had little trouble finding Cassady's condition to be serious. The only issue on screening was whether the allegations

plead "deliberate indifference" to that condition. Cassady plead that so-called "chemical castration" made things worse. This writer cannot see that phrase without thinking of Alan Turing's suicide and the U.K. government-mandated "treatment" of "sexual deviants" in the 1950's. That it can still appear in a court decision in 2018 shows how far we have yet to go. In any event, Cassady plead that only surgery would resolve the "genital and anatomical incongruence" that is causing her stress to the point of suicide and the suggested hormones are not helping and are contraindicated for some of her other conditions. As far as pleadings go, Judge Treadwell agreed. He also found that defendants, from the Georgia DOC Commissioner, Ombudsman, Medical Director, Deputy Medical Director, Warden at Cassady's current prison, and chief physician at Cassady's current prison, all had to answer for these claims. Judge Treadwell discussed each defendant separately, noting that all seemed to ignore the psychological stressors Cassady was experiencing. The Commissioner and other central office defendants (Commissioner, Ombudsman, and Medical Director) are charged with deliberately seeking an opinion to contradict the primary care recommendations for surgery, even if it came from someone with no knowledge of Cassady and little experience with treating transgender dysphoria. The Deputy Medical Director was charged with a "blanket" policy of never allowing surgery for transgender patients, despite Georgia policy permitting same in certain cases. The warden and chief physician at Cassady's current prison are charged with knowledge of her plight and refusing to take steps to address it. Only the warden of Cassady's prior prison is dismissed, because Cassady does not seek damages. It seems that Georgia officials have not taken the Ashley Diamond case as a teaching moment and have learned little from their involvement in that protracted litigation, even after they faced damages. See "Transgender Prisoner Allowed to Proceed on Damages Claim for Denial of Medical Care and Failure to Protect and Train." *Law Notes* (October 2015 at pages 435-6).

ILLINOIS – *Law Notes* has been following the saga of transgender inmate Deon ("Strawberry") Hampton, who has been sexually brutalized by other inmates and staff while incarcerated in men's prisons. *See, e.g., Hampton v. Meyer*, 2017 U.S. Dist. LEXIS 172310 (S.D. Ill., October 19, 2017) (*Law Notes*, January 2018, at page 43), where a preliminary injunction hearing was ordered. That case was "settled" by an agreement to transfer Hampton to another prison, site to be determined by a "committee." The decision made was to transfer Hampton from the men's facility at Menard to Lawrence Correctional Facility – also a men's facility. Now, Hampton has initiated another lawsuit, because the abuse is allegedly occurring unabated. In *Hampton v. Baldwin*, 18-cv-550 (S.D. Ill., filed 3/8/18), not yet reported, Hampton seeks transfer to a women's prison. The solid complaint is strong stuff and recommended reading on PACER. It clearly places Illinois DOC in the "when will they learn" category. Hampton is well-represented by the MacArthur Justice Center, Chicago.

ILLINOIS – United States District Judge J. Phil Gilbert issued two decisions in the same case on the same day. This report discusses them separately. This first decision, *Johnson v. Kruse*, 2018 WL 944743 (S.D. Ill., February 15, 2018), screened transgender *pro se* inmate Anthony Johnson's complaint. Johnson plead a litany of constitutional violations over the last six years as a transgender inmate. Judge Gilbert divides them into 12 causes of action for analytical purposes, but they are grouped here by subject matter. Johnson's pleadings allege transgender animus from several defendants who expressed outright transphobia or invoked religious justifications for denying treatment to transgender patients. Judge Gilbert allows Johnson to proceed on deliberate indifference to her serious health care needs by denial or restriction of hormone therapy and other treatments for her "severe" gender dysphoria, noting she had been on hormones since age 18 and had silicone implants in her breasts and thighs. In addition to hormones, denials included medication to remove hair (because Johnson's facial skin was too soft to shave with a razor, which caused scarring), a permit for a lower bunk (because Johnson had frequency at night and peripheral neuropathy – legs – that caused accidents and injuries trying to move quickly from an upper bunk to the toilet), lack of mental health treatment per protocols for transgender patients, refusal to repair damage to implants caused by falling, and denial of female garments (including underwear). The medical claim was allowed to proceed against the warden, too, because he was made aware personally about the denials on several occasions and responded that he would "not entertain the transgender bull crap," citing *Perez v. Fenoglio*, 792 F.3d 768, 782 (7th Cir. 2015) (prisoner could proceed with deliberate indifference claim against non-medical prison officials who failed to intervene despite knowledge of inadequate medical care). Judge Gilbert allows Johnson's claims that her cell was unjustifiably searched on several occasions over four years by different officers and her feminine items confiscated to proceed. Judge Gilbert also allows Johnson to proceed on claims of denial of equal protection and discrimination, citing *Whitaker by Whitaker v. Kenosha Unified Sch. Dist.*

No. 1 Bd. of Educ., 858 F.3d 1034, 1051 (7th Cir. 2017), as well as "class of one" theory under *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). He likewise finds a claim in Johnson's transfer to another more dangerous unit under "protection from harm" theory and retaliation – although he finds general retaliation claims for exercise of protected First Amendment rights to lack sufficient specificity to proceed without amendment, citing *Zimmerman v. Tribble*, 226 F.3d 568, 573 (7th Cir. 2000). Johnson plead numerous incidents where she lost good time as a result of false disciplinary charges or planted or confiscated contraband. These claims cannot proceed under *Bivens* (adopting Section 1983 theory), because they challenge the length of incarceration. They must be brought as a petition for a writ of *habeas corpus* under 28 U.S.C. 2241 in the judicial district where the petitioner is confined (Johnson is in West Virginia, not Illinois), under *Edwards v. Balisok*, 520 U.S. 641 (1997), *Heck v. Humphrey*, 512 U.S. 477 (1994), and *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). Claims about cell searches constituting retaliation, violation of equal protection, discrimination, or confiscation of medical items may proceed. At this early stage, confiscation of items necessary to Johnson's "minimal civilized measure of life's necessities" may also proceed, quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) – also citing *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) ("excessive risk to inmate's health"). What one of Judge Gilbert's hands giveth, the other taketh away in the companion case, *Johnson v. Kruse*, 2018 WL 905344 (S.D. Ill. February 15, 2018). In the second case, Judge Gilbert severed the cell search claims into four separate actions, under F.R.C.P. 20(a)(2), based primarily on the two-year intervals and different officers involved in the cell searches. Thus, while the primary case (above) and one cell search involving overlapping officers can continue, the cell searches of 2012, 2014, and 2016 will be handled as separate cases, with individual docket numbers and filing fees. This would make Johnson potentially liable for $1,400 in filing fees. This kind of severance was found to be an abuse of discretion by the Sixth Circuit in *McBee v. Campbell County Det. Ctr.*, 1018 U.S. App. LEXIS 6647 (6th Cir. March 15, 2018), reported in this issue of *Law Notes*.

LOUISIANA – Transgender inmate Kelvin Moses, *pro se*, sued for violation of her civil rights in *Moses v. GEO*, 2018 U.S. Dist. LEXIS 43145, 2018 WL 1354068 (W.D. La., March 14, 2018), alleging harassment, discrimination, violation of her right to be protected from harm, and retaliation. U.S. Magistrate Judge Kathleen Kay ordered Moses to file an amended complaint to correct various "deficiencies," or risk dismissal of claims. Moses alleged that she was returning to her cell block after supper when officers refused to open a locked door and they engaged in a verbal altercation, culminating in one officer asking Moses to perform a sexual act on him. Moses filed a complaint under the Prison Rape Elimination Act [PREA]. Officials investigated the complaint and treated it as a "disciplinary" issue for the officer making the demand and not a genuine PREA complaint. Nevertheless, Moses was moved to a more dangerous cellblock during the investigation. She has since been transferred to another prison and the officer has been terminated for what the institution called unrelated reasons. Judge Kay conducted a frivolity review. She found that the harassment was verbal only and not actionable under Fifth Circuit precedent, citing *McFadden v. Lucas*, 713 F.2d 143, 146 (5th Cir. 1983). Additionally, although the new unit was more dangerous, Moses was not injured, thereby failing the test for protection from harm cases that the injury be more than *de minimus* under *Siglar v. Hightower*, 112 F.3d 191, 193-94 (5th Cir. 1997). Thus, her claims under this theory "will be dismissed as frivolous unless [s]he can amend to show some type of injury." As to retaliation, however, a transfer to a more violent cellblock satisfies the "more than *de minimus*" test, and this claim survives whether or not Moses was injured, under *Morris v. Powell*, 449 F.3d 682, 687 (5th Cir. 2006). Liability will have to be established on more than a *respondeat superior* basis for supervisors, including the corporate provider, GEO, to remain in the case. Judge Kay finds no private cause of action under PREA, but practitioners should note her dicta: "the failure to follow PREA protocol might support [the] constitutional claims." Finally, Judge Kay found Moses' claim of discrimination based on sexual orientation "brief" and "insufficient." Moses must detail the disparate treatment with dates and the defendants responsible. She also notes that, now that Moses has been transferred, injunctive relief is probably not available. This argument would likely apply to all claims. Damages actions, of course, invite qualified immunity defenses, which may not defeat her retaliation claim in light of controlling Fifth Circuit law; but it might doom her discrimination claim.

MASSACHUSETTS – During Sam Smith's trial for murder in the first degree shooting death of Steven Gaul, which took place on June 12, 2001, the prosecution used a peremptory challenge to keep of the jury a man who was perceived by the prosecution as either gay or transgender. The prosecution first tried a "for cause" strike, arguing that the juror had "identity issues," but the judge denied the strike, so the prosecutor used a peremptory. Defense counsel did not explicitly object, according to a

PRISONER LITIGATION *notes*

Supreme Judicial Court appeal opinion in the case, but "instead only 'put on the record' that she was 'beginning to see a pattern' of removing white male homosexuals.'" Nonetheless, the trial went forward without that juror and Smith was convicted and sentenced to life in prison. Smith appealed and included the juror issue, but the Supreme Judicial Court rejected his argument, stating that "the factual ambiguity surrounding the juror's sex, transgendered status, and sexual orientation, as well as the motive for the prosecutor's challenge, combined with the absence of an objection from defense counsel when the challenge was made, impeded the trial judge's ability to draw an inference that purposeful discrimination occurred." *Commonwealth v. Smith*, 450 Mass. 395, 407 (2008). In subsequent years, Smith has made several attempts to get a new trial on the argument that the prosecution's peremptory strike had violated Smith's constitutional rights to a fair trial. In the course of these efforts, he obtained access to an audio recording that showed that his counsel had made an explicit objection, even mentioning *Batson*, which was not picked up in the transcript, thus misleading the SJC to state that there was no objection by defense counsel. But this hasn't gotten him very far. And neither has his contention that in fact defense counsel objected twice! On March 14, 2018, U.S. Magistrate Judge Judith Gail Dein, ruling on Smith's motion for an evidentiary hearing in support of his continuing *Batson* objection to his trial, recommended that the district court deny the motion. She noted that Smith's correction of the transcript had been brought to the attention of an SJC judge, but that court had declined to reopen the issue, asserting that their original rejection of this ground on appeal still stood. *Smith v. MacEachern*, 2018 WL 1316202 (D. Mass.). "Even assuming that Smith is able to credibly establish that another objection to the Commonwealth's peremptory challenge was made, it would not affect the outcome of this case," she wrote. "The SJC has already rejected the argument that Smith's constitutional right to equal protection was denied in connection with the trial judge's handling of the challenge to the potential juror, even assuming that defense counsel had raised a timely objection. Whether defense counsel raised one or two objections, is irrelevant to the SJC's analysis. Moreover, Smith has not established any reason why a further stay of the habeas proceedings is appropriate. The habeas record is sufficiently complete for this court to address the merits of the habeas petition. No stay or remand to the state court is warranted." In a footnote, Judge Dein wrote, "Nothing herein is intended to reflect any view as to the merits of the habeas petition. That issue has yet to be reached because of the numerous requests for a stay or extensions filed by the petitioner."

MASSACHUSETTS – In an unpublished Memorandum Order – not precedent, but citable for its "persuasive value" – Judges Ariene D. Vuono, Peter J. Rubin and Vickie L. Henry of the Massachusetts Court of Appeals vacated a denial of a name change for transgender inmate Michael Joseph Riley in *Riley, Petitioner*, 2018 Mass. App. Unpub. LEXIS 260, 2018 WL 1404474 (Mass App., March 21, 2018). Riley, who now identifies as a transgender woman, is a sex offender who is also serving a life sentence without parole for first degree murder by extreme atrocity or cruelty. She filed a routine form of petition for a name change in Massachusetts Probate and Family Court, who notified "interested" parties under Massachusetts law – here, the notice went to the state Attorney General, the heads of Probation, Public Safety, Correction, and Sex Offender Registry Board, as well as the involved offices of the county sheriff and district attorney. Only the district attorney's office objected on public safety grounds. The Family Court held a hearing, at which Riley testified that her name change was sought to affirm her transition to female and was "not inconsistent with public interest." She also argued that, since other inmates have been permitted name changes, denial would violate her constitutional rights, including equal protection. The petition was denied on the authority of *Verrill, Petitioner*, 660 N.E.2d 697 (Mass. App. 1996), wherein the court approved the denial of a name change to an inmate because it could result in confusion in the criminal justice recordkeeping system. Since *Verrill*, the court has noted the increased computerization of information and the ability to track persons on parole. *Jaynes, Petitioner*, 42 N.E.3d 1158 (Mass. App. 2015). The court also questioned the weight that should be given to "confusion" if, as here, the inmate will never be paroled. Further, the court noted that the "right" to change a name should be broadly construed and is of constitutional moment, citing *Secretary of the Commonwealth v. City Clerk of Lowell*, 366 N.E.2d 717 (Mass. 1977); and *Rusconi, Petitioner*, 167 N.E.2d 847 (Mass. 1960). Accordingly, the denial was vacated for reconsideration under *Jaynes*. On remand, the parties may also address the constitutional questions, which were not considered by the Family Court. The opinion does not state the name sought by Riley.

MONTANA – This case's caption – Alex Hamilton versus Detective Jesse Slaughter – reads like an effort to create a century-skipping *Netflix* series – but U.S. District Judge Brian Morris made short shrift of it in *Hamilton v. Slaughter*, 2018 U.S. Dist. LEXIS 46614, 2018 WL 1411211 (D. Mont., March 21, 2018). *Pro se* plaintiff Alex Dean Hamilton, who was caught in a

child sex sting, claimed his "Hippa constitutional rights" were violated when Sheriff Slaughter published the damning texts of the sting in the *Great Falls Tribune*, thereby revealing Hamilton's HIV-positive status. Judge Morris adopted U.S. Magistrate Judge John Johnson's Recommendation that there is no private cause of action under HIPAA, citing *Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078, 1081 (9th Cir. 2007). There is no discussion of the "constitutional" claim in this *pro se* case. Correctional officials often find a way to justify breaching confidentiality in prison medical care privacy cases – most commonly because the plaintiff has herself placed it in issue. Here, however, the penological justification for releasing the texts to the press seems more illusory. In *Seaton v. Mayberg*, 610 F.3d 530, 535-540 (9th Cir. 2010), there is extensive discussion of the balancing needed when penological justifications are not readily apparent – and *Seaton* recognizes a residual constitutional right to privacy, even though the inmate lost in that case. Here, there is no discussion of the point, even though a broad reading of the *pro se* complaint would seem to raise it.

NEW HAMPSHIRE – Transgender inmate Christopher ("Crystal") Beaulieu, *pro se*, is a frequent litigator. A detailed article, "Federal Magistrate Recommends Denial of Preliminary Injunction against Prison Rule Separating Romantic Inmates," appears in *Law Notes* (February 2017 at pages 148-9). Now, in *Beaulieu v. Orlando*, 2018 WL 1280789, 2018 U.S. Dist. LEXIS 39694 (D.N.H., March 12, 2018) ("not for publication"), U.S. District Judge Joseph DiClerico, Jr., grants summary judgment against her on claims of excessive force and failure to protect from harm. Judge DiClerico notes that Beaulieu had been granted six extensions of time to reply to defendants' motion, with a warning that the sixth extension was the last. Her seventh request was denied on this basis. The force incident occurred in 2012, when Beaulieu was wearing a "spit guard" because of previous spitting on officers and nevertheless managed to spit with such force that she splattered the face of an officer. Officers "took her down" and physically restrained her. She sustained what Judge DiClerico called a "minor" cut above her eye. The officers' affidavits and the videotape of the incident, which Judge DiClerico watched, justified summary judgment on lawful use of force. Beaulieu alleged that she was raped twice by another inmate (Rodier – a difference inmate from her romantic interest, who was the subject of the article referenced above). After the first incident, in 2014, officials put Beaulieu in lockdown for her protection and started an investigation. After a few weeks, Beaulieu filed a complete recantation of the charges against Rodier and a desire to return to her unit, saying she was not afraid of Rodier or anyone else. Documentation indicated that Beaulieu resumed consensual sexual activity, including with Rodier, before charging him again with rape weeks later. The opinion never resolves whether the second rape occurred, and Rodier has been released. Charges that the second rape was caused by defendants' deliberate indifference to Beaulieu's safety were dismissed by summary judgment for defendants. They maintained that Beaulieu insisted she was safe and had recanted her charges against Rodier. The complaint said that the recantation was under duress; but this is insufficient under F.R.C.P. 56 to defend against summary judgment, in light of Beaulieu's failure to file competing affidavits with counter-explanations under oath. Judge DiClerico found no evidence that Rodier had access to Beaulieu between the time of the first alleged rape and the recantation. Because of Beaulieu's procedural default after ample warning, Judge DiClerico "deems" defendants' sworn statements to the contrary to be admitted. In this writer's view, six extensions are more than enough, even for a *pro se* plaintiff; and one who procedurally disobeys a "last chance" order faces a high risk of losing, particularly if the plaintiff has credibility problems.

NEW MEXICO – Transgender inmate John Oakleaf, a/k/a Julie Marie Oakleaf, was not *pro se*, and she had an expert witness. Yet, she failed to convince U.S. Judge Robert C. Brack to grant her an affirmative preliminary injunction for gender dysphoria treatment in *Oakleaf v. Martinez*, 2018 U.S. Dist. LEXIS 36337, 2018 WL 1183365 (D. N.M., March 6, 2018). Oakleaf, serving a 15-year sentence, claimed that she was transgender since youth and was presenting as female since 2008. Yet, Judge Brack found that her arrest photograph showed her in male attire with a full beard in 2011. This caused Judge Brack to discount her oral history. Oakleaf has a complex medical and mental health background with many different (and sometimes conflicting) diagnoses, including stroke, schizophrenia, and bipolar disorder – but not gender dysphoria – prior to incarceration. There was evidence that New Mexico uses a "freeze frame" formula to refuse to initiate treatment for gender dysphoria diagnosed after incarceration. Oakleaf was told New Mexico does not have a referral for transgender patients; that if she arrived male she would leave male, that female underwear was not provided to males, and so forth. On the other hand, providers insisted that Oakleaf was screened for gender dysphoria in 2014 and did not meet the criteria. She was also told that estrogren therapy was contraindicated by her history of stroke. Oakleaf has PREA evaluation twice annually and has been found

at "low risk" of sexual victimization. Oakleaf said she was very depressed, but her psychiatric records show denial of suicidal ideation or thoughts of hurting herself. Oakleaf testified that she has such thoughts "every day," but she conceals them from her therapists. There are few references to them in her records, and Judge Brack characterizes her mental health records as "largely unremarkable . . . with several notable exceptions," for which Oakleaf had been placed on suicide watch. Oakleaf filed this lawsuit in 2015; by 2016, she had counsel; and she has filed three amended complaints. In 2016, Oakleaf was examined by Dr. Randi Ettner, who Judge Brack calls a "world-renowned expert on gender dysphoria and the treatment protocols for this condition." She diagnosed gender dysphoria under all established criteria. Dr. Ettner saw Oakleaf again a year later in 2017, confirmed her diagnosis, and indicated that Oakleaf was now "full blown" – extremely anxious, suicidal, and distraught due to her inability to obtain treatment for her gender dysphoria. Dr. Ettner opined: "Defendants' continued denial of treatment will lead to an irremediable course of psychological decompensation and potential death." Defendants asked to see Dr. Ettner's full report, but Oakleaf refused to release it until the filing of her motion for a preliminary injunction in 2018. Judge Brack seemed annoyed by this withholding – he referred to it several times, saying, in essence, that plaintiff was trying to fault defendants for not reaching a conclusion when plaintiff was withholding information relevant to reaching that conclusion. Judge Brack's opinion demonstrates a solid background in transgender literature, including diagnosis under the DSM-V and treatment under the standards of WPATH and the NCCHC, as well as the consequences of withholding treatment. He tracked at length the Tenth Circuit law on granting an affirmative preliminary injunction, noting that it is stricter than for a preliminary injunction that merely preserves the status quo, citing *O Centro Espirita Beneficiente Uniao Do Vegetal*, 389 F.3d 973, 975 (10th Cir. 2004), aff'd, 546 U.S. 418 (2006). Judge Brack found Oakleaf's needs to be serious, but he failed to see at this point a likelihood of success on the merits that defendants were deliberately indifferent. While Judge Brack questions New Mexico's "freeze frame" policy, there is also evidence that they were prepared to depart from it, because Oakleaf was evaluated for treatment – albeit not diagnosed with gender dysphoria. Here, again, Judge Brack criticizes the failure to provide Ettner's report in a timely fashion, saying it was unfair to obtain a preliminary injunction based on Oakleaf's two years of verbal reports about what Dr. Ettner said. Defendants acted on "the only record" they had. Judge Brack relies on some very old law in the Tenth Circuit relating to transgender inmates: *Supre v. Ricketts*, 792 F.2d 958, 963 (10th Cir. 1986) (holding denial of hormones a non-actionable difference of medical opinion). On the bright side, however, Judge Brack found that the potential harm was irreparable, and he directed the defendants in a separate order to "reassess" Oakleaf. Judge Brack found balance of harm and public interest did not tip in favor of further relief at this time. Oakleaf is represented by multiple counsel: ACLU offices in New Mexico, Arizona, the District of Columbia, and New York, as well as DOA Piper, LLP, Houston and Minneapolis. Undoubtedly counsel are discussing next steps: an appeal, a trial on the merits, further negotiations – for this less-than-perfect test case in a Circuit that badly needs work.

NEW YORK – Transgender inmate Jennifer E. Picknelly, *pro se*, brought a civil rights suit for damages, alleging that she had been "subjected to unconstitutional excessive force, denied equal protection based upon her transgender status, and deprived of adequate medical care, in *Picknelly v. D'Agostino*, 2018 U.S. Dist. LEXIS 40094 (N.D.N.Y., March 9, 2018). When she filed the suit, she was incarcerated in Massachusetts, and she has since been released. Apparently, Picknelly did not inform the court of a change of address since her release from custody in Massachusetts. She wrote the court on November 26, 2017 (stamped received 11/30/17), informing the court that she was to be released on January 20, 2018, and requesting no conferences or status requirements until after that date. She also asked questions about service on defendants who no longer worked at the jail. The docket in PACER shows no response to these questions – a fair reading of which suggests an active interest by Picknelly in her case. Four days later, on January 24, 2018, U.S. Magistrate Judge David E. Peebles granted *in forma pauperis* status and sent Pickney a set of rules, including her duty to inform the court of her change of address. This was returned to sender on January 29th, with the notation "released." In recommending dismissal, the Report and Recommendation [R & R], falsely states that the court did not know when Picknelly was to be released and that she had failed to communicate with the court since her case was filed. It is fair for the court to presume that Picknelly received the *Pro Se Handbook* sent to her in November and to charge her with knowledge of N.D.N.Y. Local Rule 10.1(c), which require change of address notifications. There is no basis, however, for the R & R to recite affirmatively (and rely on as fact) that Picknelly was "reminded" of her duty to report her address in the IFP Order of January 24th that she never received. Judge Peebles' R & R recites numerous unreported cases supporting dismissal under F.R.C.P. 41 – without

mentioning the time that elapsed without a change of address or even whether they were change of address cases. The primary Second Circuit case (one of the few actually reported and on which Judge Peebles primarily relies) is *Lucas v. Miles*, 84 F.3d 532, 535 (2d Cir. 1996). In *Lucas*, the Circuit reversed a dismissal for missing a 60 day deadline by 39 days, finding dismissal an abuse of discretion, stressing leniency for *pro se* plaintiffs. Here, the delay, counting from date of release, was 44 days. This writer has seen *pro se* cases languish well over a year between filing and even initial screening. Yet, after six weeks, Judge Peebles, after hearing from Picknelly about her concerns regarding release, writes: "Given plaintiff's manifest disinterest in pursuing her claims in this action, I find that the need to alleviate congestion on the court's docket outweighs her right to receive a further opportunity to be heard in this matter." Not only was this based on a false premise, but Judge Peebles knew nothing about this transgender plaintiff's circumstances, whose need for survival – possibly homeless in the depth of a Massachusetts winter – may have been more immediate than Judge Peebles' docket. The R & R goes on to express concern about lost documents and faded memories, if there is further delay – something never mentioned for cases awaiting screening for months/years in other courts. Finally, it is notable that, in *Lucas*, as here, there was no motion to dismiss by defendants. The court in *Lucas*, which was reversed, did it on its own initiative. So did Judge Peebles.

OREGON – The Supreme Court of Oregon unanimously declined a petition to review the parole denial of a transgender prisoner convicted of murder in *Gomez v. Board of Parole and Post-Prison Supervision*, 362 Or. 662, 2018 WL 1415547 (Ore., March 22, 2018). This case appears in *Law Notes* because of the unusual concurrence of one member of the Court, Justice Rives Kistler. Angel M. Gomez has been denied parole repeatedly as a danger to the community because of her lengthy criminal history and reports of psychiatrists and psychologists. "Her two most recent psychological examinations resulted in diagnoses respectively of a personality disorder not otherwise specified and a mixed personality disorder with antisocial and borderline features." She was deferred for four more years before becoming eligible again for release review on her 1981 conviction. The Supreme Court's decision consists of six words: "The petition for review is denied." The Oregon Court of Appeals decision, is half as long: "Affirmed without opinion." 287 Or App 887, 403 P.3d 817 (2017). The brevity of his colleagues makes Justice Kistler's observations all the more striking. They are more akin to a "shot across the bow" than to a judicial opinion, and they warrant quoting at length. After conceding that deference to the parole board compelled the holding in this case, Justice Kistler wrote separately "to ensure that transgender inmates receive fair and equal consideration in the parole system." He continued: "Over the course of three psychological reports that span a six-year period, it becomes increasingly clear that petitioner is a transgender inmate, that her gender identity is intertwined with her criminal history, and that that intertwined experience may bear on the personality disorders with which she was diagnosed. Despite petitioner's attempts to identify her gender to the psychologists and the board, both repeatedly and incorrectly referred to her as if she were a man. Moreover, some of the remarks in the psychologists' reports could reflect a misunderstanding of her gender identity and the effect it had on her diagnoses . . . . Because the board reasonably could have concluded that there were legitimate reasons to defer petitioner's release, I also would deny review. However, the primary authority that the board bears in this area imposes a concomitant obligation on it, in the first instance, to ensure that its determination of the risk an inmate poses to the community is not based on the inmate's gender, gender identity, race, or sexual orientation." Andrew D. Robinson, Oregon Deputy Public Defender, filed the petition for review. With him on the petition was Ernest G. Lannet, Chief Defender, Oregon Office of Public Defense Services, Salem. The State did not appear.

PENNSYLVANIA – Transgender inmate Jeremy V. Pinson is a frequent *pro se* litigator throughout the federal Bureau of Prisons. *See, e.g., Pinson v. United States*, 2017 U.S. Dis. LEXIS 184078 (M.D. Pa., November 7, 2017, reported in *Law Notes* (December 2017 at page 502-3). This case, *Pinson v. United States*, 2018 U.S. Dist. LEXIS 30138, 2018 WL 1123713 (M.D. Pa., February 26, 2018) is a continuation of the above, and it concerns two claims: deliberate indifference to Pinson's serious health care needs by denying her sex affirmation surgery [SAS]; and negligence under the Federal Tort Claims Act, for leaving her with a razor with which she cut herself, when she had a known history of self-mutilation. U.S. District Judge Sylvia H. Rambo grants summary judgment against Pinson on both counts. Judge Rambo's thorough opinion contains nearly a daily account of Pinson's 20 weeks in the federal prison in Allenwood, Pennsylvania, in 2016. (She is now at the Federal Prison Medical Center in Rochester, Minnesota). In 2016, the FBOP did not have formally adopted standards for treatment of transgender prisoners. Judge Rambo finds, however, that Pinson's allegations of deliberate indifference do not meet even the the-existent standards

from WPATH, for several reasons: Pinson's hormone therapy was sub-therapeutic for SAS, despite efforts to adjust hormone treatment to achieve a more suitable level; Pinson was non-compliant with therapy; Pinson had not lived as a woman in population for twelve months, having to be placed into segregation on several occasions for self-protection and discipline; and Pinson had other medical and mental health factors that were not sufficiently resolved or stable to meet WPATH standards for SAS. Judge Rambo examines the behavior and subjective state of mind of all defendants and finds no jury question on deliberate indifference. Pinson was seen repeatedly: daily, weekly, or monthly, depending on the reason for the encounter. Defendants adjusted her medication and therapy to try to address her needs, and any dispute was a disagreement about treatment modalities, which is not actionable under the Eighth Amendment. On the negligence claim, although Pinson had engaged in self-harm in the past, she was evaluated repeatedly for risk of this at Allenwood; and, although in segregation at the time of her self-cutting, she was not on a razor restriction list and had just been evaluated for same. Her affidavits were also inconsistent, first insisting that a particular officer had given her the razor and not retrieved it per policy, only to retract his name after he was shown not to be on duty when the razor was given. While the precise source of Pinson's possession of the unretrieved razor is not established, Judge Rambo found that no negligence question was presented under Pennsylvania law (which governs FTCA claims in this instance), because there was no breach of duty to be found. The opinion is thoroughly supported with case law, but it is standard Third Circuit law on deliberate indifference and Pennsylvania negligence law for government employees. Those wishing to explore same are referred to the lengthy opinion.

TEXAS – *Law Notes* has followed the case of Passion Star, officially *Zolicoffer v. Livingston*, 14-cv-3037 (S.D. Tex.), for several years. See "Federal Judge Defers Qualified Immunity Ruling and Orders Systemic Discovery on Policies and Failures Underlying High Rate of Gay and Transgender Inmate Assaults in Texas" (April 2016 at pages 144-5). As the case neared settlement, we reported that, too, in January 2017 at page 34. Lambda Legal has now issued a press release confirming the settlement (March 15, 2018). The press release has part of the history of physical abuse Star experienced in male prisons and her eventual parole and release. The settlement includes a monetary payment along with policy changes and staff training statewide. Pertinent documents can be found in PACER or through Lambda's link: www.lambdalegal.org/in-court/cases/star-v-livingston.

WASHINGTON – This opinion by U.S. Magistrate Judge James P. Donohue, in *Sonia v. Dep't of Corrections*, 2018 U.S. Dist. LEXIS 42884 (W.D. Wash., March 15, 2018), concerns only procedural rulings. Transgender plaintiff, Ms. Brett (Brooke) Sonia, *pro se*, alleges inadequate treatment of her gender dysphoria, but defendants' motion for summary judgment on qualified immunity, which Judge Donohue finds raises substantial questions on whether Sonia can prevail on the merits, will be considered separately. Sonia's request to add defendants is essentially a motion to amend, which was not accompanied by a proposed amended complaint. Judge Donohue also notes that the proposed new defendants are only "tangentially" involved in the matters at issue, and claims against them "would be more properly raised in a separate action." Sonia also sought an order for an examination by a "specialist" on gender dysphoria. Judge Donohue found no authority for a plaintiff's obtaining an order for examination of herself under F.R.C.P. 35. He does not mention F.R. Evid. 706 (court appointed experts), presumably because this case is early – but, in light of Judge Donohue's stay of further discovery (*see* below), granting summary judgment based on defendants' experts alone would strike this writer as unfair. We will have to wait and see how that decision plays. [Note: In an unreported bench order, this writer once persuaded a S.D.N.Y. federal judge to order Corrections defendants to bring a prisoner with a medical claim to the office of an ENT physician for examination, using a *writ of habeas corpus ad testificandum*, returnable at the physician's office.] As stated, Judge Donohue granted defendants' motion for a stay of discovery pending a ruling on their motion for summary judgment on qualified immunity – citing *Harlow v. Fitzgerald*, 457 U.S. 800, 816-818, (1982) – and he likewise denied Jackson's motion to compel discovery. Sonia sought a protective order to seal her medical records. Judge Donohue ruled that Sonia had put her health care in issue when she publicly filed her lawsuit and had therefore waived any privilege. Moreover, under the Health Insurance Portability and Accountability Act (HIPAA), her claim is also without merit as HIPAA regulations allow a covered entity to "use or disclose protected health information" for legal services to defend itself, 45 C.F.R. § 164.501. Judge Donohue found this request "arguably frivolous." Judge Donohue also denied appointment of counsel, presumably without prejudice.

WISCONSIN – A *pro se* prisoner cannot make a federal case out of a health provider's suggestion that he is gay. Chief U.S. District Judge William C. Griesbach dismissed all allegations for failure to state a claim in *Gage v.*

Dehn, 2018 WL 1175162 (E.D. Wisc., March 5, 2018). Plaintiff, Shane Ryan Gage, sued because a psychiatric care technician "implied and suggested that he was homosexual." Gage filed a grievance. Thereafter, he "noticed behavioral shifts" among the mental health staff, the inmates on his unit, and the people processing his grievance. Officials denied his request to be transferred to another unit, finally being told that if he persisted in making transfer requests he could be put into segregation. Gage failed to allege that anything tangible happened to him after the comment, or that he was actually put into segregation or disciplined. Judge Griesbach found that the comment was at most "verbal harassment," which is not alone actionable under the Eighth Amendment, citing *DeWalt v. Carter*, 224 F.3d 607, 612 (7th Cir. 2000). Without an underlying constitutional tort, bystander liable for allegedly not stopping the "behavioral shifts" asserted against the other staff was also not actionable under *Lewis v. Downey*, 581 F.3d 467, 472 (7th Cir. 2009). Finally, a mere threat of segregation if Gage did not desist from requesting a transfer was not, on these facts, First Amendment retaliation, because no retaliatory action was taken. Finding "no conceivable" federal claims, Judge Griesbach assessed a strike against Gage under the Prison Litigation Reform Act.

WISCONSIN – Transgender inmate Dominique D. Gulley-Fernandez has several *pro se* cases pending in Wisconsin. *See Law Notes* (April 2017 at 173) (summarizing history). Now in *Gulley-Fernandez v. Hoem*, 2018 WL 1257815. 2018 U.S. Dist. LEXIS 39927 (E.D. Wisc., March 12, 2017), Gulley-Fernandez is permitted to add another defendant by U.S. District Judge Lynn Adelman. Gulley-Fernandez alleges that she (Judge Adelman uses male pronouns) has had "problems" of sexual harassment and discrimination with Dr. Stacey Hoem since March 2013. According to the allegations, among other slurs, Hoem has called Gulley-Fernandez: "faggot"; "dumb schmuck faggot"; lying manipulative faggot"; "wannabe transgender"; and "needy homosexual," who should "stop his feminine tendencies." Gulley-Fernandez says that Hoem has written misconduct reports and tried to have her classification changed. Charged misconduct by Hoem includes using her psychological training to inflict psychological torture. Judge Adelman found on screening that Gulley-Fernandez meets the "verbal abuse+" test of the Seventh Circuit: "Plaintiff states plausible claims against defendant Hoem for harassment and retaliation." *See Beal v. Foster*, 803 F.3d 356, 358–59 (7th Cir. 2015); *Perez v. Fenoglio*, 792 F.3d 768, 783 (7th Cir. 2015). Hoem was ordered served through the state Attorney General.

WISCONSIN – Transgender inmate Lonnie L. Jackson, *pro se*, alleged that she was provided a contaminated medical ice bag that poisoned her when she drank the melted contents and that she was discriminated against by a particular officer (and her supervisor) because she is transgender and African American, in *Jackson v. CO II Officer Kuepper*, 2018 U.S. Dist. LEXIS 40874 (E.D. Wisc., March 13, 2018). U.S. District Judge Lynn Adelman screened the case and found that the two claims concerned unrelated actions and unrelated defendants and could not be brought as a single action under F.R.C.P. Rules 18(a) and 20. This is particularly true when prisoners may try to do so to circumvent the fee payment and "three strikes" rules of the Prison Litigation Reform Act. *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007). As to the contaminated medical ice bag, an officer admitted the placing of industrialized cleaning soap in the ice bag and said he should have used rat poison. If the bag case gets that far, what a jury would make of Jackson's assuming the contents of a medical ice bag were potable is anyone's guess, but the intentional act suffices to pass screening; and the possible contributory negligence of Jackson is not discussed. As to discrimination, the opinion discusses at length a particular officer, who made it clear she disliked African-Americans and transgender people. She allegedly had Jackson transferred to general population from a specialized unit for transgender people on multiple occasions, sometimes with the consent of her supervisor. The officer also falsely charged Jackson with misconduct on one occasion, and generally "ignored" her requests and "turned her back" on her – unlike her response to white inmates. Judge Adelman advises Jackson to be more specific about her allegations in her amended pleadings, particularly concerning the personal involvement of supervisors, citing *Morfin v. City of East Chicago*, 349 F.3d 989, 1001 (7th Cir. 2003). Judge Adelman denied counsel without prejudice and disclaimed authority to direct the prison to allow Jackson to use her commissary account for litigation expenses (except the filing fee). Although Judge Adelman does not explicitly say so, the upshot of the opinion is that Jackson must file two cases (and pay a second filing fee or be allowed *in former pauperis*) in order to proceed on both claims. Apparently, one of the cases can be an amended complaint of this case, omitting one of the two claims.

LEGISLATIVE & ADMINISTRATIVE NOTES

By Arthur S. Leonard

FEDERAL – U.S. Senators Richard Blumenthal (D-CT), Chris Murphy (D-CT) and Tammy Baldwin (D-WI) have introduced the Student Non-Discrimination Act, which would help

LEGISLATIVE & ADMINISTRATIVE *notes*

protect public school students from bullying, harassment and discrimination based on sexual orientation or gender identity. Although several courts have already ruled that Title IX's ban on sex discrimination prohibits such discrimination, the Department of Education and Justice Department withdrew an Obama-era guidance to that effect, and the DOE has stopped accepting discrimination complaints from gay and transgender students. An identical measure was introduced in the House by Representatives Jared Polis (D-CO), Ileana Ros-Lehtinen (R-FL), Bobby Scott (D-VA), and Mark Takano (D-CA). The Senate measure is cosponsored by the Democratic members. * * * On the other side of the aisle, a group of 22 Republican Senators led by Michael Lee have introduced the First Amendment Defense Act, which would bar the federal government from taking any action against individuals who discriminate against same-sex couples or others based on "sincerely held religious belief." The bill would also protect those who discriminate against marriages not recognized under federal law or against individuals who engage in extra-marital sex. We would be interested in requiring all the sponsors of this bill to submit to polygraph examinations on the question whether they have ever had sex with somebody to whom they are not married and to be required to make public the results. Just saying'. . . .

ALASKA – Local newspapers and social media in Anchorage, Alaska, were flooded with arguments pro and con concerning a proposition on the ballot to repeal protection against gender identity discrimination in places of public accommodation. The mail-in election was to be concluded as of the end of the day on April 3, with hand-counting of paper ballots and results to be certified on April 17.

FLORIDA – The Gainesville City Commissioners have approved on first reading a measure that bans licensed professionals from performing conversion therapy, following the lead of 6 other Florida jurisdictions. However, the *Gainesville Sun* reported on March 17, the measure requires approval in a second vote in April to take effect. The newspaper noted that a lawsuit is on file attacking the constitutionality of a similar ordinance adopted by Tampa.

GEORGIA – A last-ditch effort by anti-LGBT forces in the Georgia legislature to enact an anti-LGBT adoption bill failed on the final day of the 2018 session, March 29. Also, for the fifth consecutive year, sponsors of an anti-LGBT religious exemptions bill failed in their efforts to get one enacted.

MAINE – A bill to ban conversion therapy on minors was approved by the Labor, Commerce, Research and Economic Development Committee, and awaits votes in both chambers of the legislature. *Portland Press Herald*, March 8. But we speculate that there is no way that the governor, a conservative Republican, will sign it if it happens to pass.

MARYLAND – The Senate voted on March 28 to approve a bill outlawing the performance of conversion therapy on minors by a vote of 34-12. The measure now goes to the House.

MISSISSIPPI – After the City Council in Starkville, Mississippi, voted by a narrow margin on February 20 to deny a permit for a gay pride parade to be held on March 24, Roberta Kaplan's firm filed a suit on behalf of the local Pride organization against the City, seeking declaratory and injunctive relief under the 1st and 14th Amendments. *Starkville Pride v. City of Starkville*, Civil Action No. 1:18cv032-SA-DAS (N.D. Miss., filed Feb. 26, 2018), with local counsel Alysson Mills and Kristen Amond of Fishmanb Haygood LLP, New Orleans. Filing suit did the trick. The Council promptly took up the matter again and narrowly voted to grant the permit. Impact litigation had an immediate impact.

NEW HAMPSHIRE – A bipartisan House majority (196-129) approved HB 1319, which would add gender identity to the state's civil rights statute. Republican Governor Chris Sununu has stated that he would sign the bill if it passes the Senate. Acting on subject matter related bills, the House voted 188-140 to defeat HB 1560, which would forbid the state's Medicaid program from paying for sex reassignment drugs, hormone therapy, or surgery. The House voted 164-162 to narrowly defeat HB 1532, a ban on the performance of gender reassignment surgery on minors. In most states, transgender people cannot obtain surgical procedures until their reach age 18, the age specified by the Standards of Care generally referred to as authoritative by medical authorities and courts in the U.S. (By contrast, as reported in the International Notes section of this issue, Australia's Family Court has ruled that transgender teens can obtain surgical gender affirmation procedures without judicial provision, if their parents and health care providers approve.

NEW YORK – On March 6, Erie County Executive Mark C. Poloncarz signed into law a county ordinance making the practice of conversion therapy unlawful. The law forbids therapists from counseling LGBT minors in an effort to make them heterosexual, the *Buffalo News* reported on March 6.

The County Legislature unanimously approved the measure in February.

WASHINGTON – The state legislature finished work early in March on a bill to ban licensed therapists from performing conversion therapy on minors. The bill would deem it "unprofessional conduct," subjecting providers to sanctions ranging from fines to license revocation or suspension. The Senate agreed to changes made in the House that would expressly exempt non-licensed counselors working as part of a religious organization, denomination or church. It was sent to Governor Jay Inslee, who signed it into law on March 28.

WISCONSIN – The *Associated Press* (March 27) reported that the City Alderman in Milwaukee approved an ordinance banning the performance of conversion therapy on minors on March 27. Mayor Tom Barrett had until April 7 to sign the measure, which he indicated that he planned to do. Therapists who perform the prohibited procedures can be fined up to $1,000 for each violation. The measure applies only to therapists who charge for their services, and will not apply to religion-based(so-called "pray away the gay") counseling.

LAW & SOCIETY NOTES

By Arthur S. Leonard

FEDERAL – U.S. Senator Jeff Merkley (D-Ore) has placed a hold to block the confirmation of Richard Grenell, and out gay conservative nominated by President Trump to be the Ambassador to Germany. It is one of the great embarrassments of the Trump Administration that many major countries, including prominent U.S. allies, have lacked Ambassadors from the U.S. since Trump required all incumbent ambassadors to submit their resignations promptly after his inauguration, and has taken a long time to nominate replacements. Merkley's opposition to Grenell has nothing to do with his sexual orientation – Senator Merkley is a major LGBT rights proponent and co-sponsor of major LGBT rights bills – and everything to do with Grenell's extremely conservative views and track record, especially as it regards women's rights issues. Merkley released a statement explaining his position: "I cannot in good faith support a nominee who has a lengthy track record of tweets attacking both prominent Democratic and prominent Republican women. Since his nomination, these tweets have continued showing a complete disregard for the Senate confirmation process and disregard for the seriousness of the position to which he is nominated." *Washington Blade*, March 22.

FEDERAL – During the Obama Administration, the Equal Employment Opportunities changed its position on LGBTQ rights 180 degrees, overruling half a century of opposition and issuing opinions and amicus advocating for a broad interpretation of Title VII of the Civil Rights Act of 1964 to cover sexual orientation and gender identity under the umbrella of the ban on sex discrimination as a matter of interpretation. That may change with President Trump's nomination of two Republicans to fill five-year terms on the Commission, giving Republican appointees a majority for the first time in almost a decade. At a confirmation hearing in the Senate in September, the Republican EEOC nominees refused to commit to the EEOC's position on these issues, with a Reuters reporter at the hearing stating that their position on gay employees' rights was "murky" at best. At present, the Commission's three serving members are 2-1 Democratic appointees, and have adhered to the pro-LGBT position, with the agency filing an amicus brief in support of Lambda Legal's appeal to the 8th Circuit in a case seeking sexual orientation coverage under Title VII. *Reuters*, March 16.

FEDERAL – For the first time, the U.S. Civil Rights Commission has issued a report on LGBT workplace discrimination, calling for a federal law on the subject. The Commission is a strictly advisory fact-finding Commission, established by Congress in 1957 to advise on legislation to protect Americans' civil rights. The report was issued in November and widely ignored by the media, but was the subject of an article in the *BloombergBNA Daily Labor Report* on March 14. The article seems to have been sparked by recent federal court of appeals rulings on the subject, including the 2nd Circuit's recent en banc ruling in *Zarda v. Altitude Express*.

CALIFORNIA – Toni Atkins has become the first woman and first out lesbian to become President Pro Tem of the California Senate. Long a trailblazer, she was formerly Speaker of the California State Assembly. The President Pro Tem is effectively the leader of the Senate's Democratic Majority. Atkin's predecessor, Kevin de Leon, was barred by term limits from seeking reelection, and announced his intention to contest the U.S. Senate seat held by Dianne Feinstein in the upcoming Democratic primary.

CONNECTICUT – Governor Daniel P. Malloy's appointment of his long-time associate and close friend, Connecticut Supreme Court Associate Justice Andrew McDonald, an out gay man, to be the new Chief Justice was defeated in the legislature by the solid

INTERNATIONAL *notes*

opposition of Republicans, who hold enough votes in the sharply-divided body to prevent action. In this case, a handful of Democrats supported Republican senators in opposing the nomination. Although they could not seriously argue that Justice McDonald, who has already served on the court for several years, lacked the technical qualifications for the job, Republican opponents successfully made an issue of his vote on the Court concerning death penalty issues – in particular, the retroactive application of the law to block executions of people convicted and sentenced before a new law abolishing capital punishment in the state went into effect. Some Democratic legislators and pundits claimed that McDonald's sexual orientation was the cause of his defeat, a contention the Republicans stoutly denied. Political commentators suggested that the defeat of this nomination will be an issue in the campaigns for governor and state legislators this year.

MASSACHUSETTS – Sponsors of a measure to repeal the state's recently-enacted ban on gender identity discrimination in places of public accommodation secured sufficient signatures on petitions to place their measure on the November general election ballot. The opponents referred to the civil rights measure as a "bathroom bill," raising the same tired arguments that have surfaced elsewhere in recent years, especially as the issue of transgender restroom access has become the subject of lawsuits around the country brought by high school students under Title IX of the federal Education Amendments Act.

MISSISSIPPI – National attention focused on tiny Starkville after the City Council narrowly defeated a resolution to authorize a permit for the community's first-ever Gay Pride Parade, but the storm of adverse comment led to a second vote, this time approving the measure. The Parade took place on March 24 as organizers had originally planned, with news reports that "thousands of people" turned out to participate, and the *Starkville Daily News* featured video of the event showing people marching with rainbow balloons. The mayor, Lynn Spruill, told the *Associated Press* that an estimated 2,500 marched without incident. And the sky did not fall in.

PENNSYLVANIA – *AP State News* (March 16) reports that Philadelphia officials have stopped two faith-based agencies from placing foster children after learning that the agencies will not deal with LGBTQ potential foster parents. The Department of Human Services has ended foster care intake with Bethany Christian Services and Catholic Social Services as of March 15. Children already placed with families through these agencies will not be moved, but no new referrals will be made. These agencies had received a combined $3 million annually from the city in reimbursement funds for their handling of referrals from the DHS.

TEXAS – Out lesbian Lupe Valdez, former Dallas County Sheriff, won enough votes in the Democratic primary to be one of the final two contenders for the Democratic nomination for Governor of Texas, with a run-off set for May 22 with Andrew White, the son of a former governor. Valdez secured 42.9% of the votes; White received 27.4%. * * * The first round of primaries reduced the record number of openly LGBT candidates still contending for elective office in the state, as fourteen openly LGBT candidates lost in the first round. However, ten LGBTQ candidates who were in contested primaries will be participating in the May 22 runoffs, including candidates for Democratic nominations for the House of Representatives and the Texas legislature. Many of those are competing in districts where winning the Democratic nomination leaves them in a long-shot race, given Republican dominance in Texas politics. But getting nominations are an important start.

TRANSGENDER BRAINS – *Medical Daily*, 2018 WLNR 8140173 (March 16), reported on recent search using MRI scans that have been construed to show structural differences in the brains of transgender women, specifically in the region relating to body perception. Researchers from the Medical School of the University of Sao Paulo, Braziil, recruited 80 participants between the ages of 18 and 49, broken down into four groups: cisgender women, cisgender men, transgender women and had never taken hormones, and transgender women who had used hormones for at least a year. The results seemed to confirm that transgender women (who were identified as male at birth) had certain brain structures more like those in cisgender women than in cisgender men, and that the phenomenon was apparently not due to hormone treatment.

INTERNATIONAL NOTES

By Arthur S. Leonard

AUSTRALIA – The Family Court of Australia ruled during March that it will no longer need to intervene in cases where teenagers who have been diagnosed with gender dysphoria have the permission of their parents and their treating doctors for surgery. Australia has been on the cutting edge of allowing minors to seek affirmation of their gender identity through medical needs. Not too long age court orders were required even to initiate hormone

treatment. By dispensing with the need for judicial permission to perform gender affirmation surgical procedures on minors, Australia has reduced the barrier for those transgender minors whose parents and doctors are willing to support their transition. The law remains, however, that in the absence of parental approval, minors still need a court order to obtain hormone therapy or surgery. The ruling came in a case where the 16-year-old applicant was given the pseudonym of Matthew to preserve confidentiality. Matthew was identified female at birth but identifies as male, and had applied for court approval to proceed to the third stage of his transition – surgical treatment. The court found that its consent was not needed, as his doctors and parents agreed on his diagnosis of gender dysphoria, the surgery was deemed therapeutic, and he was competent to decide this question. *ABC Premium News*, March 16, 2018. * * * The Parliament in Australia's Northern Territory has approved a bill to extend adoption rights to those in same-sex and de facto relationship of more than two years. NY is the final Australian jurisdiction to take this step. *Northern Territory News*, March 14.

AUSTRIA – The Constitutional Court, ruling in favor of an intersex petitioner, has interpreted the European Convention on Human Rights to require Austria to abstain from mandating that citizens register their sex with the government as either male or female. According to a news release hailing the March 14 ruling by LGBT rights group Rechtskomitee LAMBDA (RKL), "The Constitutional Court preliminarily stated that person have to accept only state sex assignments which correspond to their gender identity. The state has to accept individual decisions for or against a certain gender. The constitution protects individuals from heteronomous sex assignment, especially persons with alternative gender identity." The ruling identifies intersex persons as a "particularly vulnerable group" due to their small numbers and their – from the perspective of the majority – "otherness." The Court said that there is no constitutional obligation to register sex, but if the state decides to have a registration system, it must accommodate individual gender identity. The provisions now in force were found to be unduly rigid and violate rights of self-determination. The court also said that sex-assigning medical interventions in newborns and children should be avoided, so that individuals could make their own choice once they are old enough to appreciate the consequences and act independently. The government has been asked to respond to the Court's preliminary ruling, with a final ruling expected not before June.

BRAZIL – Human Rights Watch reported on March 14 that the Supreme Court of Brazil issued a major decision removing medical and judicial criteria to change legal gender indications, holding that the government must drop the mandatory psychological evaluations and surgical procedures to obtain a judicial order from the Public Prosecutor in order to change the gender marker on their legal documents. This comes in response to the Inter-American Court of Human Rights advisory opinion of January 9, 2018, asserting that countries who are party to the Inter-American Human Rights treaty should establish fast, inexpensive and straightforward procedures to ensure legal gender recognition based solely on the self-perceived identity of the person.

CANADA – Ruling on a discrimination claim by a gay worker subjected to derogatory remarks at his work site by employees of another company, the Supreme Court of Canada adopted a broad interpretation of the British Columbia Human Rights codes employment discrimination provisions, holding that liability was not limited to a plaintiff's own employer, so long as the discriminatory conduct occurred at work. The case is *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62. The decision overruled a narrower interpretation of the Code by the B.C. Court of Appeal.

COSTA RICA – The presidential election, scheduled to be held on April 1, provided plenty of suspense over whether the Inter-American Court of Human Rights' decision earlier this year that the Pan American Human Rights Treaty to which Costa Rica is a party requires it to allow same-sex marriages. This was because one of the finalist candidates, Fabricio Alvarado Munoz, was so opposed to marriage equality that he proposed to reject the jurisdiction of the court in order to avoid implementing the ruling. The other finalist candidate, Carlos Alvarado Quesada, supported the ruling and was committed to implementing it. Polls predicted a photo finish, but in the event, early returns confirmed that Carlos Alvarado had won by a veritable landslide. So it seems likely that Costa Rica will have marriage equality before too much longer. *New York Times*, April 1.

EUROPEAN PARLIAMENT – On March 1 the European Parliament adopted its *Annual Report on the Situation of Fundamental Rights in the EU*. The Parliament's Intergroup on LGBT Rights stated that the Report "contains strong content on LGBTI rights, condemning all forms of discrimination against LGBTI people" in Paragraph 62. Also, for the first time, it puts the European Parliament on record as opposing conversion therapy.

INTERNATIONAL *notes*

FINLAND – The Parliament approved a measure at the end of February – the Maternity Act – which improves legal protection for children being raised in LGBT families. Among other things, it will give automatic legal co-parent status for female same-sex couples who have children through donor insemination. As of now, adoption proceedings, which can be drawn out and expensive, are necessary to secure parental rights for the non-biological mother. The new law is expected to come into force in the spring of 2019.

IRELAND – HIV Ireland hailed a High Court decision that an HIV-positive teenage who is living under the care of the Child & Family Agency may not be compelled to disclose his HIV status to a girl he is dating who is also under the Agency's care. The 18 year old has been HIV-positive since birth. The court decided that the circumstances did not warrant authorizing the Agency to make the disclosure to the girl without the boy's consent. Niall Mulligan, a spokesperson for HIV Ireland, explained, "Forcing someone to disclose they are living with HIV only perpetuates the stigma that currently exists in Ireland. HIV is a manageable illness. We know people living with HIV, who are compliant with their treatment, and have an undetectable viral load that cannot pass it on to someone else. The onus is on all of us to take responsibility for our own sexual health. We encourage everyone to use condoms, to avail of regular sexual health testing and to be informed of the risks involved in having unprotected sex." *Mirror (UK)*, March 13.

KENYA – The Court of Appeal in Mombasa issued an opinion on March 22 finding that the Bill of Rights of the nation's constitution makes it unconstitutional for the police to subject people suspected of being gay to intrusive and nonconsensual anal examinations, purporting to determine whether there was physical evidence of sodomy. Wrote the court, "The right to privacy particularly, not to have one's privacy invaded by an unlawful search of the person, is closely linked to the right to dignity. Those rights, in our view, extend to a person not being compelled to undergo a medical examination." The court cast doubt on whether consent purportedly obtained (under duress) could be credited. The court granted Orders setting aside a trial court decree rejecting the challenge to the testing, finding that "the Respondents conduct in subjecting the petitioners to anal examinations violated the Petitioners' rights under Articles 25, 27, 28 and 29 of the Constitution," ordering that "the use of evidence obtained through anal examinations of the petitioners in criminal proceedings against them violates their rights under Article 50 of the Constitution," and awarding costs of the appeal to the litigants.

NORTHERN IRELAND – Without a functioning Parliament as a result of no party achieving sufficient numbers to form a governing coalition, and negotiations stymied over, among other things, the Democratic Unionist Party's refusal to allow the legislative majority to approve marriage equality, pressure is mounting for a judicial solution to the marriage equality question or action by the U.K. Parliament in London, which theoretically retains the legislative authority to pass a marriage equality law for Northern Ireland. An appeal is pending in the courts in a marriage equality case, which could be a vehicle for achieving this goal, but meanwhile some members of Parliament are introducing private member bills seeking the same result. In the House of Lords, Conservative peer Lord Hayward tabled the Marriage (Same Sex Couples) (Northern Ireland) Bill on March 27, with Labour MP Conor McGinn introducing an identical bill in the House of Commons on March 28. There was a formal first reading of Hayward's bill, but no indication when it might come to a vote. Commentators suggested that passage of a bill through Parliament was unlikely, as it might unravel all kinds of compromises and arrangements for the degree of self-government in Northern Ireland that underlies the fragile power-sharing relationship between rival factions there. In the lawsuit, a panel of three appeal judges heard arguments in March, and Lord Chief Justice Sir Declan Morgan "pledged to deliver a verdict as soon as possible," reported the *Belfast Telegraph* on March 16. The litigants have been allowed to proceed anonymously to protect their privacy. The couple, who married in the U.K., are seeking a ruling that their marriage must be recognized as such in Northern Ireland and, indeed, through the United Kingdom.

PAKISTAN – In a ceremony held at the Traffic Police Headquarters in Khuber Pakhtunkhwa Provine, there was a celebration to mark the first award of driver's licenses to transgender Pakistani's indicating their correct gender identity. Thirty transgender people received the new licenses. No person was forced or asked to change their legal documents in order to receive the national driving license, according to an online report by *Right Vision News*, March 7. * * * Pakistan's Senate has approved a Transgender rights bill that is intended to assure protection against sexual and physical assaults and harassment motivated by the victim's transgender status. The Transgender Persons (Protection of Rights) Bill 2017 still needs approval in the lower house before it can become law.

PROFESSIONAL *notes*

PHILIPPINES – The Supreme Court set June 19 as the date for oral arguments on a petition seeking legalization of same-sex marriages. The petition, filed by members of the LGBTS Christian Church, challenges Family Code provisions standing in the way of same-sex marriages. President Rodrigo Duterte has stated public support for legalization.

ROMANIA – The *Associated Press* (March 26) reported that Liviu Dragnea, leader of the ruling Social Democratic Party, has called for the country to consider legalizing civil partnership between same-sex couples. Dragnea also stated that the Parliament would vote on a proposal to hold a referendum on changing the Constitution's definition of a family, to take account of families headed by same-sex couples.

SWEDEN – The Swedish Parliament voted on March 21 to pay compensation to transgender people who were forcibly sterilized between 1972 and 2013. The measure affects approximately 600-700 people. According to a statement released by RFSL, a Swedish LGBT rights group, "Sweden has a long history of forced sterilization of different vulnerable groups. In the 1990's, the Swedish state paid damages to other groups subjected to forced sterilizations. Trans people will be the last group to now get compensation and restitution." The organization stated a hope that the government will also hold a ceremony to extend a formal apology to transgender people who were subjected to this procedure.

UNITED KINGDOM – The England and Wales Court of Appeal ruled on March 22 that a statutory exception from the Equality Act's discrimination provision for religious organizations required rejecting an employment discrimination lawsuit by Jeremy Pemberton, a Church of England priest who was prevented from taking a position as a chaplain at a religious hospital because he married a same-sex partner. Wrote Lady Justice Aplin in explanation of the decision: "If you belong to an institution with known, and lawful, rules, it implies no violation of dignity, and is not cause for reasonable offence, that those rules should be applied to you, however wrong you may believe them to be. Not all opposition of interests is hostile or offensive." *The Guardian*.

PROFESSIONAL NOTES

By Arthur S. Leonard

KATE KENDELL, who has served as Executive Director of the **NATIONAL CENTER FOR LESBIAN RIGHTS** for the past 22 years, announced in March that she will be stepping down from that position at the end of 2018. During her stewardship of the organization, it has been involved as advocate in a direct or amicus capacity in some of the most momentous achievements of the LGBT legal movement, including the California Supreme Court's historic 2008 marriage equality ruling and path breaking decisions in California and other states in LGBT family law and discrimination. NCLR was an amicus party in the four major U.S. Supreme Court victories, including ending sodomy laws, getting rid of the Defense of Marriage Act, and winning marriage equality. Kendell has been highly respected as a movement strategist, energizer, and spokesperson. Whoever follows her in this position has big shoes to fill!

DEAN J. TRANTALIS, an out gay real estate attorney who has been serving on the Ft. Lauderdale, Florida, City Commission, was elected Mayor of Fort Lauderdale on March 13. He will be the first out gay mayor of a major Florida city and the only one serving anywhere in the Southeastern U.S. Steve Glassman, an LGBT candidate who was running to fill Trantalis's seat on the City Commission, was also elected.

JEAN GUSTAFSON has been honored by the **MINNESOTA LAVENDER BAR ASSOCIATION**, an affiliate of the Minnesota State Bar, with the Greater Minnesota Fellowship Award on February 18 at the 17th Annual Minnesota Lavender Bar Association Conference, which was held this year at Mitchell-Hamline Law School in St. Paul. Gustafson, a local attorney practicing in Brainard, said, "I am very pleased to be an ambassador for the Minnesota Lavender Bar Association to Greater Minnesota." *Pilot Independent*, March 19.

EEOC COMMISSIONER CHAI FELDBLUM, the first and so far only out Commissioner at the agency that enforces federal employment discrimination laws, will be honored with the **RAPHAEL LEMKIN HUMAN RIGHTS AWARD** at the annual gala of T'ruah: The Rabbinic Call for Human Rights. The White House recently announced that President Trump will nominate Feldblum for another term as Commissioner when her current term expires this summer. She is credited with persuading a majority of the Commissioners to change the agency's stance on LGBT discrimination under Title VII, as reflected in the recent victory in *EEOC v. R.G. & G.R. Harris Funeral Homes*, 2018 U.S. App. LEXIS 5720 (6th Cir., March 7, 2018) (awarding summary judgment to transgender funeral director).

The **HISPANIC NATIONAL BAR ASSOCIATION** has honored Lambda Legal staff attorneys Omar Gonzalez-Pagan and Ricahrd Saenz as recipients of the 2018 HNBA Top Lawyers Under 40 Award.

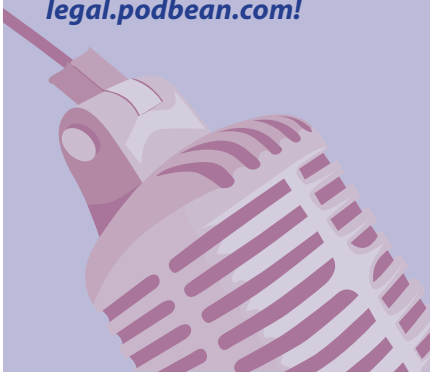
PUBLICATIONS NOTED

1. Anderson, Ryan T., Disagreement is Not Always Discrimination: On *Masterpiece Cakeshop* and the Analogy to Interracial Marriage, 16 Geo. J. L. & Pub. Pol'y 123 (Winter 2018) (Anderson, a "scholar" at the Heritage Foundation, is churning out numerous articles contesting major gay rights court decisions, and is reportedly one of the players behind the Defense Department's "Report and Recommendations" presented to support Trump's revised transgender military ban).
2. Astrada, Marvin L, and Scott B. Astrada, Reexamining the Integrity of the Binary: Politics, Identity, and Law, 17 U. Md. L.J. Race, Religion, Gender & Class 173 (Fall 2017).
3. Baumgardner, Paul, On Critical Juncture, Intercurrence, and Dynamic Political Orders, 9 ConLawNOW 65 (2017-18) (another set of ruminations on the intersecting and clashing public consciousness on religious liberty and LGBT rights).
4. Chilton, Adam S., and Mila Versteeg, Courts' Limited Ability to Protect Constitutional Rights, 85 U. Chi. L. Rev. 293 (March 2018).
5. Corbin, Caroline Mala, Government Employee Religion, 49 Ariz. St. L.J. 1193 (Winter 2017).
6. Engel, Stephen M., and Timothy S. Lyle, Fucking With Dignity: Public Sex, Queer Intimate Kinship, and How the AIDS Epidemic Bathhouse Closures Constituted a Dignity Taking, 92 Chi.-Kent L. Rev. 961 (2017).
7. Fallon, Richard H., Jr., Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age, 96 Tex. L. Rev. 487 (Feb. 2018).
8. Franks, Mary Anne, "Revenge Porn" Reform: A View From the Front Lines, 69 Fla. L. Rev. 1251 (September 2017).
9. Hamilton, Marci A., The Cognitive Dissonance of Religious Liberty Discourse: Statutory rights Masquerading as Constitutional Mandates, 41 Harv. J.L. & Pub. Pol'y 79 (Winter 2018) (RFRA and the battle over religious exemptions from generally applicable laws).
10. Hirschl, Ran, and Ayelet Shachar, Competing Orders? The Challenge of Religion to Modern Constitutionalism, 85 U. Chi. L. Rev. 425 (March 2018).
11. Hunter, Nan D., Varieties of Constitutional Experience: Democracy and the Marriage Equality Campaign, 64 UCLA L. Rev. 1662 (December 2017).
12. Huntington, Clare, The Empirical Turn in Family Law, 118 Colum. L. Rev. 227 (January 2018) (includes detailed discussion about how empirical research on the impact on children of being raised by same-sex couples influenced marriage equality decisions in the 21st century).
13. Joslin, Courtney G., Discrimination In and Out of Marriage, 98 B.U. L. Rev. 1 (Jan. 2018).
14. Kazinetz, Tricia, You Can't Have One Without the Other: Why the Legalization of Same Sex Marriage Created a Need for Courts to Have Discretion in Granting Legal Parentage to More Than Two Individuals, 24 Widener L. Rev. 179 (2018).
15. Khazanei, Navid, Reading Arendt after Sex and *Obergefell*: Education as the Solution for the Crisis in the Queer Revolution, 19 W. Mich. U. Cooley J. Prac. & Clinical L. 99 (2017).
16. Kolenc, Antony Barone, Religion Lessons from Europe: Intolerant Secularism, Pluralistic Neutrality, and the U.S. Supreme Court, 30 Pace Int'l L. Rev. 43 (Winter 2017).
17. Laycock, Douglas, The Wedding Vendor Cases, 41 Harv. J.L. & Pub. Pol'y 49 (Winter 2018) (Symposium: The First Amendment in Contemporary Society).
18. Lindell, Noah B., The Dignity Canon, 27 Cornell J.L. & Pub. Pol'y 415 (Winter 2017) ("dignity" as a powerful concept in constitutional law; urges adaptation to statutory interpretation as well).
19. Panel Three: LGBTQ and Gender Equalities: Beijing+20, 38 Women's Rts. L. Rep. 264 (Panelists: Anju Gupta, Carlos Ball, Andrea Bowen, Katie Eyer) (from Symposium on Women's Rights 20 Years after the Beijing Conference of 1995) (Spring/Summer 2017).
20. Pochie, Colin, Sick and Tired of Hearing About the Damn Bathrooms, 93 Chi.-Kent L. Rev. 281 (2018).
21. Rafferty, Meagan M., Diversifying the Law Through an All-Minority Bench, 4 Savannah L. Rev. 189 (2017) (Consider this: "Now imagine, instead, a Supreme Court consisting entirely of lesbian and bisexual women of color.").
22. Santhanagopalana, Renuka, Menage a What? The Fundamental Right to Plural Marriages, 24 Wm. & Mary J. Women & L. 415 (Winter 2018).
23. Siegel, Reva B., Community in Conflict: Same-Sex Marriage and Backlash, 64 UCLA L. Rev. 1728 (December 2017).
24. Sullivan, Barry, Making Room for More: Theorizing Educational Diversity and Identifying Best Practices in the Age of *Fisher*, 51 U.C. Davis L. Rev. 1105 (February 2018).

LGBT Law Notes
Podcast

Check out the LGBT Law Notes Podcast each month to hear our Editor-In-Chief, New York Law School Professor Art Leonard, and Eric Lesh, the Executive Director of LeGaL, weigh in on contemporary LGBTQ legal issues and news.

Listen through iTunes or at legal.podbean.com!



EDITOR'S NOTES

This proud, monthly publication is edited and chiefly written by Arthur S. Leonard, Robert F. Wagner Professor of Labor and Employment Law at New York Law School, with a staff of volunteer writers consisting of lawyers, law school graduates, current law students, and legal workers.

All points of view expressed in *LGBT Law Notes* are those of identified writers, and are not official positions of the LGBT Bar Association of Greater New York or the LeGaL Foundation, Inc. All comments in Publications Noted are attributable to the Editor. Correspondence pertinent to issues covered in *LGBT Law Notes* is welcome and will be published subject to editing. Please address correspondence to the Editor or send via e-mail to info@le-gal.org.